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CYCLOPEDIA
OF THE LAW OF
PRIVATE CORPORATIONS

By WILLIAM MEADE FLETCHER

**Author of "Corporation Forms," "Illinois Corporations," "Equity
Pleading and Practice," etc.**

IN EIGHT VOLUMES

VOLUME IV

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VOLUME IV

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XXII. RATIFICATION AND ESTOPPEL

§ 2177. **General considerations.** In this connection, it is intended to state the rules governing estoppel and ratification as affecting unauthorized or irregular acts of corporate directors or other officers and corporate agents. Estoppel to deny corporate existence,⁷⁶ estoppel to set up the defense of ultra vires,⁷⁷ etc., have been treated of in preceding chapters, as has the ratification of promoters' contracts.⁷⁸ So estoppel to deny that an officer or agent has powers as extensive as his apparent powers exercised with the knowledge of the corporation has already been considered.

The law relating to ratification is a part of the law relating to agency. There is but little in connection therewith which is peculiar to the law governing corporations. In other words, the rules governing ratification by a principal who is an individual are equally

⁷⁶ See §§ 322-357, *supra*.

⁷⁷ See §§ 1536 et seq., 1559 et seq.

⁷⁸ See §§ 152-156, *supra*.

A corporation may adopt and ren-

der binding acts done and contracts made on its behalf by its promoters, but, properly speaking, this is not ratification.

applicable to ratification by a principal which is a corporation, and hence reference should be made, in connection herewith, to standard works on the law of agency.⁷⁹

Ratification and estoppel are often very closely associated, and many times the terms are used interchangeably, although there is a clear line of demarcation between the two in that prejudice is a necessary element of estoppel, while ratification requires no change of condition or prejudice.⁸⁰

§ 2178. Statement of general rule. If the officers of a corporation or other persons assume to act for the corporation without any authority at all, or if they exceed their authority or act irregularly, and the act is one which could have been authorized in the first instance by the stockholders, board of directors or subordinate officers, as the case may be, it may be expressly or impliedly ratified by them, and thus be rendered just as binding, except as to intervening rights of third persons, as if it had been authorized when done, or done

⁷⁹ See 1 Mechem, Agency (2nd Ed.), §§ 343-546; 1 Clark & Skyles, Agency, §§ 97-145.

⁸⁰ See 1 Mechem, Agency (2nd Ed.), § 349, where difference is clearly stated.

⁸¹ **United States.** Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co., 163 U. S. 564, 41 L. Ed. 265; Pittsburgh, C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co., 131 U. S. 371, 33 L. Ed. 157; Indianapolis Rolling Mill v. St. Louis, Ft. S. & W. R. Co., 120 U. S. 256, 30 L. Ed. 639; People's Bank v. Manufacturers' Nat. Bank, 101 U. S. 181, 25 L. Ed. 907; Hartford & N. Y. Transp. Co. v. Plymmer, 120 Fed. 624, aff'g 103 Fed. 674; Taylor Gas Producer Co. v. Wood, 119 Fed. 966, aff'd 125 Fed. 337; Prentiss Tool & Supply Co. v. Godchaux, 66 Fed. 234; Leroy & C. Val. Air Line R. Co. v. Sidell, 66 Fed. 27; Nebraska & K. Farm Loan Co. v. Bell, 58 Fed. 326; Augusta, T. & G. R. Co. v. Kittel, 52 Fed. 63; Anglo-Californian Bank v. Mahoney Min. Co., 5 Sawy. 255, Fed. Cas. No. 392, aff'd 104 U. S. 192, 26 L. Ed. 707.

Alabama. Hall & Farley v. Alabama Terminal & Improvement Co., 173 Ala. 398, 56 So. 235; Mobile, J. & K. C. R. Co. v. Owen, 121 Ala. 505, 25 So. 612; Kahn v. Hall, 101 Ala. 102, 14 So. 105; Bibb v. Hall, 101 Ala. 79, 14 So. 98; Mobile & M. Ry. Co. v. Gilmer, 85 Ala. 422, 5 So. 138; Alabama Great Southern R. Co. v. South & North Alabama R. Co., 84 Ala. 570, 5 Am. St. Rep. 401, 3 So. 286. See also Continental Baking Powder Co. v. Stoner, 168 Ala. 304, 53 So. 303.

Arizona. George Fishbaugh, Inc. v. Beeler, 15 Ariz. 119, 136 Pac. 1057.

California. Newmark Grain Co. v. Merchants' Nat. Bank of Los Angeles, 166 Cal. 203, 135 Pac. 958; Black v. Harrison Home Co., 155 Cal. 121, 99 Pac. 494; Illinois Trust & Savings Bank v. Pacific Ry. Co., 117 Cal. 332, 49 Pac. 197; Seeley v. San Jose Independent Mill & Lumber Co., 59 Cal. 22; Pixley v. Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623; Blen v. Bear River & A. Water & Mining Co., 20 Cal. 602, 81 Am. Dec. 132; Shaver v. Bear River & A. Water & Mining

regularly. In this respect, a corporation is subject to substantially

Co., 10 Cal. 396; *Stevens v. Selma Fruit Co.*, 18 Cal. App. 242, 123 Pac. 212; *Jones v. Evans*, 6 Cal. App. 88, 91 Pac. 532; *Riley v. Loma Vista Ranch Co.*, 1 Cal. App. 488, 82 Pac. 686.

Colorado. *Bingel v. Brown*, 43 Colo. 281, 96 Pac. 449; *Conqueror Gold Mining & Milling Co. v. Ashton*, 39 Colo. 133, 90 Pac. 1124; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565, 1 Colo. 531, 96 U. S. 640, 24 L. Ed. 648; *Consolidated Gregory Co. v. Raber*, 1 Colo. 511; *Freeman Improvement Co. v. Osborn*, 14 Colo. App. 488, 60 Pac. 730; *Henry v. Colorado Land & Water Co.*, 10 Colo. App. 14, 15 Pac. 90.

Connecticut. *Converse v. First Nat. Bank of Suffield*, 79 Conn. 603, 65 Atl. 1065; *Smith v. New Hartford Water Co.*, 73 Conn. 626, 48 Atl. 754; *Tryon v. White & Corbin Co.*, 62 Conn. 161, 25 Atl. 712; *Perry v. Simpson Waterproof Mfg. Co.*, 37 Conn. 520; *Howe v. Keeler*, 27 Conn. 538.

District of Columbia. *Washington Times Co. v. Wilder*, 12 App. Cas. 62.

Georgia. *Singleton v. Bank of Monticello*, 113 Ga. 527, 38 S. E. 947; *Merchants' Bank of Macon v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 665; *Eminent Household of Columbian Woodmen v. George E. Benz & Co.*, 11 Ga. App. 733, 76 S. E. 99.

Idaho. *Valley Lumber Co. v. McGilvery*, 16 Idaho 338, 101 Pac. 94.

Illinois. *Union Surety & Guaranty Co. v. Tenney*, 200 Ill. 349, 65 N. E. 688, aff'g 102 Ill. App. 95; *Wheeler v. Home Savings & State Bank*, 188 Ill. 34, 80 Am. St. Rep. 161, 58 N. E. 598, rev'g 85 Ill. App. 28; *Beach v. Miller*, 130 Ill. 162, 17 Am. St. Rep. 291, 22 N. E. 464, rev'g 23 Ill. App. 151; *Hull v. Glover*, 126 Ill. 122, 18 N. E. 198;

Reichwald v. Commercial Hotel Co., 106 Ill. 439; *Parmly v. Buckley*, 103 Ill. 115; *Cairo & St. L. R. Co. v. Mahoney*, 82 Ill. 73, 25 Am. Rep. 299; *Aurora Agricultural & Horticultural Society v. Paddock*, 80 Ill. 263; *Chicago Consol. Traction Co. v. Mathews*, 117 Ill. App. 174; *Lake St. El. R. Co. v. Carmichael*, 82 Ill. App. 344, aff'd 184 Ill. 348, 56 N. E. 372; *Independent Brewing Ass'n v. Powers*, 80 Ill. App. 471; *Ragland v. McFall*, 36 Ill. App. 135, aff'd 137 Ill. 81, 27 N. E. 75.

Indiana. *Hawkins v. Fourth Nat. Bank of New York*, 150 Ind. 117, 49 N. E. 957; *Smith v. Wells Mfg. Co.*, 148 Ind. 333, 46 N. E. 1000; *White Water Valley Canal Co. v. Hawkins*, 4 Ind. 474; *Tevis v. Hammersmith (Ind. App.)*, 81 N. E. 614; *Marion Trust Co. v. Crescent Loan & Investment Co.*, 27 Ind. App. 451, 87 Am. St. Rep. 257, 61 N. E. 688.

Iowa. *White v. Elgin Creamery Co.*, 108 Iowa 522, 79 N. W. 283; *Beach v. Wakefield*, 107 Iowa 567, 78 N. W. 197, 76 N. W. 688; *Shaver v. Hardin*, 82 Iowa 378, 48 N. W. 68; *Merchants' Union Barb Wire Co. v. Rice*, 70 Iowa 14, 29 N. W. 784; *Tracy v. Guthrie County Agr. Society*, 47 Iowa 27; *Merrick v. Burlington & W. Plank Road Co.*, 11 Iowa 74.

Kansas. *Morisette v. Howard*, 62 Kan. 463, 63 Pac. 756; *Marbourg v. Lloyd*, 21 Kan. 545; *Pacific R. Co. v. Thomas*, 19 Kan. 256; *Topeka Capital Co. v. March*, 10 Kan. App. 40, 61 Pac. 876.

Kentucky. *Pittsburgh, C. & St. L. R. Co. v. Woolley*, 12 Bush 451; *Her-ring v. Dix River & L. Turnpike Road Co.*, 23 Ky. L. Rep. 642, 63 S. W. 576; *German Nat. Bank v. Grinstead*, 21 Ky. L. Rep. 674, 52 S. W. 951; *Bell & Coggeshall Co. v. Kentucky Glass-*

the same rules as a natural person.⁸¹ A corporation "is governed,

Works, 20 Ky. L. Rep. 1089, 48 S. W. 440; Maxville W. & L. Turnpike-Road Co. v. Barnes, 14 Ky. L. Rep. 431 (abstract).

Louisiana. J. B. Levert Co. v. John T. Moore Planting Co., 139 La. 792, 72 So. 249; Perchmann v. Mt. Eagle Const. Co., 128 La. 894, 55 So. 567; Poche v. New Orleans Home Inv. Co., 52 La. Ann. 1287, 27 So. 797; Robinson Mineral Spring Co. v. De Bautte, 50 La. Ann. 1281, 23 So. 865; Bezou v. Pike, 23 La. Ann. 788.

Maine. Patten v. Moses, 49 Me. 255; Perkins v. Portland, S. & P. R. Co., 47 Me. 573, 74 Am. Dec. 507.

Maryland. Carrington v. Turner, 101 Md. 437, 61 Atl. 324; Miller v. Matthews, 87 Md. 464, 40 Atl. 176; Stokes v. Detrick, 75 Md. 256, 23 Atl. 846; Grape Sugar & Vinegar Mfg. Co. v. Small, 40 Md. 395.

Massachusetts. New England Mut. Life Ins. Co. v. Wing, 191 Mass. 192, 77 N. E. 376; Beacon Trust Co. v. Souther, 183 Mass. 413, 67 N. E. 345; Jacobs v. German Workingmen's Ass'n, 183 Mass. 3, 66 N. E. 605; Simmons v. Shaw, 172 Mass. 516, 52 N. E. 1087; Nims v. Mt. Hermon Boys' School, 160 Mass. 177, 22 L. R. A. 364, 39 Am. St. Rep. 467, 35 N. E. 776; Parish of St. James v. Newburyport & A. Horse R. Co., 141 Mass. 500, 6 N. E. 749; Lyndeborough Glass Co. v. Massachusetts Glass Co., 111 Mass. 315; Sherman v. Fitch, 98 Mass. 59; Brown v. Winnisimmet Co., 11 Allen 326; Dedham Inst. for Savings v. Slack, 6 Cush. 408; Burrill v. Nahant Bank, 2 Mete. 163, 35 Am. Dec. 395.

Michigan. McLaughlin v. Detroit & M. Ry. Co., 8 Mich. 100.

Minnesota. Willis v. St. Paul Sanitation Co., 53 Minn. 370, 55 N. W. 550; Western Land Ass'n v. Ready, 24 Minn. 350.

Mississippi. Watts Mercantile Co.

v. Buchanan, 92 Miss. 540, 46 So. 66.

Missouri. Washington Sav. Bank v. Butchers' & Drovers' Bank, 107 Mo. 133, 28 Am. St. Rep. 405, 17 S. W. 644; Campbell v. Pope, 96 Mo. 468, 10 S. W. 187; First Nat. Bank of Springfield v. Fricke, 75 Mo. 178, 42 Am. Rep. 397; Kansas City Star Pub. Co. v. Standard Warehouse Co., 123 Mo. App. 13, 99 S. W. 765; Birch v. Glasgow Sav. Bank, 114 Mo. App. 711, 90 S. W. 746; Smith v. Richardson, 77 Mo. App. 422. See also Gregmoore Orchard Co. v. Gilmour, 159 Mo. App. 204, 140 S. W. 763.

Montana. Agle v. Standard Drug Co., 29 Mont. 111, 74 Pac. 135; Starr v. Gregory Consol. Min. Co., 6 Mont. 485, 13 Pac. 195.

Nebraska. Bishop v. Fuller, 78 Neb. 259, 110 N. W. 715; Omaha Consol. Vinegar Co. v. Burns, 49 Neb. 229, 68 N. W. 492; Nebraska Nat. Bank of York v. Ferguson, 49 Neb. 109, 59 Am. St. Rep. 522, 68 N. W. 370; Rich v. State Nat. Bank, 7 Neb. 201, 29 Am. Rep. 382.

New Hampshire. Goodwin v. Union Screw Co., 34 N. H. 378; Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

New Jersey. Parsons Mfg. Co. v. Hamilton Ice Mfg. Co., 78 N. J. L. 309, 73 Atl. 254; Durar v. Hudson County Mut. Ins. Co., 24 N. J. L. 171; J. H. Mohlman Co. v. American Grocery Co., 68 N. J. Eq. 602, 60 Atl. 950; Flaherty v. Atlantic Lumber Co., 58 N. J. Eq. 467, 44 Atl. 186; Pomeroy v. New York Smelting & Refining Co. (N. J. Eq.), 48 Atl. 395; Blake v. Domestic Mfg. Co. (N. J. Eq.), 38 Atl. 241; Hoyt v. Bridgewater Copper-Mining Co., 6 N. J. Eq. 253; Leggett v. New Jersey Manufacturing & Banking Co., 1 N. J. Eq. 541, 23 Am. Dec. 728.

New York. Shaw v. New York El.

like an individual, by the same principles as to the ratification of the

R. Co., 187 N. Y. 186, 79 N. E. 984; *Oakes v. Cattaraugus Water Co.*, 143 N. Y. 430, 26 L. R. A. 544, 38 N. E. 461; *Sheldon Hat Blocking Co. v. Eickemeyer Hat-Blocking Mach. Co.*, 90 N. Y. 607; *Hooker v. Eagle Bank*, 30 N. Y. 83, 86 Am. Dec. 351; *Olcott v. Tidga R. Co.*, 27 N. Y. 546, 84 Am. Dec. 298; *Hoyt v. Thompson's Ex'r*, 19 N. Y. 207; *Condon v. Church of St. Augustine*, 112 App. Div. 168, 98 N. Y. Supp. 253; *Usher v. New York Cent. & H. River R. Co.*, 76 App. Div. 422, 78 N. Y. Supp. 508; *New York Security & Trust Co. v. Saratoga Gas & Electric Light Co.*, 88 Hun 569, 34 N. Y. Supp. 890; *Patterson v. Ongley Elec. Co.*, 87 Hun 462, 34 N. Y. Supp. 209; *Smith v. Martin Anti-Fire Car Heater Co.*, 64 Hun 639, 19 N. Y. Supp. 285. See also *Standard Steam Specialty Co. v. Corn Exch. Bank*, 84 Misc. 445, 146 N. Y. Supp. 181, rev'd on other grounds 163 App. Div. 496, 148 N. Y. Supp. 549.

North Carolina. *Benbow v. Cook*, 115 N. C. 324, 44 Am. St. Rep. 454, 20 S. E. 453; *Lewis v. Albemarle & R. R. Co.*, 95 N. C. 179. See also *Acme Cement & Plaster Co. v. Greensboro Wood Fiber Plaster Co.*, 156 N. C. 455, 72 S. E. 569.

Oklahoma. *C. M. Keys Commission Co. v. Miller*, 157 Pac. 1029.

Oregon. *Guillaume v. K. S. D. Fruit Land Co.*, 48 Ore. 400, 88 Pac. 586, 86 Pac. 883; *Reid v. Alaska Packing Co.*, 47 Ore. 215, 83 Pac. 139; *Finnegan v. Pacific Vinegar Co.*, 26 Ore. 152, 37 Pac. 457; *Currie v. Bowman*, 25 Ore. 364, 35 Pac. 848.

Pennsylvania. *National Bank of Boyertown v. Fridenberg*, 206 Pa. 243, 55 Atl. 960; *Mohrfeld v. Second German S. E. Bldg. Ass'n*, 194 Pa. St. 488, 45 Atl. 335; *Wayne Title & Trust Co. v. Schuylkill Elec. Ry. Co.*, 191 Pa. St. 90, 43 Atl. 135; *Cooper v.*

Potts, 185 Pa. St. 115, 39 Atl. 824; *Dallas v. Columbia Iron & Steel Co.*, 158 Pa. St. 444, 27 Atl. 1055; *Goldbeck v. Kensington Nat. Bank*, 147 Pa. St. 267, 23 Atl. 565, 48 Leg. Int. 76; *Bagaley v. Pittsburgh & L. S. Iron Co.*, 146 Pa. St. 478, 23 Atl. 837; *Balliet v. Brown*, 103 Pa. St. 546; *Kelsey v. National Bank of Crawford County*, 69 Pa. St. 426; *Gordon v. Preston*, 1 Watts 385, 26 Am. Dec. 75.

South Carolina. *Graham v. Burgiss*, 78 S. C. 404, 59 S. E. 29; *Moyer v. East Shore Terminal Co.*, 41 S. C. 300, 25 L. R. A. 48, 44 Am. St. Rep. 709, 19 S. E. 651; *Hubbard v. Camperdown Mills*, 26 S. C. 581, 2 S. E. 576.

South Dakota. *Davis v. Brown County Coal Co.*, 21 S. D. 173, 110 N. W. 113; *Hunt v. Northwestern Mortg. Trust Co.*, 16 S. D. 241, 92 N. W. 23; *Dedrick v. Ormsby Land & Mortgage Co.*, 12 S. D. 59, 80 N. W. 153.

Tennessee. *First Nat. Bank of Nashville v. Shook*, 100 Tenn. 436, 45 S. W. 338; *Stainback v. Junk Bros. Lumber & Manufacturing Co.*, 98 Tenn. 306, 39 S. W. 530.

Texas. *Texas & P. Ry. Co. v. Davis*, 93 Tex. 378, 54 S. W. 381.

Utah. *Ober v. Schenck*, 23 Utah 614, 65 Pac. 1073; *Murray v. Beal*, 23 Utah 548, 65 Pac. 726.

Vermont. *John A. Roebling's Sons Co. v. Barre & M. Traction & Power Co.*, 76 Vt. 131, 56 Atl. 530.

Virginia. *Richmond Union Passenger Ry. Co. v. Richmond, F. & P. R. Co.*, 96 Va. 670, 32 S. E. 787; *Owens v. Boyd Land Co.*, 95 Va. 560, 28 S. E. 950; *West Salem Land Co. v. Montgomery Land Co.*, 89 Va. 192, 15 S. E. 524.

Washington. *Vulcan Ironworks v. Burrell Const. Co.*, 39 Wash. 319, 81 Pac. 836; *Miller v. Washington Southern Ry. Co.*, 11 Wash. 414, 39 Pac. 673. And see *Dexter, Horton & Co.*

acts of its agents and as to estoppel in pais."⁸² Not only may acts in excess of the authority of a corporate officer or agent be ratified, but also informal or irregular action of corporate officers or agents.⁸³ If an act or contract of a corporate officer or agent is beyond the scope of his authority, or is invalid because of informalities making the act or contract voidable but not void, the corporation has two courses open to it. If it desires not to be bound thereby, it may escape liability by promptly repudiating the act or contract, after

v. Long, 2 Wash. 435, 26 Am. St. Rep. 867, 27 Pac. 271.

Wisconsin. Petersen v. Elholm, 130 Wis. 1, 109 N. W. 76; Heinze v. South Green Bay Land & Dock Co., 109 Wis. 99, 85 N. W. 145; Bullen v. Milwaukee Trading Co., 109 Wis. 41, 85 N. W. 115; Johnson v. Weed & Gumaer Mfg. Co., 103 Wis. 291, 79 N. W. 236; Northwestern Fuel Co. v. Lee, 102 Wis. 426, 78 N. W. 584; Hubbard v. Haley, 96 Wis. 578, 71 N. W. 1036; Pratt v. Oshkosh Match Co., 89 Wis. 406, 62 N. W. 84; McLaren v. First Nat. Bank of Milwaukee, 76 Wis. 259, 45 N. W. 223; Kickland v. Menasha Wooden-Ware Co., 68 Wis. 34, 60 Am. Rep. 831, 31 N. W. 471; Chicago & N. W. Ry. Co. v. James, 24 Wis. 388; Walworth County Bank v. Farmers' Loan & Trust Co., 16 Wis. 629; Racine County Bank v. Lathrop, 12 Wis. 466.

Wyoming. Frank v. Hicks, 4 Wyo. 502, 35 Pac. 475, 1025.

England. Smith v. Hull Glass Co., 11 C. B. 897.

"A principal is bound only by the authorized acts of his agent, and prior authority or subsequent ratification must be shown in order to render the principal answerable *ex contractu* for the conduct of his agent. The agent's authority may be either express or implied; but the act done or the promise made by the agent must be within the powers expressly or impliedly delegated to him; though the act was not authorized at the time it was done, it may be ratified subsequently by a competent principal." Spelman

v. Gold Coin Mining & Milling Co., 26 Mont. 76, 55 L. R. A. 644, 91 Am. St. Rep. 402, 66 Pac. 597.

A corporation may waive objection to payment by the president of a personal debt with a corporate check and become bound thereby. Security Warehousing Co. v. American Exch. Nat. Bank, 118 N. Y. App. Div. 350, 103 N. Y. Supp. 399.

It is unnecessary, in a suit against a corporation for violation of a contract, to allege that said contract was ratified by the necessary majority, where it is alleged that the corporation made the contract, and it was within the corporate powers. Escondido Oil & Development Co. v. Glaser, 144 Cal. 494, 77 Pac. 1040.

It is harmless error to admit evidence of ratification of a wrongful act by an agent of the corporation where the corporation would have been liable irrespective of such ratification. Dwyer v. St. Louis Transit Co., 108 Mo. App. 152, 83 S. W. 303.

Recordation in the minutes does not make the act of directors valid but merely preserves evidence of it. Watts v. Gordon, 127 Tenn. 96, 153 S. W. 483.

⁸² Metzger v. Southern Bank, 98 Miss. 108, 54 So. 241.

Like a natural person, a corporation may ratify any act which it can perform. Rowley v. Stack-Gibbs Lumber Co., 19 Idaho 107, 112 Pac. 1041.

⁸³ Morissette v. Howard, 62 Kan. 463, 63 Pac. 756; Silsby v. Strong, 38 Ore. 36, 62 Pac. 633.

notice thereof, and, if benefits have been received, returning them or otherwise placing the other party in statu quo.⁸⁴ If it desires to ratify the contract, it may either expressly ratify it or impliedly ratify it by conduct.

Torts committed by corporate officers or agents may be ratified the same as any other act.⁸⁵

Like other cases of agency, void, as distinguished from voidable, acts cannot be ratified,⁸⁶ and this includes acts done in violation of law or in contravention of public policy. Likewise, a corporation cannot ratify an ultra vires contract.⁸⁷

§ 2179. Statutory regulation. In some states statutes lay down certain rules as to ratification which are applicable to corporations as well as to others.⁸⁸ Ordinarily, however, these rules are merely declaratory of the common law.

§ 2180. Necessity for ratification. Of course no ratification is ordinarily necessary where a corporate officer or agent acts within his authority and in an authorized manner. However, ratification or approval of particular corporate acts or contracts is sometimes required by statute or charter provision or by the by-laws; and consent of the stockholders or a certain percentage thereof is sometimes necessary to validate a corporate transaction.⁸⁹ So ratification by the stockholders is sometimes made a condition to a power to contract delegated by the board of directors, in which case ratification of a particular contract made by the officer or officers to whom the power was delegated is necessary, although the contract is silent in regard thereto.⁹⁰ A contract may itself provide for its ratification by certain officers before it shall become effective, in which case ratification is necessary, although the representatives of the corporation who made the contract had implied power, by virtue of their offices, to bind the corporation without any ratification.⁹¹ But an assignee of a lease who has collected rents thereunder cannot attack the lease

⁸⁴ *H. J. Mohlman Co. v. Reikers*, 36 N. Y. Misc. 770, 74 N. Y. Supp. 848.

⁸⁵ See generally 1 Mechem, Agency (2nd Ed.), § 357.

⁸⁶ See generally 1 Mechem, Agency (2nd Ed.), § 358.

⁸⁷ See § 1518, *supra*.

⁸⁸ See *Colpe v. Jubilee Min. Co.*, 2 Cal. App. 393, 84 Pac. 324.

⁸⁹ See § 801, *supra*.

⁹⁰ *Kelsey v. New England St. Ry. Co.*, 60 N. J. Eq. 230, 46 Atl. 1059.

As to what constitutes waiver of required ratification, see *Kelsey v. New England St. Ry. Co.*, 60 N. J. Eq. 230, 46 Atl. 1059.

⁹¹ *Roberts v. New & B. St. Corporation*, 138 N. Y. App. Div. 47, 122 N. Y. Supp. 989.

on the ground that it was not ratified by the stockholders of the lessor as required by statute.⁹²

If the charter requires contracts to be ratified by the directors, assent to a proposed contract given by the directors before its execution is equivalent to subsequent ratification.⁹³

§ 2181. Ultra vires acts. As a corporation has such powers only as are conferred upon it by its charter, and cannot properly authorize its officers or agents to engage in transactions which are ultra vires, it cannot properly ratify ultra vires acts or contracts. Ratification of such an act or contract cannot render it any the less ultra vires.⁹⁴ This rule has been stated and considered at length in preceding

⁹² *Standard Oil Co. v. Slye*, 164 Cal. 435, 129 Pac. 589.

⁹³ *New York & N. J. Globe Gas Light Co. v. Metropolitan Inv. Co.*, 10 N. Y. App. Div. 342, 41 N. Y. Supp. 797.

⁹⁴ *United States. Medlin Milling Co. v. Moffatt Commission Co.*, 218 Fed. 686, gambling in futures in grain. *Park Hotel Co. v. Fourth Nat. Bank of St. Louis*, 86 Fed. 742.

Alabama. Alabama Great Southern R. Co. v. Loveman Compress Co., 72 So. 311.

Illinois. Wheeler v. Home Savings & State Bank, 188 Ill. 34, 80 Am. St. Rep. 161, 58 N. E. 598, rev'g 85 Ill. App. 28; *National Home Building & Loan Ass'n v. Home Sav. Bank*, 181 Ill. 35, 64 L. R. A. 399, 72 Am. St. Rep. 245.

Nebraska. Thompson v. West, 59 Neb. 677, 49 L. R. A. 337, 82 N. W. 13.

New Jersey. Elkins v. Camden & A. R. Co., 36 N. J. Eq. 5.

New Mexico. Rankin v. Southwestern Brewery & Ice Co., 12 N. M. 49, 73 Pac. 612.

Tennessee. Buckeye Marble & Freestone Co. v. Harvey, 92 Tenn. 115, 18 L. R. A. 252, 36 Am. St. Rep. 71, 20 S. W. 427.

England. Ashbury Ry. Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653.

Thus a wrongful withdrawal by a

member of a building and loan association, and payment for his stock when the association has no funds applicable to withdrawals, cannot be validated by ratification by the directors. *Aldrich v. Gray*, 147 Fed. 453, 8 Ann. Cas. 832.

"It is settled that the powers of the agents of corporations to enter into contracts in their behalf are limited, by the nature of things, to such contracts as the corporations are by their charters authorized to make. The same want of power to give authority to an agent to contract, and thereby bind the corporation in matters beyond the scope of their corporate objects, must be equally conclusive against any attempt to ratify such contract. What they cannot do directly they cannot do indirectly. They cannot bind themselves by the ratification of a contract which they had no authority to make. The power of the agent must be restricted to the business which the company was authorized to do. Within the scope of the business which they had power to transact, he, as its agent, may be authorized to act for it, but beyond that he could not be authorized, for its powers extend no further." *Downing v. Mt. Washington Road Co.*, 40 N. H. 230.

chapters.⁹⁵ However, a corporation is capable of exceeding its powers, and in most jurisdictions it cannot always escape liability upon a contract, or for an act which it has authorized, by setting up that it was beyond its powers.⁹⁶ This is just as true where an ultra vires contract is ratified as where it was authorized.⁹⁷ Individual directors, by their words or their silence, cannot ratify a contract made by a corporate officer, nominally in its behalf, but actually without authority, and a matter with which the company has no concern.⁹⁸ So the board of directors cannot bind the company by ratifying transactions of officers which the by-laws expressly prohibited, for the reason that the by-laws apply as much to the directors as to the officers violating them.⁹⁹

§ 2182. Knowledge as element of ratification—General rule. As a general rule, ratification of the unauthorized act of an agent, to be effectual and binding upon the principal, must have been made with a full knowledge of all material facts;¹ and this rule applies, of course, to ratification by a corporation of an unauthorized contract or other act by its officers or agents, whether the ratification is by the stockholders or by the directors, or by a subordinate officer having authority to ratify.² It follows that if a corporation had no knowledge

⁹⁵ See §§ 801, 1518, *supra*.

⁹⁶ See § 1539 *et seq.*, *supra*.

⁹⁷ *Perkins v. Portland, S. & P. R. Co.*, 47 Me. 573, 74 Am. Dec. 507. See *Peck v. Doran & Wright Co.*, 57 Hun (N. Y.) 343, 10 N. Y. Supp. 401.

⁹⁸ *Demarest v. Spiral Riveted Tube Co.*, 71 N. J. L. 14, 58 Atl. 161.

⁹⁹ *Hoffman v. Farmers' Co-op. Shipping Ass'n*, 78 Kan. 561, 97 Pac. 440.

¹ *Combs v. Scott*, 12 Allen (Mass.) 493.

² *United States v. Watkins Salt Co. v. Mulkey*, 225 Fed. 739; *Marqusee v. Insurance Co. of North America*, 211 Fed. 903, 907; *Pennsylvania Taximeter Cab Co. v. Cressey*, 191 Fed. 337.

California. *Smith v. Pacific Vinegar & Pickle Works*, 145 Cal. 352, 104 Am. St. Rep. 42, 78 Pac. 550; *Blen v. Bear River & A. Water & Mining Co.*, 20 Cal. 602, 81 Am. Dec. 132; *Wickersham Banking Co. v. Nicholas*, 2 Cal. App. 18, 82 Pac. 1124.

Colorado. *Conqueror, Gold Mining & Milling Co. v. Ashton*, 39 Colo. 133, 90 Pac. 1124; *Extension Gold Mining & Milling Co. v. Skinner*, 28 Colo. 237, 64 Pac. 198.

Florida. *First Nat. Bank v. Kirkby*, 43 Fla. 376, 32 So. 881.

Georgia. *Butler v. Standard Guaranty & Trust Co.*, 122 Ga. 371, 50 S. E. 132; *Singleton v. Bank of Monticello*, 113 Ga. 527, 38 S. E. 947.

Illinois. *National Hollow Brake-Beam Co. v. Chicago R. Equipment Co.*, 226 Ill. 28, 80 N. E. 556, *rev'g* 123 Ill. App. 533; *Thompson v. Hemmenway*, 218 Ill. 46, 109 Am. St. Rep. 239, 75 N. E. 791.

Iowa. *Teeple v. Hawkeye Gold Dredging Co.*, 137 Iowa 206, 114 N. W. 906; *Bristol Sav. Bank v. Judd*, 116 Iowa 26, 89 N. W. 93; *Groeltz v. Armstrong Real Estate Co.*, 115 Iowa 602, 89 N. W. 21; *Thompson v. Des Moines Driving Park*, 112 Iowa 628, 84 N. W. 678.

of a contract when made by one of its officers, but as soon as it learns thereof it refuses to accept the fruits thereof, there is no ratification or estoppel.³ It is also necessary to show knowledge, or to show facts from which knowledge may be presumed, in order that a corporation may be held to have impliedly ratified an unauthorized act

Kentucky. *Star Mills v. Bailey*, 140 Ky. 194, 140 Am. St. Rep. 370, 130 S. W. 1077; *Pennsylvania Iron Works Co. v. Voght Mach. Co.*, 29 Ky. L. Rep. 861, 96 S. W. 551.

Maine. *Hyams v. Old Dominion Co.*, 113 Me. 294, 300, L. R. A. 1915 D 1128, 93 Atl. 747; *Camden Land Co. v. Lewis*, 101 Me. 78, 63 Atl. 523.

Maryland. *Cumberland Coal & Iron Co. v. Sherman*, 20 Md. 117.

Massachusetts. *Bishop v. Burke*, 207 Mass. 133, 93 N. E. 254; *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 203 Mass. 159, 89 N. E. 193; *Bi-Spool Sew. Mach. Co. v. Acme Mfg. Co.*, 153 Mass. 404, 26 N. E. 991; *Murray v. Nelson Lumber Co.*, 143 Mass. 250, 9 N. E. 634.

Minnesota. *National City Bank of Minneapolis v. Zimmer Vacuum Renovator Co.*, 132 Minn. 211, 156 N. W. 265.

Missouri. *Sanders v. Chartrand*, 158 Mo. 352, 59 S. W. 95; *Bartlett v. Garrett*, 188 Mo. App. 144, 185 S. W. 79; *Bradley-Metcalf Co. v. Tootle-Campbell Dry Goods Co.*, — Mo. App. —, 180 S. W. 389; *Sedalia Nat. Bank v. Economy Steam Heating & Electric Co.*, 145 Mo. App. 319, 130 S. W. 377.

Montana. *Trent v. Sherlock*, 26 Mont. 85, 66 Pac. 700.

New Jersey. *Lister Agr. Chemical Works v. Selby*, 68 N. J. Eq. 271, 59 Atl. 247; *Pomeroy v. New York Smelting & Refining Co. (N. J. Ch.)*, 48 Atl. 395.

New York. *Lord v. United States Transp. Co.*, 143 App. Div. 437, 128 N. Y. Supp. 451; *Gause v. Commonwealth Trust Co.*, 124 App. Div. 438,

108 N. Y. Supp. 1080, aff'g 55 Misc. 110, 106 N. Y. Supp. 288; *Caldwell v. Mutual Reserve Fund Life Ass'n*, 53 App. Div. 245, 65 N. Y. Supp. 826; *Ives v. Smith*, 55 Hun 606, 8 N. Y. Supp. 46; *Missouri Pac. Ry. v. Mercantile Trust Co.*, 76 Misc. 10, 134 N. Y. Supp. 548.

North Dakota. *Smith v. Courant Co.*, 23 N. D. 297, 136 N. W. 781.

Oregon. *Crawford v. Albany Ice Co.*, 36 Ore. 535, 60 Pac. 14.

South Carolina. *Ravenel v. Lyles*, Speer Eq. 281.

South Dakota. *Porter v. Lien*, 36 S. D. 18, 153 N. W. 905.

Texas. *Morgan v. Washburn Lumber Co.*, — Tex. Civ. App. —, 180 S. W. 911; *American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co.*, — Tex. Civ. App. —, 155 S. W. 286; *Southern Kansas Ry. Co. of Texas v. Logue*, — Tex. Civ. App. —, 139 S. W. 11; *Hurlbut v. Gainer*, 45 Tex. Civ. App. 588, 103 S. W. 409.

Utah. *Murray v. Beal*, 23 Utah 548, 65 Pac. 726.

Washington. *Coolidge v. Schering*, 32 Wash. 557, 73 Pac. 682.

Wisconsin. *Glendale Inv. Ass'n v. Harvey Land Co.*, 114 Wis. 408, 90 N. W. 456.

Where there is no knowledge of an unauthorized exchange of notes for bonds until after the bankruptcy of the corporation, a sale of the bonds by the trustee before acquiring knowledge of the facts does not constitute a ratification. In re *Charles R. Partridge Lumber Co.*, 215 Fed. 973.

³ *Red Cross Protective Society v. Wayte*, 171 Fed. 643.

by accepting the benefits of it, or by failure on its part to disaffirm it.⁴

However, want of knowledge of the law, as distinguished from the facts, is immaterial.⁵

§ 2183. — Matters equivalent to knowledge and what constitutes knowledge. Summing up the conclusions of Professor Mechem in his valuable work on the law of agency, they are that the knowledge required for ratification is ordinarily actual knowledge and not merely the opportunity for acquiring knowledge: but that the principal cannot be justified in wilfully closing his eyes to knowledge; the facts may be so patent and obvious that the principal, as a reasonable man, cannot be heard to say that he was ignorant of them; the existence of actual knowledge may be found by inference like any other fact; and the knowledge may be the knowledge possessed by some other agent having a general authority in the matter, and which

⁴ **California.** *Blen v. Bear River & A. Water & Mining Co.*, 20 Cal. 602, 81 Am. Dec. 132.

Colorado. *Extension Gold Mining & Milling Co. v. Skinner*, 28 Colo. 237, 64 Pac. 198; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 1 Colo. 531.

Iowa. *Thompson v. Des Moines Driving Park*, 112 Iowa 628, 84 N. W. 678.

Kansas. *Getty v. C. R. Barnes Milling Co.*, 40 Kan. 281, 19 Pac. 617; *First Nat. Bank of Ft. Scott v. Drake*, 29 Kan. 311, 44 Am. Rep. 646.

Maryland. *Cumberland Coal & Iron Co. v. Sherman*, 20 Md. 117.

Massachusetts. *Bi-Spool Sew. Mach. Co. v. Acme Mfg. Co.*, 153 Mass. 404, 26 N. E. 991; *Murray v. Nelson Lumber Co.*, 143 Mass. 250, 9 N. E. 634.

Minnesota. *Ft. Dearborn Nat. Bank v. Seymour*, 75 Minn. 100, 77 N. W. 543.

Missouri. *Sanders v. Chartrand*, 158 Mo. 352, 59 S. W. 95.

Nevada. *Edwards v. Carson Water Co.*, 21 Nev. 469, 34 Pac. 381; *Yellow Jacket Silver Min. Co. v. Stevenson*, 5 Nev. 224.

New York. *Caldwell v. Mutual Reserve Fund Life Ass'n*, 53 App. Div.

245, 65 N. Y. Supp. 826; *Camacho v. Hamilton Bank Note & Engraving Co.*, 2 App. Div. 369, 37 N. Y. Supp. 725; *French v. O'Brien*, 52 How. Pr. 394.

South Carolina. *Ravenel v. Lyles*, Speer Eq. 281.

Vermont. *Lyndon Mill Co. v. Lyndon Literary & Biblical Inst.*, 63 Vt. 581, 25 Am. St. Rep. 783, 22 Atl. 575; *Stark Bank v. United States Pottery Co.*, 34 Vt. 144.

Washington. *Elwell v. Puget Sound & C. R. Co.*, 7 Wash. 487, 35 Pac. 376.

If an officer purchases goods for a corporation without authority, and it is agreed and understood between him and the directors that he is furnishing the goods to the corporation gratuitously, the use of the goods by the corporation is not a ratification of his unauthorized purchase, nor ground for implying a promise on the part of the corporation to pay for the goods. *Lyndon Mill Co. v. Lyndon Literary & Biblical Inst.*, 63 Vt. 581, 25 Am. St. Rep. 783, 22 Atl. 575.

⁵ *Davis v. Nueces Valley Irr. Co.*, 103 Tex. 243, 126 S. W. 4, rev'g on other grounds (Tex. Civ. App.), 116 S. W. 633.

may be imputed to the principal in accordance with the general rule making notice to an agent notice to his principal.⁶ These rules are as applicable to ratifications where the principal is a corporation as to cases where the principal is not a corporation. Thus, ratification by the directors of an unauthorized contract by an officer, in the proper sense of the term "ratification," cannot be implied from their failure to disaffirm the same, unless they had actual knowledge of the contract. The fact that, in the proper discharge of their duties, they ought to have known of it, is not enough.⁷ But if their ignorance was due to negligence and inattention in the discharge of their duties and third persons have acted in reliance on their apparent knowledge and acquiescence, the corporation may be estopped to deny that the contract was authorized or ratified.⁸ Moreover, in corporation cases,

⁶ 1 Mechem, Agency (2nd Ed.), §§ 403-407.

⁷ In an action against a corporation on a contract executed by its president without authority, where the plaintiff had performed all the acts required of him by the contract, and relied upon the acquiescence of the directors as a ratification, it was held error to charge the jury that "all directors * * * are presumed to know what it is their duty to know, what they are able to know, and what they undertook to know when they accepted the responsibility of directors," and that, "in the absence of direct and positive evidence of the knowledge of the directors, jurors have the right to assume that they are doing what they were appointed to do, and that they know what they are appointed to know." The party relying on a ratification, said the court, must show that the directors, or a majority of them, actually knew of the contract and its terms, and with such knowledge acquiesced in it. *Murray v. Nelson Lumber Co.*, 143 Mass. 250, 9 N. E. 634. Compare, however, *Michigan Cent. R. Co. v. Chicago, K. & S. R. Co.*, 132 Mich. 324, 93 N. W. 882, 9 Det. L. N. 627.

Where a bank acted fraudulently in accepting an unauthorized pledge

of another bank's credit from its cashier, it was held that the latter bank could not be held to have ratified the transaction because of the negligence of its officers and stockholders in not discovering the fraud. *Ft. Dearborn Nat. Bank v. Seymour*, 75 Minn. 100, 77 N. W. 543.

Under some circumstances, however, where the directors accept the benefits of a contract made by an officer or agent without authority, it is their duty to inquire into the terms of the contract and to give timely notice if they do not propose to be bound thereby. *Bauersmith v. Extreme Gold Mining & Milling Co.*, 146 Fed. 95, 99; *Scott v. Middletown, U. & W. G. R. Co.*, 86 N. Y. 200.

⁸ *Mobile & M. Ry. Co. v. Gilmer*, 85 Ala. 422, 5 So. 138; *Campbell v. Pope*, 96 Mo. 468, 10 S. W. 187; *Scott v. Middletown, U. & W. G. R. Co.*, 86 N. Y. 200; *Currie v. Bowman*, 25 Ore. 364, 35 Pac. 848.

"If the directors, in the exercise of ordinary care, ought to have known of the execution of the contract * * * , it is in law as if they knew." *Smith v. Bank of New England*, 72 N. H. 4, 9, 54 Atl. 385.

Where a railroad company received material bought upon its credit and for its use by one of its officers with-

it has been held that the circumstances of the case may be such that the court or jury may presume knowledge on the part of the stockholders or of the directors or other officers whose knowledge is imputable to the corporation;⁹ and knowledge upon the part of the corporation will be presumed from slight circumstances where it has had the benefit of the contract.¹⁰ If an unauthorized contract or other transaction appears on the books of the corporation, which are subject to inspection by the officer or officers having authority to

out authority, and used it for the corporate purposes for which it was designed, it was held that this was an adoption and ratification of the act of the officer; that the directors using the material so purchased were bound to inquire, and were presumed to know, whether it was paid for or not; and that it was not necessary, therefore, to show that the directors knew the terms of the contract. *Scott v. Middletown, U. & W. G. R. Co.*, 86 N. Y. 200.

A nontrading corporation is not liable for money loaned its general manager who had no authority to borrow money, on the theory of negligence in failing to examine pass books issued to the manager by the lending banks and which contained entries relating to the loans. *Sedalia Nat. Bank v. Economy Steam Heating & Electric Co.*, 145 Mo. App. 319, 130 S. W. 377, distinguishing *Hennessy Bros. & Evans Co. v. Memphis Nat. Bank*, 129 Fed. 557, in which latter case the manager had power to borrow money.

⁹ *United States. Egbert v. Sun Co.*, 126 Fed. 568.

California. Blen v. Bear River & A. Water & Mining Co., 20 Cal. 602, 81 Am. Dec. 132.

Missouri. Campbell v. Pope, 96 Mo. 468, 10 S. W. 187.

New York. Scott v. Middletown, U. & W. G. R. Co., 86 N. Y. 200; *Curtis v. Natalie Anthracite Coal Co.*, 89 App. Div. 61, 85 N. Y. Supp. 413, aff'g 39 Misc. 586, 80 N. Y. Supp. 603.

Wisconsin. Racine County Bank v. Lathrop, 12 Wis. 466.

Knowledge may be shown by circumstantial evidence. *Danglade & Robinson Min. Co. v. Mexico-Joplin Land Co.*, — Mo. App. —, 190 S. W. 35.

In *Blen v. Bear River & A. Water & Mining Co.*, 20 Cal. 602, 81 Am. Dec. 132, it was said: "A ratification supposes a knowledge of the thing ratified, and in the case of a contract, the inference from the ratification is, that its provisions were known. When the ratification is proved, this inference necessarily follows, and if there was any mistake or misapprehension, that fact must be shown."

Knowledge of act of superintendent of railroad in posting offers of reward for conviction of persons obstructing the road, as inferred, see *Central Railroad & Banking Co. v. Cheatham*, 85 Ala. 292, 7 Am. St. Rep. 48, 4 So. 828; *Arkansas Southwestern R. Co. v. Dickinson*, 78 Ark. 483, 115 Am. St. Rep. 54, 95 S. W. 802.

The fact that the secretary made out a statement of the debts of the corporation in gross was held insufficient to give the stockholders or directors notice of an unauthorized note executed by him and the president, and included in the statement. *Edwards v. Carson Water Co.*, 21 Nev. 469, 34 Pac. 381.

¹⁰ *Pannebaker v. Tuscarora Valley R. Co.*, 219 Pa. 60, 67 Atl. 923. See also § 2204, *infra*.

authorize or ratify such transactions, his knowledge of the same may be presumed, unless the circumstances are such as to rebut the presumption.¹¹

If the stockholders, directors or other officers elect to ratify without inquiry as to the facts, their conduct is equivalent to knowledge.¹² The rule is stated in a leading work on agency as follows: "It is an essential element of a valid ratification that the principal shall have a full knowledge of all material facts, unless he intentionally and deliberately ratifies when he knows that he has no such knowledge, not caring to make further inquiry into the matter. It is his privilege if he so desires, to intentionally ratify the unauthorized acts of his agent or of an assumed agent, without full knowledge of the facts, and if he is misled he cannot complain."¹³

§ 2184. — Partial knowledge. Ratification of an unauthorized contract must have been made with knowledge of all of its terms, at least unless it is ratified with knowledge that all its terms are not known, and without regard thereto.¹⁴ Thus, acceptance of the benefits of a contract is no estoppel where such acceptance was without knowledge of unauthorized provisions in the contract, at least where the contract was an oral one.¹⁵ And knowledge that a corporate officer has made a contract is not necessarily knowledge of unauthorized agreements in connection therewith.¹⁶

§ 2185. — Knowledge of officer or agent as imputable to corporation. Knowledge of officers or agents may, in certain cases, be imputed to the corporation, so that knowledge of the officer or agent is considered as the knowledge of the corporation, within this rule,¹⁷

¹¹ *Deposit Bank of Carlisle v. Fleming*, 19 Ky. L. Rep. 1947, 44 S. W. 961; *Racine County Bank v. Lathrop*, 12 Wis. 466.

¹² *Beacon Trust Co. v. Souther*, 183 Mass. 413, 67 N. E. 345.

¹³ 1 *Clark & Skyles, Agency*, § 106.

¹⁴ *Blen v. Bear River & A. Water & Mining Co.*, 20 Cal. 602, 81 Am. Dec. 132.

Mere knowledge by a corporation that a person was in its employ was held insufficient to show ratification of the terms of a written contract of employment, made by one of the officers without authority. *Camacho v.*

Hamilton Bank Note & Engraving Co., 2 N. Y. App. Div. 369, 37 N. Y. Supp. 725.

¹⁵ *American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co.*, — Tex. Civ. App. —, 155 S. W. 286; *Hurlbut v. Gainor*, 45 Tex. Civ. App. 588, 103 S. W. 409.

¹⁶ *Beach v. Palisade Realty & Amusement Co.*, 86 N. J. L. 238, 90 Atl. 1118.

¹⁷ *Joseph Wolf Co. v. Bank of Commerce*, 107 Ill. App. 58; *Beacon Trust Co. v. Souther*, 183 Mass. 413, 67 N. E. 345.

but the knowledge necessary must be that of some officer or agent other than the wrongdoer.¹⁸ Thus, the knowledge of the president of a corporation, who has signed a contract without authority of the directors, is not knowledge on the part of the corporation, where the other stockholders and directors have no knowledge of it.¹⁹ For the purpose of ratification or estoppel by acquiescence, knowledge on the part of an officer or officers having authority in the premises is knowledge on the part of the corporation.²⁰ But knowledge on the part of an officer who has no authority to bind the corporation is not imputable to it.²¹ Where an unauthorized contract can only be

Where a superintendent of a corporation was authorized by the general manager to sell a vessel belonging to the corporation, a broker's commission to be deducted from the sale price, the manager assuming that his acts would be ratified by the corporation, and after a sale had been made through a broker employed by the superintendent the sale was ratified at a meeting at which the manager was present and participated as a director, the ratification was deemed to have been made with knowledge of the facts concerning the sale which the manager possessed. *Hartford & N. Y. Transp. Co. v. Plymmer*, 120 Fed. 624.

¹⁸ *Danglade & Robinson Min. Co. v. Mexico-Joplin Land Co.*, — Mo. App. —, 190 S. W. 35.

¹⁹ *Bi-Spool Sew. Mach. Co. v. Acme Mfg. Co.*, 153 Mass. 404, 26 N. E. 991. Compare *Mobile & M. Ry. Co. v. Gilmer*, 85 Ala. 422, 5 So. 138.

²⁰ *Ditty v. Dominion Nat. Bank*, 75 Fed. 769; *Mobile & M. Ry. Co. v. Gilmer*, 85 Ala. 422, 5 So. 138; *Chouteau v. Allen*, 70 Mo. 290.

²¹ *United States. American Surety Co. v. Pauly*, 170 U. S. 133, 12 L. Ed. 977.

Colorado. Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 2 Colo. 248, 565.

Massachusetts. Bi-Spool Sew. Mach. Co. v. Acme Mfg. Co., 153 Mass.

404, 26 N. E. 991; *Murray v. Nelson Lumber Co.*, 143 Mass. 250, 9 N. E. 634.

Minnesota. Ft. Dearborn Nat. Bank of Chicago v. Seymour, 71 Minn. 81, 73 N. W. 724.

Nevada. Edwards v. Carson Water Co., 21 Nev. 469, 34 Pac. 381; *Yellow Jacket Silver Min. Co. v. Stevenson*, 5 Nev. 224.

Vermont. Lyndon Mill Co. v. Lyndon Literary & Biblical Inst., 63 Vt. 581, 25 Am. St. Rep. 783, 22 Atl. 575.

A corporation is not chargeable with notice that an officer, having no authority to do so, has executed a note in its name. *Helena Nat. Bank v. Rocky Mountain Tel. Co.*, 20 Mont. 379, 63 Am. St. Rep. 628, 51 Pac. 829.

A president of a national bank has no authority, in the usual course of business, to certify to the fidelity and integrity of the cashier for the purpose of enabling him to procure a bond insuring his fidelity, and therefore the bank cannot be deemed, merely by virtue of the president's relation to it, to have knowledge of his giving such certificate. *American Surety Co. v. Pauly*, 170 U. S. 133, 12 L. Ed. 977.

Knowledge of the cashier and two directors of a bank that the cashier has pledged the bank's credit, without authority, on the note of a corporation in which he and such directors are interested, is not notice to the

ratified by the board of directors or trustees, knowledge thereof on the part of a minority of the board individually is not enough.²² In order that a corporation may be bound by acquiescence of its directors in an unauthorized act of one of its officers, it is not necessary that notice thereof shall be given them while sitting as a board. It is sufficient if they are personally cognizant thereof and do not call a meeting to disavow it.²³

Whether notice to or knowledge of a particular officer or agent of the corporation is notice to or knowledge of the corporation is considered at length in the next following subdivision.

§ 2186. Who may ratify—General rules. Unauthorized or irregular contracts or other acts by the officers or agents of a corporation cannot be ratified except by a person or persons having authority to authorize the same, and bind the corporation. Obviously, an officer or officers who have no power to do or authorize an act have no power to ratify such an act.²⁴

On the other hand, at least presumably, any officer having authority to do or authorize an act has the same authority to ratify it if done

bank. *Ft. Dearborn Nat. Bank of Chicago v. Seymour*, 71 Minn. 81, 73 N. W. 724.

A corporation is not chargeable with notice of an unauthorized contract of employment made by an agent, because of such agent's copying of letters evidencing the contract in the company's letter book, where the officers of the company have no knowledge thereof. *Camacho v. Hamilton Bank Note & Engraving Co.*, 2 N. Y. App. Div. 369, 37 N. Y. Supp. 725.

²² *Yellow Jacket Silver Min. Co. v. Stevenson*, 5 Nev. 224; *Elwell v. Puget Sound & C.R. Co.*, 7 Wash. 487, 35 Pac. 376.

And in *Edwards v. Carson Water Co.*, 21 Nev. 469, 34 Pac. 381, it was held that where the power to authorize the execution of notes by a corporation was in the board of trustees, the trustees could not be held to have ratified the act of the president and secretary, who had executed a note, by reason of the knowledge of a majority, acquired while acting as president and secretary.

²³ *Henry v. Colorado Land & Water Co.*, 10 Colo. App. 14, 51 Pac. 90; *Kelsey v. National Bank of Crawford County*, 69 Pa. St. 426.

²⁴ *Colorado. Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565.

Iowa. Tracy v. Guthrie County Agr. Society, 47 Iowa 27.

Pennsylvania. In re Crum's Appeal, 66 Pa. St. 474.

Texas. Pabst Brewing Co. v. Emerson (Tex. Civ. App.), 36 S. W. 342.

Vermont. Lyndon Mill Co. v. Lyndon Literary & Biblical Institute, 63 Vt. 581, 25 Am. St. Rep. 783, 22 Atl. 575.

Compare *Parmly v. Buckley*, 103 Ill. 115.

Irregular corporate action may be made binding by ratification on the part of the corporate body which might have taken the action originally. *Kessler v. Ensley Co.*, 123 Fed. 546.

without authority.²⁵ In other words, ratification must be by the officer or governing body having authority to make or to enter into the contract claimed to have been ratified.²⁶ "Mere knowledge or unauthorized assurances on the part of individual members or officers of" a corporation cannot, it is said, "operate to effect a ratification against affirmative action of the board of directors by resolution to the contrary."²⁷

§ 2187. — Ratification of one's own acts. A corporate officer or agent cannot ratify an unauthorized act or contract done or entered into by himself so as to bind the corporation.²⁸ In other words, one who makes an unauthorized contract has no more right to ratify it than he has to make it.²⁹ Thus directors cannot ratify their own unauthorized acts;³⁰ and a board of directors, the majority of which were the members of a preceding board which authorized or entered into an illegal contract cannot ratify it, since this would be in effect a ratification of one's own act.³¹ In like manner a de facto board of directors cannot ratify its own acts.³² However, notwithstanding this rule that an officer cannot ratify his own acts, it is settled that a stockholder may vote to ratify his own act as director, notwithstanding he has a personal interest in the ratification of such act or though he owns a majority of the stock—and his vote must be

²⁵ *Washington Times Co. v. Wilder*, 12 App. Cas. (D. C.) 62; *Hosteter v. Wear-U-Well Shoe Co.*, 171 Iowa 346, 152 N. W. 1; *White v. Elgin Creamery Co.*, 108 Iowa 522, 79 N. W. 283; *Pacific R. Co. v. Thomas*, 19 Kan. 256.

²⁶ *Teeple v. Hawkeye Gold Dredging Co.*, 137 Iowa 206, 114 N. W. 906.

²⁷ *Lawrence v. Washington Detroit Theatre Co.*, 190 Mich. 44, 155 N. W. 738.

²⁸ *United States. In re Roanoke Furnace Co.*, 166 Fed. 944.

Illinois. Smeeth-Harwood Co. v. Hutchison, 175 Ill. App. 602.

Kentucky. Kenyon Realty Co. v. National Deposit Bank, 140 Ky. 133, 31 L. R. A. (N. S.) 169, 130 S. W. 965.

New York. Giebler Mfg. Co. v. Kranenberg, 102 App. Div. 471, 92 N. Y. Supp. 843.

Washington. Mooney v. O. P. Mooney Co., 71 Wash. 258, 128 Pac. 225.

But an agreement between a lessor and lessee railroad may be binding by ratification although the two corporations had a majority of the directors in common. *Continental Ins. Co. v. New York & H. R. Co.*, 187 N. Y. 225, 79 N. E. 1026.

Part payment by, or other conduct of, the president of a corporation, not authorized or acquiesced in by the directors, is not a ratification of a note executed by him without authority. *Porter v. Winona & D. Grain Co.*, 78 Minn. 210, 80 N. W. 965.

²⁹ *Marqusee v. Insurance Co. of North America*, 211 Fed. 903, 906.

³⁰ *Oliver v. Rahway Ice Co.*, 64 N. J. Eq. 596, 54 Atl. 460; *In re Crum's Appeal*, 66 Pa. St. 474.

³¹ *Oliver v. Rahway Ice Co.*, 64 N. J. Eq. 596, 54 Atl. 460.

³² *Stratton-Massachusetts Gold Mines Co. v. Davis*, 222 Mass. 549, 111 N. E. 375.

counted although otherwise the resolution would not pass—provided, however, that the ratification will not be fraudulent as to minority stockholders;³³ but if the act is a wanton or fraudulent violation of the interests of minority stockholders, then it cannot be ratified by the votes of interested directors.³⁴ Thus, the directors who own and control a majority of the corporate stock cannot ratify their fraudulent and unauthorized acts by calling a stockholders' meeting which they control as effectually as they do the board of directors and causing a majority of the stock to be voted in favor of the ratification.³⁵

§ 2188. — Directors. A single director, having no authority to act for the corporation otherwise than as a member of the board of directors, cannot bind it by ratification of an unauthorized contract.³⁶

³³ **California.** See *Middleton v. Arastraville Min. Co.*, 146 Cal. 219, 79 Pac. 889.

Minnesota. *Bjorngaard v. Goodhue County Bank*, 49 Minn. 483, 52 N. W. 48.

New Jersey. *Colgate v. United States Leather Co.*, 73 N. J. Eq. 72, 67 Atl. 657; *United States Steel Corporation v. Hodge*, 64 N. J. Eq. 807, 60 L. R. A. 742, 54 Atl. 1. Compare *Booth v. Land Filling & Improvement Co.*, 68 N. J. Eq. 536, 59 Atl. 767.

Pennsylvania. *Russell v. Henry C. Patterson Co.*, 232 Pa. 113, 36 L. R. A. (N. S.) 199 with note, 81 Atl. 136.

England. *Northwest Transp. Co. v. Beatty*, 57 L. T. N. S. 426.

A resolution of stockholders ratifying the action of the directors in increasing the salaries of two of the directors is not invalid because passed by the votes of the same individuals by whose votes the resolution of the board of directors was passed and two of whom were the recipients of the salaries. *Russell v. Henry C. Patterson Co.*, 232 Pa. 113, 121, 36 L. R. A. (N. S.) 199, 81 Atl. 136.

See generally Ch. 43, *infra*.

³⁴ *Camden Land Co. v. Lewis*, 101 Me. 78, 63 Atl. 523.

³⁵ *Klein v. Independent Brewing Ass'n*, 231 Ill. 594, 613, 83 N. E. 434.

"It is not to be tolerated that the directors of a corporation owning and controlling a majority of its stock shall be permitted to cause their unlawful acts to be ratified by calling a stockholders' meeting which they control as effectually as they do the board of directors, and causing a majority of the stock to be voted in favor of the ratification. If the acts complained of were unaffected by any unlawful and fraudulent motive and conduct, and it were a question simply whether the directors had exercised good judgment for the best interests of the corporation, a different rule would perhaps apply, for the directors and a majority of the stockholders have the right to control, direct and manage the corporation. In this case, however, the directors purchased from themselves property for an amount much in excess of its value, and this was a fraud upon the stockholders, which could not be ratified or condoned by a stockholders' meeting at which a majority of the votes cast in favor of the ratification were cast by or under the control of the directors who were guilty of the wrongdoing." *Klein v. Independent Brewing Ass'n*, 231 Ill. 594, 83 N. E. 434.

³⁶ *Spinks v. Athens Sav. Bank*, 108 Ga. 376, 33 S. E. 1903.

So a majority of the board of directors acting individually cannot ratify;³⁷ and knowledge and acquiescence of a minority of the board is not a ratification;³⁸ and a minority cannot expressly ratify an act unless they constitute a majority of a quorum. On the other hand, the board of directors or trustees of a corporation may ratify and render binding any act by a subordinate officer or agent which it could have authorized originally;³⁹ and the directors, at a regular and legal meeting, may ratify a contract or act done or authorized by them at an illegal meeting, and thus render it valid.⁴⁰ So directors may ratify any act of one of their own number that they could have authorized in the first instance.⁴¹ A board may ratify acts of a former board.⁴² Thus contracts between interlocking boards of directors may be ratified by a subsequent board of directors having no common

³⁷ *Farrell v. Gold Flint Min. Co.*, 32 Mont. 416, 80 Pac. 1027.

³⁸ *Leggett v. New Jersey Manufacturing & Banking Co.*, 1 N. J. Eq. 541, 23 Am. Dec. 728.

³⁹ *United States. Indianapolis Rolling Mill v. St. Louis, Ft. S. & W. R. Co.*, 120 U. S. 256, 30 L. Ed. 639, 26 Fed. 140; *Mahoney Min. Co. v. Anglo-Californian Bank*, 104 U. S. 192, 26 L. Ed. 707; *Nebraska & K. Farm Loan Co. v. Bell*, 58 Fed. 326; *Anglo-Californian Bank v. Mahoney Mining Co.*, 5 Sawy. 255, Fed. Cas. No. 392.

Alabama. Bibb v. Hall, 101 Ala. 79, 14 So. 98.

California. Shaver v. Bear River & A. Water & Mining Co., 10 Cal. 396.

Illinois. Lemars Shoe Co. v. Lemars Shoe Mfg. Co., 89 Ill. App. 245.

Kentucky. Deposit Bank of Carlisle v. Fleming, 19 Ky. L. Rep. 1947, 44 S. W. 961.

Louisiana. Poche v. New Orleans Home Inv. Co., 52 La. Ann. 1287, 27 So. 797.

Maryland. Miller v. Matthews, 87 Md. 464, 40 Atl. 176.

Minnesota. Western Land Ass'n v. Ready, 24 Minn. 350.

Nebraska. First Nat. Bank of Omaha v. East Omaha Box Co., 90 N. W. 223.

New Hampshire. Smith v. Bank of New England, 72 N. H. 4, 54 Atl. 385.

New Jersey. See Audenried v. East Coast Milling Co., 68 N. J. Eq. 450, 59 Atl. 577.

Pennsylvania. Dallas v. Columbia Iron & Steel Co., 158 Pa. St. 444, 27 Atl. 1055.

West Virginia. Third Nat. Bank v. Laboringman's Mercantile & Manufacturing Co., 56 W. Va. 446, 49 S. E. 544.

Wisconsin. Northwestern Fuel Co. v. Lee, 102 Wis. 426, 78 N. W. 584.

Even though a corporate note be defective for irregularity in its execution or for want of authority in the officer by whom executed, a renewal thereof will not be deemed tainted by such irregularity where authorized by the board of directors at a regular meeting. *Smith v. New Hartford Water Co.*, 73 Conn. 626, 48 Atl. 754.

⁴⁰ *Taylor County Court v. Baltimore & O. R. Co.*, 35 Fed. 161; *Smith v. New Hartford Water Works*, 73 Conn. 626, 48 Atl. 754; *In re Portuguese Consol. Copper Mines*, 45 Ch. Div. 16.

⁴¹ *Guillaume v. K. S. D. Fruit Land Co.*, 48 Ore. 400, 88 Pac. 586, 86 Pac. 883.

⁴² *Smith v. Hartford Water Works*, 73 Conn. 626, 48 Atl. 754.

directors.⁴³ Likewise, directors may ratify the acts of a stockholder who has represented the corporation as an agent.⁴⁴ So an action of the corporation, irregular because done by the stockholders where it should have been done by the directors, may be validated by ratification or acquiescence on the part of the directors.⁴⁵ An executive committee, at a regular meeting, may ratify individual acts of its members.⁴⁶ But, of course, the directors cannot ratify their own "unauthorized" acts.⁴⁷ So the approval of the minutes of a previous meeting of the directors as correct does not legalize the invalid acts of the previous meeting.⁴⁸ And it has been held that the acts of trustees of a corporation whose terms of office have not commenced are not capable of ratification by the board of directors.⁴⁹

When approval by a majority of the board of trustees or directors is necessary to confer authority to bind the corporation by a particular act, the act, if done by an officer without authority, cannot be ratified except by a majority of the trustees or directors.⁵⁰

Ratification by directors may be by an express resolution or vote to that effect, or it may be implied from adoption of the act, acceptance of benefits or acquiescence.⁵¹ Ratification may be effected by a resolution or vote of the board of directors expressly ratifying previous acts either of corporate officers or agents;⁵² but it is not necessary, ordinarily, to show a meeting and formal action by the board of directors, in order to establish a ratification. As a general rule, ratification of a contract or other act will be implied if the corporation, represented by the board of directors, who have knowledge of the facts, accepts and retains the benefits of the contract or act, or recognizes it as binding, or acquiesces in it.⁵³ They may ratify by acquiescence,⁵⁴ and need not act at a meeting regularly called, but

⁴³ Gould Copper Min. Co. v. Walker, 17 Ariz. 332, 152 Pac. 853.

⁴⁴ Dupignac v. Bernstrom, 76 N. Y. App. Div. 105, 78 N. Y. Supp. 705.

⁴⁵ Kessler v. Ensley Co., 123 Fed. 546.

⁴⁶ De Zavala v. Daughters of Republic of Texas, 58 Tex. Civ. App. 19, 124 S. W. 160.

⁴⁷ See § 2187, *supra*.

⁴⁸ R. T. Davis Mill Co. v. Bennett, 39 Mo. App. 460.

⁴⁹ Ballard v. Audubon Nat. Bank, 222 Fed. 57.

⁵⁰ Barcus v. Hannibal, R. C. & P.

Plank Road Co., 26 Mo. 102; Lyndon Mill Co. v. Lyndon Literary & Biblical Inst., 63 Vt. 581, 25 Am. St. Rep. 783, 22 Atl. 575.

⁵¹ As to the mode of ratification in general, see § 2193 et seq., *infra*.

⁵² Flanagan v. Flanagan Coal Co., — W. Va. —, 88 S. E. 402.

⁵³ See § 2199, *infra*.

⁵⁴ Marion Trust Co. v. Crescent Loan & Investment Co., 27 Ind. App. 451, 87 Am. St. Rep. 257, 61 N. E. 688; John A. Roebling's Sons Co. v. Barre & M. Traction & Power Co., 76 Vt. 131, 56 Atl. 530; Third Nat. Bank

may ratify without any formal action.⁵⁵ Thus, it has been held that if the majority of the board of directors were advised individually of the terms of an unauthorized contract and took no measures to disaffirm it, such contract was ratified.⁵⁶ An express resolution of ratification is not necessary but it is sufficient that the board of directors, as a board, received report or notice of the transaction requiring ratification, and, with knowledge, not only failed to repudiate it, but treated it the same as other obligations of like kind.⁵⁷

If the ratification is express, there is some conflict of opinion as to whether the individual consent of a majority of the board, without a meeting of the directors, is sufficient. The affirmative has been held in some states.⁵⁸ In a federal case, where the directors could not get a quorum of the board to hold a meeting, it was held that "the assent of the directors to its [a mortgage's] execution without a formal meeting of the board, with full knowledge on their part of all the facts, in advance of, and at the time of, its execution, ought, in equity, to be deemed the equivalent in law to a ratification thereof by the board."⁵⁹ In Colorado it was held that it could be shown that the president who did the act "told the members of the directory what he had done, and that those directors, when thus informed of it by the president, approved of his acts."⁶⁰

On the other hand, in Missouri, it was held that the members of a board of directors could not severally ratify an assignment of the property of the corporation; and the court gave as the reason that

v. Laboringman's Mercantile & Manufacturing Co., 56 W. Va. 446, 49 S. E. 544.

Directors may ratify a contract of which they have knowledge by their acquiescence therein, without expressly accepting it in terms by a resolution. *Davis v. Brown County Coal Co.*, 21 S. D. 173, 110 N. W. 113.

⁵⁵ *Knowles v. Northern Texas Traction Co.* (Tex. Civ. App.), 121 S. W. 232.

⁵⁶ *Brown v. Crown Gold Milling Co.*, 150 Cal. 376, 89 Pac. 86.

In California, however, under a statute, it seems to have been held in a later case that a ratification of the cancellation of a written contract can be accomplished only by a formal act of the board of directors, their mere

acquiescence being insufficient. *Blair v. Brownstone Oil & Refining Co.*, 168 Cal. 632, 143 Pac. 1022.

⁵⁷ *Salem Iron Co. v. Lake Superior Consol. Iron Mines*, 112 Fed. 239.

⁵⁸ It is not necessary that the acts of an officer of the corporation be ratified by action of the board of directors at a regular meeting, but it is sufficient that there be separate assent of a majority of the board. *Scott v. Superior Sunset Oil Co.*, 144 Cal. 140, 143, 77 Pac. 817; *Anderson v. Wallace Lumber & Manufacturing Co.*, 30 Wash. 147, 70 Pac. 247.

⁵⁹ *Nevada Nickel Syndicate v. National Nickel Co.*, 96 Fed. 133, 150.

⁶⁰ *Henry v. Colorado Land & Water Co.*, 10 Colo. App. 14, 24, 51 Pac. 90.

"the members of the board, severally, could not ratify the assignment, because they could not, in the first place, have made it in their individual capacity, but only as a board, and not otherwise, could they ratify it."⁶¹ A like rule has been laid down in Kansas⁶² and, it seems, in Massachusetts.⁶³ And in Alabama, the signatures by six of the nine directors at separate times, and not at a meeting of the directors, of a ratification was held, "though not a ratification by the directory," to be "evidence of a knowledge and approval of the act and of a determination not to disaffirm it."⁶⁴ In any event, consent of a majority of the directors individually to an act of the manager, where the custom was for the manager to consult the directors individually instead of their holding meetings, constituted a ratification.⁶⁵

If express ratification by the board of directors at a regular meeting is relied on, it is necessary that notice thereof be given, if notice is necessary, that a quorum be present, and that the ratification be by a majority vote, as in the case of any other corporate business.⁶⁶ Thus, when notes or other instruments have been executed by an officer without authority, and ratification by the directors is necessary to render them binding, an attempted ratification at a special meeting of the board, held without notice and at which all of the directors are not present, is not sufficient.⁶⁷ So the board cannot ratify at a meeting at which there is no quorum.⁶⁸ It follows that ratification by the board of directors where one of the board necessary to a quorum is interested may be repudiated.⁶⁹

§ 2189. — Officers or agents other than directors. The president or other like officer of a corporation may ratify a contract which he

⁶¹ *Calumet Paper Co. v. Haskell Show Printing Co.*, 144 Mo. 331, 338, 66 Am. St. Rep. 425, 45 S. W. 1115.

⁶² *First Nat. Bank v. Drake*, 35 Kan. 564, 57 Am. Rep. 193, 11 Pac. 445.

⁶³ *Commercial Brewing Co. v. McCormick*, 225 Mass. 504, 114 N. E. 812.

⁶⁴ *Bibb v. Hall*, 101 Ala. 79, 95, 14 So. 98.

⁶⁵ *Indiana Die-Casting Development Co. v. Newcomb*, 184 Ind. 250, 111 N. E. 16.

⁶⁶ *Cupit v. Park City Bank*, 20 Utah 292, 58 Pac. 839.

⁶⁷ *Pauly v. Pauly*, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29. See also

Cupit v. Park City Bank, 20 Utah 292, 58 Pac. 839.

"As to the attempted express ratification, it appearing affirmatively that the meeting was special, and that the directors were not all notified, the meeting was not duly assembled, and its action did not bind the corporation as a valid corporate act." *Pauly v. Pauly*, 107 Cal. 8, 40 Am. St. Rep. 98, 40 Pac. 29.

⁶⁸ *Stratton-Massachusetts Gold Mines Co. v. Davis*, 222 Mass. 549, 111 N. E. 375.

⁶⁹ *Flanagan v. Flanagan Coal Co.*, — W. Va. —, 88 S. E. 397.

has authority to make;⁷⁰ but he cannot ratify a contract executed by himself without authority, unless he is given authority to do so.⁷¹ So the general manager of a corporation may ratify acts of subordinates either by assenting thereto or by declining to interfere, where these acts pertain to the ordinary business of the corporation.⁷² And a general agent of a corporation who has power to institute a suit for the corporation has power to ratify the act of another agent in instituting it.⁷³ But a secretary of a corporation who has no power to make any contracts cannot ratify a contract made by a corporate agent.⁷⁴

§ 2190. — Stockholders. The stockholders of a corporation may ratify and render valid acts done or authorized by the board of directors, but which were beyond the powers of the directors, or acts done or authorized by the directors at an illegal meeting, or unauthorized acts of others than the directors, provided the acts are such as may be done or authorized by the stockholders.⁷⁵ But the stockholders

⁷⁰ *White v. Elgin Creamery Co.*, 108 Iowa 522, 79 N. W. 283.

⁷¹ See § 2187, *supra*.

⁷² *Conklin v. Consolidated R. Co.*, 198 Mass. 302, 82 N. E. 23; *White v. Apsley Rubber Co.*, 194 Mass. 97, 8 L. R. A. (N. S.) 484, 80 N. E. 500.

⁷³ *Cascarella v. National Grocer Co.*, 151 Mich. 15, 114 N. W. 857, 14 Det. L. N. 838.

⁷⁴ *Reid v. Alaska Packing Co.*, 47 Ore. 215, 83 Pac. 139.

⁷⁵ *United States v. Berry*, 113 U. S. 322, 28 L. Ed. 1003; *Bensiek v. Thomas*, 66 Fed. 104; *Venner v. Atchison, T. & S. F. R. Co.*, 28 Fed. 581; *Samuel v. Holladay*, Woolw. 400, Fed. Cas. No. 12,288; *Payson v. Stoevers*, 2 Dill. 427, Fed. Cas. No. 10,863.

California. *Sausalito Bay Land Co. v. Sausalito Imp. Co.*, 166 Cal. 302, 136 Pac. 57; *Bassett v. Fairchild*, 61 Pac. 791, *rev'd on other grounds* 132 Cal. 637, 52 L. R. A. 611, 64 Pac. 1082.

Illinois. *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149, 56 Am. St. Rep. 187, 45 N. E. 410, *aff'g* 60 Ill. App. 179; *Reichwald v. Commercial Hotel*

Co., 106 Ill. 439; *Aurora Agricultural & Horticultural Soc. of Aurora v. Paddock*, 80 Ill. 263; *Eidman v. Bowman*, 58 Ill. 444, 11 Am. Rep. 90; *Robertson v. H. E. Bucklen & Co.*, 107 Ill. App. 369.

Kansas. *Morisette v. Howard*, 62 Kan. 463, 63 Pac. 756.

Louisiana. *Robinson Mineral Spring Co. v. De Bautte*, 50 La. Ann. 1281, 23 So. 865.

Minnesota. *Lindeke v. Scott County Co-op. Co.*, 126 Minn. 464, 148 N. W. 459.

New York. *Brooklyn Heights R. Co. v. Brooklyn City R. Co.*, 151 App. Div. 465, 135 N. Y. Supp. 990; *H. Remington & Son Pulp & Paper Co. v. Caswell*, 126 App. Div. 142, 110 N. Y. Supp. 556; *First Nat. Bank of Binghamton v. Commercial Travellers' Home Ass'n of America*, 108 App. Div. 78, 95 N. Y. Supp. 454, *aff'd* 185 N. Y. 575, 78 N. E. 1103.

Pennsylvania. *Moller v. Keystone Fibre Co.*, 187 Pa. St. 553, 41 Atl. 478; *Johnson Co. v. Miller*, 174 Pa. St. 605, 52 Am. St. Rep. 833, 34 Atl. 316; *Balliet v. Brown*, 103 Pa. St. 546.

cannot bind the corporation by ratification of an act which, under the charter of the corporation, is within the exclusive authority of the directors.⁷⁶ However, the fact that the statutes provide that "the corporate powers of the corporation shall be exercised by a board of" trustees does not prevent a ratification by the stockholders of a contract made by a corporate agent, since the power to contract is not lodged exclusively in the board.⁷⁷ So the fact that a by-law prohibits corporate officers and agents from creating any debt or obligation except by direct authority of the board of directors does not preclude ratification of a contract by the corporation, although the contract was not directly authorized in the first instance by the board of directors.⁷⁸ In any event, unauthorized acts of directors of a corporation can only be ratified by bona fide stockholders.⁷⁹

Void acts or contracts of corporate officers or agents, however, cannot be ratified. This includes acts which are ultra vires in the strict sense of the term,⁸⁰ as already noted in a preceding chapter,⁸¹ as well as acts or contracts expressly prohibited by statute or which are invalid as against public policy.⁸² The rule is well stated by Justice

Tennessee. *Stainback v. Junk Bros. Lumber & Manufacturing Co.*, 98 Tenn. 306, 39 S. W. 530.

Texas. *Steger v. Davis*, 8 Tex. Civ. App. 23, 27 S. W. 1068.

Vermont. *State v. Smith*, 48 Vt. 266.

Washington. *Parker v. Hill*, 68 Wash. 134, 122 Pac. 618.

England. *Sewell's Case*, 3 Ch. App. 131.

Stockholders of a corporation may subsequently ratify the acts and validate the originally unauthorized transactions of its officers. *First Nat. Bank of Binghamton v. Commercial Travellers' Home Ass'n of America*, 108 N. Y. App. Div. 78, 95 N. Y. Supp. 454, aff'd without decision in 185 N. Y. 575, 78 N. E. 1103.

It is well settled that any act of a board of directors may be ratified by the stockholders where they might originally have authorized the act. *Russell v. Henry C. Patterson Co.*, 232 Pa. 113, 120, 36 L. R. A. (N. S.) 199, 81 Atl. 136.

"Such recognized authority in

stockholders to ratify and confirm the acts of board of directors is confined to acts voidable by reason of irregularities in the make up of the board or otherwise or by reason of the directors or some of them being personally interested in the subject-matter of the contract or act, or for some other similar reason which makes the action of the directors voidable." *Continental Securities Co. v. Belmont*, 206 N. Y. 7, 18, Ann. Cas. 1914 A 777, 99 N. E. 138.

⁷⁶ *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565.

⁷⁷ *Kirwin v. Washington Match Co.*, 37 Wash. 285, 79 Pac. 928.

⁷⁸ *Lake St. El. R. Co. v. Carmichael*, 184 Ill. 348, 56 N. E. 372, aff'g 82 Ill. App. 344.

⁷⁹ *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954, aff'g 63 Ill. App. 593.

⁸⁰ See § 2196, *infra*.

⁸¹ See § 1511 et seq., *supra*.

⁸² *Continental Securities Co. v. Belmont*, 206 N. Y. 7, 18, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914 A 777, 99 N.

Harrison in a recent Virginia decision as follows: "It was not competent for the stockholders, by subsequent ratification, to validate an act of its board of directors which was illegal and void at the time it was done. A void act cannot be validated by subsequent ratification. The act to be ratified must be voidable merely and not absolutely void. This well-settled principle of the law of agency is as applicable to corporations as to individuals."⁸³ Thus, stockholders cannot ratify a void acceptance of charter amendments by the board of directors.⁸⁴ Likewise, where the directors undertake to act at a meeting which is illegal, so that their action is absolutely void, it cannot be rendered valid by the ratification of the stockholders alone, where the charter or a general statute requires, for the validity of such act, formal action or consent on the part of both the stockholders and the directors.⁸⁵ On the other hand, the act of directors in increasing the salaries of some of their number is not void but merely voidable, and may be ratified by the stockholders, at least where the increase is reasonable.⁸⁶ So, also, the stockholders may ratify action taken at a meeting irregularly called by their action in voting down, at a meeting regularly called, a resolution to withdraw action taken at the prior meeting.⁸⁷

The stockholders may ratify unauthorized or irregular acts of the directors or of other corporate officers or agents in two ways, viz.: (1) by vote at a stockholders' meeting, or (2) by implication by accepting the benefits, affirmative acts which can be accounted for only on the theory of adoption of the unauthorized or irregular acts, or by acquiescence. "It is not necessary that a meeting of the stockholders be held in order to ratify an illegal act of the board of managers."⁸⁸ Stockholders may ratify unauthorized or defective acts of the directors either by unanimous acquiescence or by a majority vote in a corporate meeting.⁸⁹

Stockholders cannot ratify a fraudulent corporate contract, however,

E. 138, aff'g 150 N. Y. App. Div. 298, 134 N. Y. Supp. 635.

⁸³ *Com. v. Richmond, F. & P. R. Co.*, 111 Va. 611, 621, 69 S. E. 1070.

⁸⁴ *Com. v. Richmond, F. & P. R. Co.*, 111 Va. 611, 621, 69 S. E. 1070.

⁸⁵ *Curtin v. Salmon River Hydraulic Gold Mining & Ditch Co.*, 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552.

⁸⁶ *Russell v. Henry C. Patterson Co.*, 232 Pa. 113, 120, 36 L. R. A. (N. S.) 199, 81 Atl. 136.

⁸⁷ *Hill v. Atlantic & N. C. R. Co.*, 143 N. C. 539, 9 L. R. A. (N. S.) 606, 55 S. E. 854.

⁸⁸ *Rosehill Cemetery Co. v. Dempster*, 121 Ill. App. 143, aff'd 223 Ill. 567, 79 N. E. 276.

⁸⁹ *Kidd v. New York Security & Trust Co.*, 75 N. H. 154, 71 Atl. 878.

Express ratification at a stockholders' meeting binds minority stockholders. *McAlpin v. Universal Tobacco Co.* (N. J. Ch.), 57 Atl. 802.

except by their unanimous act.⁹⁰ In any case where action is taken by stockholders confirming and ratifying a fraud and a misapplication of the funds of the corporation by the directors or others, the action is binding only by way of estoppel upon such stockholders as vote in favor of such approval.⁹¹ The direct or indirect misappropriation of corporate assets to his own use or benefit by an officer thereof is incapable of being ratified by a vote or by any act or omission of a majority of the stockholders;⁹² but a contract which is not fraudulent, but which is voidable because violating the rule that directors cannot lawfully enter into a contract in the benefit of which they or one of them participate without the knowledge and consent of the stockholders may be ratified by a majority of the stockholders.⁹³

Ordinarily stockholders may ratify contracts made without their consent, where their consent is necessary.⁹⁴ For instance, a transfer of all the corporate property by the board of directors may be made binding, although beyond the powers of such board, by subsequent ratification by the stockholders, provided of course the stockholders originally had power to make such a transfer.⁹⁵ However, a federal court has held that noncompliance with the New York statute requiring certain corporate mortgages to be authorized by at least two-thirds of the capital stock of the corporation by a written consent or a vote at a special meeting of the stockholders, and requiring the filing of a certificate showing such consent or vote, cannot be cured by subsequent ratification of the mortgage by the stockholders.⁹⁶

§ 2191. Withdrawal by the other party before ratification. It has been held in England, and there is dictum to the same effect in this country in some of the cases, that where a person assumes to enter into a contract for another without authority, the other party to the contract cannot withdraw so as to prevent a subsequent ratification by the person for whom the pretended agent acts.⁹⁷ But this view

⁹⁰ *Dana v. Morgan*, 219 Fed. 313.

⁹¹ *Continental Securities Co. v. Belmont*, 206 N. Y. 7, 18, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914 A 777, 99 N. E. 138.

⁹² *Pollitz v. Wabash R. Co.*, 207 N. Y. 113, 127, 100 N. E. 721.

⁹³ *Pollitz v. Wabash R. Co.*, 207 N. Y. 113, 127, 100 N. E. 721, *aff'g* 150 N. Y. App. Div. 715, 135 N. Y. Supp. 789.

⁹⁴ *West Michigan Park Ass'n v.*

Pere Marquette R. Co., 172 Mich. 179, 137 N. W. 799.

⁹⁵ *Metcalf v. American School Furniture Co.*, 122 Fed. 115.

⁹⁶ *In re Post & Davis Co.*, 219 Fed. 171, criticising *Black v. Ellis*, 129 N. Y. App. Div. 140, 113 N. Y. Supp. 558.

⁹⁷ *In re Portuguese Consol. Copper Mines*, 45 Ch. Div. 16. See also *Andrews v. Aetna Life Ins. Co.*, 92 N. Y. 596.

is contrary to settled principles of law and to the weight of authority. Until the principal ratifies the contract, there is no mutuality or consideration for the other party's promise, and it follows that he may withdraw at any time before the principal becomes bound.⁹⁸ A corporation, therefore, cannot, by ratification of a contract made by an officer or agent without authority, render it binding on the other party if the latter has withdrawn, and given notice thereof, before the ratification.⁹⁹

§ 2192. Time for. It seems that ratification may be made at any time before the other party repudiates the contract,¹ provided, of course, the time is a reasonable one. Ratification of authority to institute a suit is sufficient although the ratification takes place after the commencement of the suit.²

§ 2193. How ratification may be effected in general—Express and implied. Ratification need not necessarily be express. It may be deduced from course of conduct on the part of the directors, stockholders or other officers or agents.³ A contract made or other act done by an officer or officers of a corporation without authority may be ratified in any mode in which it might have been authorized. It need not be under the corporate seal, nor by formal vote of the stockholders or directors, as the case may be, unless this would have been necessary to authorize the contract or act in the first instance; but, as in the case of ratification by a natural person, it may be by parol, or may be implied from the conduct of the corporation, or of officers having authority to ratify, in accepting the benefits, with knowledge of the facts, or otherwise treating or recognizing the contract or act as binding; and under some circumstances it may be implied from a mere failure to repudiate or disaffirm the same.⁴ As in case of

⁹⁸ See *Townsend v. Corning*, 23 Wend. (N. Y.) 435; *McClintock v. South Penn Oil Co.*, 146 Pa. St. 144, 28 Am. St. Rep. 785, 23 Atl. 211; *Consolidated Water Power Co. v. Nash*, 109 Wis. 490, 85 N. W. 485; *Atlee v. Bartholomew*, 69 Wis. 43, 5 Am. St. Rep. 103, 33 N. W. 110; *Dodge v. Hopkins*, 14 Wis. 630.

⁹⁹ *Consolidated Water Power Co. v. Nash*, 109 Wis. 490, 85 N. W. 485.

¹ *Waratah Oil Co. v. Reward Oil Co.*, 23 Cal. App. 638, 139 Pac. 91.

² *Massachusetts Const. Co. v. Kidd*, 142 Fed. 285.

³ *Taylor Gas Producer Co. v. Wood*, 119 Fed. 966.

⁴ *Connecticut. Howe v. Keeler*, 27 Conn. 538.

Illinois. Beach v. Miller, 130 Ill. 162, 17 Am. St. Rep. 291, 22 N. E. 464, rev'g 23 Ill. App. 151.

Michigan. McLaughlin v. Detroit & M. Ry. Co., 8 Mich. 100.

Missouri. Washington Sav. Bank v. Butchers' & Drovers' Bank, 107 Mo. 133, 28 Am. St. Rep. 405, 17 S. W. 644; *First Nat. Bank of Springfield v. Fricke*, 75 Mo. 178, 42 Am. Rep. 397. *New Hampshire. Despatch Line of*

a ratification by an individual,⁵ the ratification may be express⁶ or implied.⁷ If implied, it may result from (1) accepting and retaining the benefits of the act or contract, (2) silence or acquiescence, or (3) other affirmative acts showing an adoption of the act or contract.⁸ There need not be any formal action of the board of directors,⁹ and the ratification need not be express nor shown by vote or resolution of the board of directors.¹⁰ But a letter merely expressing the personal approbation of the writer, an officer of the company, is not a ratification.¹¹

§ 2194. — When particular form or mode of authority is necessary. If it is necessary that authority to do a particular act or enter into a particular contract shall be given in a certain form or mode, either by reason of a mandatory charter or statutory provision, or by reason of a common-law rule, ratification of such an act or contract must be in the prescribed form or mode. "A ratification of an act, done by one assuming to be an agent, relates back, and is equivalent to prior authority. * * * When, therefore, the adoption of any particular form or mode is necessary to confer the authority in the first instance, there can be no valid ratification except in the same manner."¹² Thus, it is held that if a corporation can only authorize

Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

Pennsylvania. *Bagaley v. Pittsburgh & L. S. Iron Co.*, 146 Pa. St. 478, 23 Atl. 837.

⁵ See 1 Clark & Skyles, Agency, §§ 128-142.

⁶ **Idaho.** *Heath v. Potlatch Lumber Co.*, 18 Idaho 42, 27 L. R. A. (N. S.) 707, 108 Pac. 343.

Louisiana. *Poche v. New Orleans Home Inv. Co.*, 52 La. Ann. 1287, 27 So. 797.

New York. *First Nat. Bank of Binghamton v. Commercial Travelers' Home Ass'n of America*, 108 N. Y. App. Div. 78, 95 N. Y. Supp. 454, aff'd 185 N. Y. 575, 78 N. E. 1103.

Oregon. *Schreyer v. Turner Flouring Mills Co.*, 29 Ore. 1, 43 Pac. 719.

West Virginia. *Flanagan v. Flanagan Coal Co.*, — W. Va. —, 88 S. E. 402.

⁷ Ratification may be inferred from

acts or acquiescence on the part of the corporation. *Schreyer v. Turner Flouring Mills Co.*, 29 Ore. 1, 43 Pac. 719.

⁸ See §§ 2195-2202, *infra*.

⁹ *National Life Ins. Co. v. Headrick*, — Ind. App. —, 112 N. E. 559.

¹⁰ *Lake St. El. R. Co. v. Carmichael*, 82 Ill. App. 344, aff'd 184 Ill. 348, 56 N. E. 372; *Wehrung v. Portland Country Club & Live Stock Ass'n*, 61 Ore. 48, 120 Pac. 747; *Texas & P. Ry. Co. v. Davis*, 93 Tex. 378, 54 S. W. 381.

¹¹ *Mexican Nat. Coal, Timber & Iron Co. v. Frank*, 154 Fed. 217, 231.

¹² *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203.

If the original authorization is required to be in a particular mode, the authority to ratify must be conferred in like manner. *Marqusee v. Insurance Co. of North America*, 211 Fed.

a particular act or contract by a power under seal, or by a formal vote, ratification of such an act or contract must be under seal or by a formal vote, as the case may be.¹³ However, the old rule that an instrument under seal can be ratified only by an instrument under seal is largely abrogated by modern statutes dispensing with a seal or limiting the effect of the want of a seal;¹⁴ and it is held that a corporate bond need not be ratified under seal where a statute has abolished the distinction between sealed and unsealed instruments.¹⁵

§ 2195. Silence or acquiescence as ratification—General rules. The rule that when a principal has not disaffirmed an unauthorized act of his agent within a reasonable time after it came to his knowledge, he will be deemed to have acquiesced in such act, applies to corporate bodies as well as individuals.¹⁶ Ratification may be implied, or the

903, 907; *Lochwitz v. Pine Tree Mining & Milling Co.*, 37 Utah 349, 108 Pac. 1128.

¹³ *Blood v. La Serena Land & Water Co.*, 113 Cal. 221, 45 Pac. 252, 41 Pac. 1017; *Melroy v. Central Nat. Bank*, 17 Wash. Law Rep. (D. C.) 63; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203.

¹⁴ See 1 *Mechem, Agency* (2nd Ed.), §§ 420-425; 1 *Clark & Skyles, Agency*, § 132.

¹⁵ *State v. Parke-Davis & Co.*, 191 Mo. App. 219, 177 S. W. 1070.

¹⁶ *First Nat. Bank of Binghamton v. Commercial Travellers' Home Ass'n of America*, 108 N. Y. App. Div. 78, 95 N. Y. Supp. 454, aff'd without opinion 185 N. Y. 575, 78 N. E. 1103.

Ratification may be inferred from informal acquiescence in and approval of the acts. *O'Grady v. Howe & Rogers Co.*, 166 N. Y. App. Div. 552, 152 N. Y. Supp. 79.

Acts of an officer are binding, although unauthorized where the directors have knowledge thereof and make no objection thereto. *German-American Indemnity Co. v. State Mercantile Bank*, 26 Colo. App. 242, 142 Pac. 189.

If the board of directors, on obtaining knowledge of a contract made by

an unauthorized officer, do not within a reasonable time notify the other party to the contract of the want of authority, they are estopped to set up the want of authority. *Domestic Bldg. Ass'n v. Guadiano*, 195 Ill. 222, 227, 63 N. E. 98.

The rule that where a principal has not disaffirmed an unauthorized act of his agent within a reasonable time after it came to his knowledge, he is estopped to deny such authority, applies to corporations as well as to individuals, so that if a contract is brought before a full meeting of the board of directors after its execution and it fails to disaffirm the contract, the corporation is bound. *First Nat. Bank of Binghamton v. Commercial Travellers' Home Ass'n of America*, 108 N. Y. App. Div. 78, 95 N. Y. Supp. 454, aff'd without opinion, 185 N. Y. 575, 78 N. E. 1103.

Silence by the directors while an officer acts will entail upon the corporation the legal consequences of the officer's act, where the circumstances are such as to place the directors under legal obligation to speak. *Alaska & Chicago Commercial Co. v. Solner*, 123 Fed. 855; *Oliver v. Rahway Ice Co.*, 64 N. J. Eq. 596, 54 Atl. 460.

corporation be held estopped to deny ratification, from acquiescence on the part of the corporation. When the officers or agents of a corporation exceed their powers in entering into contracts or doing other acts, the corporation, when it has knowledge thereof, must promptly disaffirm the contract or act, and not allow the other party or third persons to act in the belief that it was authorized or has been ratified. If it acquiesces, with knowledge of the facts, or fails to disaffirm, a ratification will be implied, or else it will be estopped to deny a ratification.¹⁷ After knowledge of the unauthorized or irregular act

17 United States. Sun Prtg. & Pub. Ass'n v. Moore, 183 U. S. 642, 46 L. Ed. 366, aff'g 101 Fed. 591; Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co., 163 U. S. 564, 41 L. Ed. 265; Indianapolis Rolling Mill v. St. Louis, Ft. S. & W. R. Co., 120 U. S. 256, 30 L. Ed. 639, 26 Fed. 140; Illinois Pneumatic Gas Co. v. Berry, 113 U. S. 322, 28 L. Ed. 1003; Freygang v. Vera Cruz & P. R. Co., 154 Fed. 640; Alaska & C. Commercial Co. v. Solner, 123 Fed. 855; G. V. B. Min. Co. v. First Nat. Bank of Hailey, 95 Fed. 23, modifying 89 Fed. 439; Armstrong v. Chemical Nat. Bank of New York, 83 Fed. 556, aff'g 76 Fed. 339; Central Trust Co. v. Ashville Land Co., 72 Fed. 361; Augusta, T. & G. R. Co. v. Kit-tel, 52 Fed. 63.

Alabama. Mobile, J. & K. City R. Co. v. Owen, 121 Ala. 505, 25 So. 612; Alabama Great Southern R. Co. v. South & North Alabama R. Co., 84 Ala. 570, 5 Am. St. Rep. 401, 3 So. 286.

California. Phillips v. Sanger Lum-ber Co., 130 Cal. 431, 62 Pac. 749; Illinois Trust & Savings Bank v. Paci-fic Ry. Co., 117 Cal. 332, 49 Pac. 197.

Colorado. Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 1 Colo. 531; McCornick v. Bittinger, 13 Colo. App. 170, 57 Pac. 736; Henry v. Colorado Land & Water Co., 10 Colo. App. 14, 51 Pac. 90.

Connecticut. Mahoney v. Hartford Inv. Corporation, 82 Conn. 280, 73 Atl. 766.

Illinois. Wheeler v. Home Savings & State Bank, 188 Ill. 34, 80 Am. St. Rep. 161, 58 N. E. 598, rev'g 85 Ill. App. 28; Atwater v. American Exch. Nat. Bank, 152 Ill. 605, 38 N. E. 1017, rev'g 40 Ill. App. 501; Grollman v. Montgomery Ward & Co., 181 Ill. App. 598; Ragland v. McFall, 36 Ill. App. 135, aff'd 137 Ill. 81, 27 N. E. 75; Meister v. Cleveland Dryer Co., 11 Ill. App. 227.

Indiana. Hawkins v. Fourth Nat. Bank of New York, 150 Ind. 117, 49 N. E. 957; Smith v. Wells Mfg. Co., 148 Ind. 333, 46 N. E. 1000; White-water Valley Canal Co. v. Hawkins, 4 Ind. 474.

Iowa. Marshall County High School Co. v. Iowa Evangelical Synod, 28 Iowa 360.

Kentucky. Pittsburgh, C. & St. L. R. Co. v. Woolley, 12 Bush 451; Bell & Coggeshall Co. v. Kentucky Glass-Works, 20 Ky. L. Rep. 1089, 48 S. W. 440; Deposit Bank of Carlisle v. Fleming, 19 Ky. L. Rep. 1947, 44 S. W. 961.

Louisiana. Bezou v. Pike, 23 La. Ann. 788.

Maryland. Miller v. Matthews, 87 Md. 464, 40 Atl. 176; Stokes v. De-trick, 75 Md. 256, 23 Atl. 846; Elya-ville Mfg. Co. v. Okisko Co., 5 Md. 152, 1 Md. Ch. 392.

Missouri. Campbell v. Pope, 96 Mo. 468, 10 S. W. 187; Smith v. Richard-son, 77 Mo. App. 422.

Nebraska. Alexander v. Culbertson Irrigation & Water Power Co., 61 Neb.

or contract, the corporation must repudiate it within a reasonable

333, 85 N. W. 283; German Nat. Bank v. First Nat. Bank of Hastings, 59 Neb. 7, 80 N. W. 48; Omaha Consol. Vinegar Co. v. Burns, 49 Neb. 229, 68 N. W. 492; Nebraska Nat. Bank of York v. Ferguson, 49 Neb. 109, 59 Am. St. Rep. 522, 68 N. W. 370.

Nevada. Henningsen v. Tonopah & G. R. Co., 33 Nev. 208, Ann. Cas. 1913 D 1008, 111 Pac. 36, 119 Pac. 774.

New Jersey. Bennett v. Millville Improvement Co., 67 N. J. L. 320, 51 Atl. 706; In re West Jersey Traction Co., 59 N. J. Eq. 63, 45 Atl. 282; Flaherty v. Atlantic Lumber Co., 58 N. J. Eq. 467, 44 Atl. 186.

New York. Sheldon Hat Blocking Co. v. Eickemeyer Hat-Blocking Mach. Co., 90 N. Y. 607; Hooker v. Eagle Bank of Rochester, 30 N. Y. 83, 86 Am. Dec. 351; Story v. Farman, 25 N. Y. 214; Hoyt v. Thompson's Ex'rs, 19 N. Y. 207; New Hope & D. Bridge Co. v. Phenix Bank, 3 N. Y. 156; First Nat. Bank of Binghamton v. Commercial Travellers' Home Ass'n of America, 108 App. Div. 78, 95 N. Y. Supp. 454, aff'd 185 N. Y. 575, 78 N. E. 1103; President, etc., Great Western Turnpike Co. v. Shafer, 57 App. Div. 331, 58 N. Y. Supp. 5; Jenkins v. John Good Cordage & Machine Co., 56 App. Div. 578, 68 N. Y. Supp. 239; Mesinger v. Mesinger Bicycle Saddle Co., 44 App. Div. 26, 60 N. Y. Supp. 431; White v. Sheppard, 41 App. Div. 113, 58 N. Y. Supp. 563; New Britain Nat. Bank v. Cleveland Co., 91 Hun 447, 19 N. Y. Supp. 94, 158 N. Y. 722, 53 N. E. 1128; Davies v. New York Concert Co., 59 Hun 623, 13 N. Y. Supp. 739; Bronx Hospital v. Grolier Society, 88 Misc. 3, 150 N. Y. Supp. 149.

North Carolina. Johnson County Sav. Bank v. Scoggin Drug Co., 152 N. C. 142, 50 L. R. A. (N. S.) 581, 136 Am. St. Rep. 821, 67 S. E. 253; Watson v. Proximity Mfg. Co., 147 N.

C. 469, 478, 61 S. E. 273; Lewis v. Albemarle & R. R. Co., 95 N. C. 179.

Ohio. Larwill v. Burke, 19 Ohio Cir. Ct. 449, 613, 10 Ohio Cir. Dec. 605.

Oregon. Finnegan v. Pacific Vinegar Co., 26 Ore. 152, 37 Pac. 457; Currie v. Bowman, 25 Ore. 364, 35 Pac. 848.

Pennsylvania. First Nat. Bank v. Colonial Hotel Co., 226 Pa. 292, 75 Atl. 412; Mohrfeld v. Second German S. E. Bldg. Ass'n, 194 Pa. St. 488, 45 Atl. 335; Moller v. Keystone Fibre Co., 187 Pa. St. 553, 41 Atl. 478; Cooper v. Potts, 185 Pa. St. 115, 39 Atl. 824; Balliet v. Brown, 103 Pa. St. 546; Gordon v. Preston, 1 Watts 385, 26 Am. Dec. 75.

Tennessee. First Nat. Bank of Nashville v. Shook, 100 Tenn. 436, 45 S. W. 338; Stainback v. Junk Bros. Lumber & Manufacturing Co., 98 Tenn. 306, 39 S. W. 530.

Texas. Texas & P. Ry. Co. v. Davis, 93 Tex. 378, 54 S. W. 381.

Washington. West Seattle Land & Improvement Co. v. Novelty Mill Co., 31 Wash. 435, 72 Pac. 69; Miller v. Washington Southern Ry. Co., 11 Wash. 414, 39 Pac. 673.

West Virginia. Williams v. S. M. Smith Ins. Agency, 90 S. E. 393.

Wisconsin. Northwestern Fuel Co. v. Lee, 102 Wis. 426, 78 N. W. 584; McLaren v. First Nat. Bank of Milwaukee, 76 Wis. 259, 45 N. W. 223; Walworth County Bank v. Farmers' Loan & Trust Co., 16 Wis. 629.

Wyoming. Frank v. Hicks, 4 Wyo. 502, 35 Pac. 475, 1025.

A note executed by stockholders of a corporation in the corporate name, without authority from the directors, is ratified if the corporation allows judgment to go against it on the same. Nebraska Nat. Bank of York v. Ferguson, 49 Neb. 109, 59 Am. St. Rep. 522, 68 N. W. 370.

time or else consent and approval will be presumed.¹⁸ Of course there is no acquiescence where the corporate officers promptly repudiate an agreement made without authority by a subordinate officer or agent.¹⁹ The duty promptly to disaffirm unauthorized acts, on knowledge thereof being acquired, is less imperative, or does not exist, where the corporation has received no benefit from the acts and no loss is caused to the other party and his position is not in any way changed by the failure to notify him.²⁰

Acquiescence, as used in connection with ratification, closely approaches estoppel, and it has been said that "it seems particularly difficult to keep it free from considerations of estoppel, although the two things are entirely distinguishable."²¹ Acquiescence as a defense has, as said by Justice Collins in a decision of the Court of Appeals of New York, "a dual nature. It may, upon the one hand, rest upon the principle of ratification, and may be denominated implied ratification, or it may, upon the other hand, rest upon the principle of estoppel, and may be denominated equitable estoppel. The former principle underlies it when the conduct of a plaintiff, relating to the transaction or matter complained of by him, subsequent to the rise of it, justifies and supports the normal and reasonable conclusion that he, by his assent thereto or acquiescence therein, has accepted and adopted it. His ratification is implied through his acquiescence instead of expressed by positive and distinct action or language. * * * The latter principle underlies it when a plaintiff against whom it is invoked remained silent or inactive when there was the opportunity and the duty to speak or act."²²

§ 2196. — Applications of rules. Applications of this rule are too numerous to be susceptible of extended notice.²³ Whether acqui-

¹⁸ *Alexander v. Culbertson Irrigation & Water Power Co.*, 61 Neb. 333, 85 N. W. 283.

¹⁹ *Mobile Land Improvement Co. v. Gass*, 142 Ala. 520, 39 So. 229.

This rule was applied to a promise to pay a debt made by one who was not even a de facto officer. *Exline-Reimers Co. v. Lone Star Life Ins. Co.*, — Tex. Civ. App. —, 171 S. W. 1060.

²⁰ *Blum v. Whipple*, 194 Mass. 253, 13 L. E. A. (N. S.) 211, 120 Am. St. Rep. 553, 80 N. E. 501.

Where the corporation has taken no

affirmative step, has received no benefit, and the other contracting party has suffered no prejudice, mere delay in repudiating the attempted contract may not bind the corporation. *Blum v. Whipple*, 194 Mass. 253, 13 L. E. A. (N. S.) 211, 120 Am. St. Rep. 553, 80 N. E. 501.

²¹ *Mechem, Agency* (2nd Ed.), § 452, where this question is considered at length.

²² *Pollitz v. Wabash R. Co.*, 207 N. Y. 113, 129, 100 N. E. 721.

²³ That a corporation had not

escence will amount to ratification depends largely upon the facts of the particular case.²⁴ Directors may ratify acts of the president by acquiescence.²⁵ A lease made by a corporate officer without authority will be deemed ratified by the directors where they remain silent with full knowledge of the facts.²⁶ The rule has been applied to contracts of employment;²⁷ and failure to repudiate liability, under some circumstances, may bind the corporation for medical or like attendance on an injured employee.²⁸ It was also applied to the acquiescence of the corporation in a pledge of corporate assets by an officer of the corporation as collateral security for his individual debt;²⁹ but on appeal the case was reversed on the ground that the act was ultra vires and void and hence incapable of ratification.³⁰ Where the three

specially employed an attorney will not affect the binding force of a decree rendered in a suit, where the attorney filed the bill in the name of the corporation, with the knowledge of the corporation, and it raised no objection to the prosecution of the suit to such decree. *Thompson v. Hemenway*, 218 Ill. 46, 75 N. E. 791.

After acquiescing for an extended period in an action taken by its officers in filing amended articles of incorporation rendering the corporation such under a new statutory enactment with the privileges thereby conferred, and being charged with notice of the action of its officers by reason of the filing of the articles as provided by law, a corporation will not be permitted to repudiate such action of the officers when suit is brought for the collection of the statutory organization tax. *Licking Valley Bldg. Ass'n No. 3 v. Com.*, 28 Ky. L. Rep. 543, 89 S. W. 682.

A statement by a member of the board of trustees, made during the session of the board, is not binding upon the board, although allowed to pass uncontradicted. *Williams v. Christian Female College*, 29 Mo. 250, 77 Am. Dec. 569.

²⁴ *Elk Valley Coal Co. v. Thompson*, 150 Ky. 614, 150 S. W. 817.

²⁵ *De Forest v. Northwest Townsite Co.*, 236 Pa. 125, 84 Atl. 674.

²⁶ *Clement v. Young-McShea Amusement Co.*, 69 N. J. Eq. 347, '60 Atl. 419; *King v. West Coast Grocery Co.*, 72 Wash. 132, 129 Pac. 1081.

²⁷ *Eddy v. American Amusement Co.*, 21 Cal. App. 487, 132 Pac. 83.

²⁸ *Taylor v. C. M. Robertson Co.*, 85 Conn. 504, 83 Atl. 534.

The rule has been applied to medical attendance furnished an employee of corporation, with expectation of payment from the corporation, to the knowledge of its superintendent. *Ward v. J. Samuels & Bro.*, 37 R. I. 438, 93 Atl. 649.

Where an employee of a corporation is injured and a physician is called by another employee who asks the manager of the corporation who will pay the bill, and the manager refers him to the casualty company with whom the corporation is insured, the mere failure of the manager to deny the corporation's liability and his reference to the insurance company do not necessarily constitute a ratification of the employment of the physician. *J. H. Mohlman Co. v. American Grocery Co.*, 68 N. J. Eq. 602, 60 Atl. 950.

²⁹ *Wheeler v. Home Savings & State Bank*, 85 Ill. App. 28, rev'd 188 Ill. 34, 80 Am. St. Rep. 161, '58 N. E. 598.

³⁰ *Wheeler v. Home Savings & State*

directors owned all the stock of the corporation, and the president assigned an application for a patent which another director signed as a witness, and the third director had knowledge of the transfer shortly after it was made, but made no objection, there was a ratification of the assignment notwithstanding the board of directors refused to ratify expressly the action of the president.³¹ Where the general manager of a railroad posted notices at every station offering a reward for the conviction of any one causing injuries to the tracks, over which the president passed not less than once in each ten days, the action of the general manager was deemed ratified by the corporation, since the knowledge of the president would be imputed to the company.³² The mere presence of the superintendent of a corporation at the time an alleged slander was uttered does not of itself show a ratification.³³

If the directors of a corporation enter into contracts or do other acts which are beyond their powers, but within the powers conferred upon the corporation, the stockholders ratify the same if they acquiesce with full knowledge of the facts.³⁴

§ 2197. — Retention of agent as ratification. The mere fact that a corporation retains in its employment one who has exceeded his authority does not necessarily amount to a ratification of his unauthorized acts, in the absence of other circumstances showing an intention to ratify.³⁵ This rule has been applied to the retention of one charged with assault and battery.³⁶ However, retention in the employ of a railroad company of a conductor after knowledge of a

Bank, 188 Ill. 34, 80 Am. St. Rep. 161, 58 N. E. 598, rev'g 85 Ill. App. 28.

³¹ *United States Light & Heating Co. v. J. B. M. Elec. Co.*, 194 Fed. 866, aff'g 189 Fed. 382.

³² *Arkansas Southwestern R. Co. v. Dickinson*, 78 Ark. 483, 115 Am. St. Rep. 54, 95 S. W. 802.

³³ *Flaherty v. Maxwell Motor Co.*, 187 Mich. 62, 153 N. W. 45.

³⁴ *United States Pneumatic Gas Co. v. Berry*, 113 U. S. 322, 28 L. Ed. 1003; *Payson v. Stoeber*, 2 Dill. 427, Fed. Cas. No. 10,863.

Illinois. Eidman v. Bowman, 58 Ill. 444, 11 Am. Rep. 90.

Louisiana. Robinson Mineral Spring Co. v. De Bauppe, 50 La. Ann. 1281, 23 So. 865.

Pennsylvania. Balliet v. Brown, 103 Pa. St. 546.

Tennessee. Stainback v. Junk Bros. Lumber & Manufacturing Co., 98 Tenn. 306, 39 S. W. 530.

England. Sewell's Case, 3 Ch. App. 131.

As to ratification of an increase of stock by the directors, when it should have been authorized by the stockholders, see the chapter on Stock and Stockholders.

³⁵ *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 87, 8 Am. St. Rep. 512, 3 So. 631; *Robinson v. Superior Rapid Transit Ry. Co.*, 94 Wis. 345, 59 Am. St. Rep. 897, 68 N. W. 961.

³⁶ *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 87, 8 Am. St. Rep.

wilful and malicious tort on his part is evidence of ratification of such tort.³⁷

§ 2198. — Time within which to disaffirm. To be permitted to escape the consequences of an unauthorized act of a corporate officer or agent, the corporation must disaffirm within a reasonable time.³⁸ What constitutes a reasonable time cannot be definitely stated.³⁹ Failure to disaffirm within two months has been held a ratification in a particular case.⁴⁰ In other cases, delays of five months,⁴¹ six months,⁴² nine months,⁴³ thirteen months,⁴⁴ and two years,⁴⁵ have been held unreasonable. On the other hand, it has been held in New Jersey that silence of the stockholders for over two years, with knowledge of an invalid sale by directors to the corporation, was not sufficiently long continued to be evidence of ratification.⁴⁶

§ 2199. Acceptance and retention of benefits as implied ratification. As a general rule, if a corporation, with knowledge of the facts, accepts or retains the benefit of an unauthorized contract or other transaction by its officers or agents, as where it receives and uses or retains money or property paid or delivered by the other party, or accepts the benefit of services, etc., it thereby ratifies the contract or other transaction, or will be estopped to deny ratification.⁴⁷ This

512, 3 So. 631. See the chapter on Liability for Torts, *infra*.

³⁷ *Robinson v. Superior Rapid Transit Ry. Co.*, 94 Wis. 345, 34 L. R. A. 205, 59 Am. St. Rep. 897, 68 N. W. 961. See the chapter on Liability for Torts, *infra*.

³⁸ *Salem Iron Co. v. Lake Superior Consol. Iron Mines*, 112 Fed. 239; *Mallory v. Mallory Wheeler Co.*, 61 Conn. 131, 23 Atl. 708; *Alexander v. Culbertson Irrigation & Water Power Co.*, 61 Neb. 333, 85 N. W. 283; *Reid v. Alaska Packing Co.*, 47 Ore. 215, 83 Pac. 139.

³⁹ See, generally, 1 Clark & Skyles, Agency, § 141e.

⁴⁰ *Raymond v. Palmer*, 41 La. Ann. 425, 17 Am. St. Rep. 398, 6 So. 692.

⁴¹ *Common Sense Min. Co. v. Taylor*, 247 Mo. 1, 152 S. W. 5.

⁴² A delay of six months in the disaffirmance by the board of directors

after knowledge of an unauthorized contract made by the president has been held an unreasonable delay. *Indianapolis Rolling Mill v. St. Louis, Ft. S. & W. R. Co.*, 120 U. S. 256, 30 L. Ed. 639.

⁴³ *McLaren v. First Nat. Bank of Milwaukee*, 76 Wis. 259, 45 N. W. 223.

⁴⁴ *Silsby v. Strong*, 38 Ore. 36, 62 Pac. 633.

⁴⁵ *American Bonding Co. of Baltimore v. Laigle Stave & Lumber Co.*, 111 Ark. 151, 163 S. W. 167; *Coolidge v. Schering*, 32 Wash. 557, 73 Pac. 682.

⁴⁶ *Oliver v. Rahway Ice Co.*, 64 N. J. Eq. 596, 54 Atl. 460.

⁴⁷ *United States*. *Jacksonville, M. P. Ry. & Nav. Co. v. Hooper*, 160 U. S. 514, 40 L. Ed. 515; *Pittsburgh, C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co.*, 131 U. S. 371, 33 L. Ed. 157; *People's Bank of Belleville v. Manufacturers' Nat. Bank of Chicago*,

rule is based upon the doctrine of ratification in toto, under which a principal must either ratify the whole transaction or repudiate the

101 U. S. 181, 25 L. Ed. 907; *Shafer v. Spruks*, 225 Fed. 480; *Bank of Dillon v. Murchison*, 213 Fed. 147; *Pacific State Bank v. Coats*, 205 Fed. 618, Ann. Cas. 1913 E 846; *Wayte v. Red Cross Protective Society*, 166 Fed. 372, rev'd on other grounds 171 Fed. 643; *Love v. Export Storage Co.*, 143 Fed. 1; *Kessler & Co. v. Ensley Co.*, 141 Fed. 130, aff'd 148 Fed. 1019; *Washington Irrigation Co. v. Krutz*, 119 Fed. 279; *Moore v. Sun Prtg. & Pub. Ass'n*, 95 Fed. 485; *G. V. B. Min. Co. v. First Nat. Bank of Hailey*, 95 Fed. 23, modifying 89 Fed. 439; *The Sappho*, 94 Fed. 545; *McDougall v. Hazelton Tripod-Boiler Co.*, 88 Fed. 217; *McKenzie v. Poorman Silver Mines*, 88 Fed. 111; *Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America*, 82 Fed. 124; *Pren-tiss Tool & Supply Co. v. Godchaux*, 66 Fed. 234; *Bensiek v. Thomas*, 66 Fed. 104; *Waynesville Nat. Bank v. Irons*, 8 Fed. 1.

Alabama. *Henderson v. Hall*, 134 Ala. 455, 63 L. R. A. 673, 32 So. 840; *Mobile, J. & K. City R. Co. v. Owen*, 121 Ala. 505, 25 So. 612; *Mobile & M. Ry. Co. v. Gilmer*, 85 Ala. 422, 5 So. 138.

Arkansas. *J. K. Siphon Ventilator Co. v. Hutton*, 116 Ark. 545, 175 S. W. 30; *Arkansas Amusement Ass'n v. Higgins*, 96 Ark. 493, 132 S. W. 635; *St. Louis, I. M. & S. R. Co. v. Berry*, 86 Ark. 309, 110 S. W. 1049.

California. *Blood v. La Serena Land & Water Co.*, 134 Cal. 361, 66 Pac. 317; *Mills v. Boyle Min. Co.*, 132 Cal. 95, 64 Pac. 122; *Phillips v. Sanger Lumber Co.*, 130 Cal. 431, 62 Pac. 749; *Pixley v. Western Pac. R. Co.*, 33 Cal. 183, 91 Am. Dec. 623; *Shaver v. Bear River & A. Water & Mining Co.*, 10 Cal. 396; *A. Meister & Sons Co. v. Wood & Tatum Co.*, 26 Cal.

App. 584, 147 Pac. 981; *L. Scatena & Co. v. Van Loben Sels*, 19 Cal. App. 423, 126 Pac. 187; *Hudson v. Seeley Specialties Co.*, 19 Cal. App. 213, 124 Pac. 1051; *Newhall v. Joseph Levy Bag Co.*, 19 Cal. App. 9, 124 Pac. 875; *Dickinson v. Zubiarte Min. Co.*, 11 Cal. App. 656, 106 Pac. 123; *Tilden v. Goldy Mach. Co.*, 9 Cal. App. 9, 98 Pac. 39; *West v. Will C. Prather & Co.*, 7 Cal. App. 81, 93 Pac. 892.

Colorado. *Golden Age No. 2 Mining & Milling Co. v. Langridge*, 39 Colo. 157, 88 Pac. 1070; *Thatcher v. Salomon*, 16 Colo. App. 150, 64 Pac. 368; *Drescher v. Fulham*, 11 Colo. App. 62, 52 Pac. 685.

Connecticut. *New Haven Trust Co. v. Doherty*, 74 Conn. 353, 50 Atl. 887; *Tryon v. White & Corbin Co.*, 62 Conn. 161, 20 L. R. A. 291, 25 Atl. 712.

Delaware. *St. Joseph's Polish Catholic Beneficial Society v. St. Hedwig's Church*, 4 Pennw. 141, 53 Atl. 353.

Florida. *Atlanta & St. A. B. R. Co. v. Thomas*, 60 Fla. 412, 53 So. 510.

Georgia. *Bank of Garfield v. Clark*, 138 Ga. 798, 76 S. E. 95; *Merchants' Bank of Macon v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 665.

Idaho. *First Nat. Bank of American Falls v. American Falls Canal & Power Co.*, 20 Idaho 368, 118 Pac. 668; *Rowley v. Stack-Gibbs Lumber Co.*, 19 Idaho 107, 112 Pac. 1041.

Illinois. *Lake St. El. R. Co. v. Carmichael*, 184 Ill. 348, 56 N. E. 372, aff'g 82 Ill. App. 344; *Aurora Agricultural & Horticultural Society v. Paddock*, 80 Ill. 263; *Illinois State Board of Education v. Greenebaum & Sons*, 39 Ill. 609; *American Credit Indemnity Co. of New York v. Yamer*, 170 Ill. App. 350; *Rosehill Cemetery Co. v. Dempster*, 121 Ill. App. 143,

whole. He cannot separate the transaction and ratify the part that is beneficial to him, repudiating the remainder; but if he, of his own

aff'd by 223 Ill. 567, 79 N. E. 276.

Indiana. Hawkins v. Fourth Nat. Bank of New York, 150 Ind. 117, 49 N. E. 957; White Water Valley Canal Co. v. Hawkins, 4 Ind. 474; Indiana Union Traction Co. v. Scribner, 47 Ind. App. 621, 93 N. E. 1014; Cole Carriage Co. v. Hacker, 45 Ind. App. 368, 90 N. E. 923; Marion Trust Co. v. Crescent Loan & Investment Co., 27 Ind. App. 451, 87 Am. St. Rep. 257, 61 N. E. 688.

Iowa. Heaton v. A. D. Clark & Co., 122 Iowa 716, 98 N. W. 597; Beach v. Wakefield, 107 Iowa 567, 76 N. W. 688, 78 N. W. 197.

Kansas. Neesho Valley Inv. Co. v. Hannum, 63 Kan. 621, 66 Pac. 631; Marbourg v. Lloyd, 21 Kan. 545; Topeka Capital Co. v. March, 10 Kan. App. 40, 61 Pac. 876.

Kentucky. Paducah Wharfboat Co. v. Mechanics' Trust & Savings Bank, 164 Ky. 729, 176 S. W. 190; Ford Lumber & Manufacturing Co. v. Cobb, 138 Ky. 174, 127 S. W. 763; Pittsburgh, C. & St. L. R. Co. v. Woolley, 12 Bush 451; Herring v. Dix River & L. Turnpike Road Co., 23 Ky. L. Rep. 642, 63 S. W. 576; German Nat. Bank v. Grinstead, 21 Ky. L. Rep. 674, 52 S. W. 951; Imeson v. Newport Bridge Co., 5 Ky. L. Rep. 685.

Louisiana. Town of Vinton v. Lyons, 131 La. 673, 60 So. 54; Blanc v. Germania Nat. Bank, 114 La. 739, 38 So. 537; Bezou v. Pike, 23 La. Ann. 788.

Maine. Patten v. Moses, 49 Me. 255.

Maryland. Edelhoff v. Horner-Miller Mfg. Co., 86 Md. 595, 39 Atl. 314; Elysville Mfg. Co. v. Okisko Co., 5 Md. 152, 1 Md. Ch. 392.

Massachusetts. Cumberland Glass Mfg. Co. v. Wheaton, 208 Mass. 425, 94 N. E. 803; Dedham Inst. for Savings v. Slack, 6 Cush. 408.

Michigan. Ruttle v. What Cheer

Coal Min. Co., 153 Mich. 300, 117 N. W. 168, 15 Det. L. N. 471; Gould v. W. J. Gould & Co., 134 Mich. 515, 104 Am. St. Rep. 624, 96 N. W. 576.

Minnesota. Clearwater County State Bank v. Bagley-Ogema Tel. Co., 116 Minn. 4, Ann. Cas. 1913 A 622, 133 N. W. 91; Willis v. St. Paul Sanitation Co., 53 Minn. 370, 55 N. W. 550.

Missouri. Kansas City Star Pub. Co. v. Standard Warehouse Co., 123 Mo. App. 13, 99 S. W. 765; Stotts City Bank v. Miller Lumber Co., 102 Mo. App. 75, 74 S. W. 472; Tyrell v. Cairo & St. L. R. Co., 7 Mo. App. 294.

Montana. Agle v. Standard Drug Co., 29 Mont. 111, 74 Pac. 135.

Nebraska. Rich v. State Nat. Bank of Lincoln, 7 Neb. 201, 29 Am. Rep. 382.

New Hampshire. Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

New Jersey. Trenton St. R. Co. v. Lawlor, 74 N. J. Eq. 828, 74 Atl. 668, 71 Atl. 234; Reed v. Helois Carbide Specialty Co., 64 N. J. Eq. 231, 53 Atl. 1057; Blake v. Domestic Mfg. Co. (N. J. Eq.), 38 Atl. 241; Pomeroy v. New York Smelting & Refining Co. (N. J. Ch.), 48 Atl. 395.

New York. Scott v. Middletown, U. & W. G. R. Co., 86 N. Y. 200; Hooker v. Eagle Bank of Rochester, 30 N. Y. 83, 86 Am. Dec. 351; Olcott v. Tioga R. Co., 27 N. Y. 546, 84 Am. Dec. 298; Dill & Collins Co. v. Morison, 159 App. Div. 583, 144 N. Y. Supp. 894; Higginbotham v. International Trust Co., 141 App. Div. 535, 126 N. Y. Supp. 366; First Nat. Bank of Binghamton v. Commercial Travellers' Home Ass'n of America, 108 App. Div. 78, 95 N. Y. Supp. 454, aff'd 185 N. Y. 575, 78 N. E. 1103; McVity v. E. D. Albro Co., 90 App. Div. 109, 86 N. Y. Supp. 144; Curtis v. Natalie An-

election and with full knowledge, accepts and retains the benefits of an unauthorized transaction, he must also accept the part that is

thracite Coal Co., 89 App. Div. 61, 85 N. Y. Supp. 413; Mathews v. Hardt, 79 App. Div. 570, 80 N. Y. Supp. 462; Carr v. National Bank & Loan Co., 43 App. Div. 10, 59 N. Y. Supp. 618, aff'd 167 N. Y. 375, 60 N. E. 649; White v. Sheppard, 41 App. Div. 113, 58 N. Y. Supp. 563; Balet v. New York & N. J. Bridge Co., 40 App. Div. 245, 58 N. Y. Supp. 19; Munson v. Magee, 22 App. Div. 333, 47 N. Y. Supp. 942; Davies v. Harvey Steel Co., 6 App. Div. 166, 39 N. Y. Supp. 791; Milbank v. De Riesthal, 82 Hun 537, 31 N. Y. Supp. 522; Sheridan Elec. Light Co. v. Chatham Nat. Bank, 52 Hun 575, 5 N. Y. Supp. 529; Cawthra v. Stewart, 59 Misc. 38, 109 N. Y. Supp. 770; Quantmeyer v. J. H. Mohlman Co., 29 Misc. 746, 60 N. Y. Supp. 220; William Wicke Co. v. Kaldenberg Mfg. Co., 21 Misc. 79, 46 N. Y. Supp. 937; Fister v. La Rue, 15 Barb. 323; Halstead v. Dodge, 1 How. Pr. (N. S.) 170.

North Carolina. Anderson v. American Suburban Corporation, 155 N. C. 131, 36 L. R. A. (N. S.) 896, 71 S. E. 221; Compare Duke v. Markham, 105 N. C. 131, 18 Am. St. Rep. 889, 10 S. E. 1017.

Oklahoma. Shawnee Nat. Bank v. Purell Wholesale Grocery Co., 34 Okla. 34, 41 L. R. A. (N. S.) 494, 124 Pac. 603.

Oregon. Bauer v. Northwest Blowpipe Co., 75 Ore. 1, 146 Pac. 129; Dillard v. Olalla Min. Co., 52 Ore. 126, 94 Pac. 966, 96 Pac. 678.

Pennsylvania. First Nat. Bank v. America Bangor Slate Co., 229 Pa. 27, 77 Atl. 1100; National Bank of Boyertown v. Fridenberg, 206 Pa. 243, 55 Atl. 960, Wayne Title & Trust Co. v. Schuylkill Elec. Ry. Co., 191 Pa. St. 90, 39 Atl. 824; Zearfoss v. Farmers' & Mechanics' Institute of

Northampton County, 154 Pa. St. 449, 35 Am. St. Rep. 848, 26 Atl. 211; Goldbeck v. Kensington Nat. Bank, 147 Pa. St. 267, 23 Atl. 565, 48 Leg. Int. 76.

Rhode Island. Adam v. New England Inv. Co., 33 R. I. 193, 80 Atl. 426.

South Carolina. Batesburg Cotton Oil Co. v. Southern R. Co., 103 S. C. 494, 88 S. E. 360; Hubbard v. Camperdown Mills, 26 S. C. 581, 2 S. E. 576.

South Dakota. Hunt v. Northwestern Mortg. Trust Co., 16 S. D. 241, 92 N. W. 23; Dedrick v. Ormsby Land & Mortgage Co., 12 S. D. 59, 80 N. W. 153.

Tennessee. Memphis City Bank v. Smith, 110 Tenn. 337, 75 S. W. 1065.

Texas. Bankers' Trust Co. of Amarillo v. Cooper, Merrill & Lumpkin, — Tex. Civ. App. —, 179 S. W. 541; Benford Lumber Mfg. Co. v. Knox, — Tex. Civ. App. —, 168 S. W. 32; Kansas City, M. & O. R. Co. of Texas v. Sweetwater, 62 Tex. Civ. App. 242, 131 S. W. 251; Texas & G. Ry. Co. v. Whiteside, 55 Tex. Civ. App. 593, 119 S. W. 126; Hayward Lumber Co. v. Cox (Tex. Civ. App.), 104 S. W. 403; W. F. Taylor Co. v. Gaines Grocery Co., 31 Tex. Civ. App. 385, 72 S. W. 260.

Utah. Murray v. Beal, 23 Utah 548, 65 Pac. 726.

Vermont. Lyndon Sav. Bank v. International Co., 78 Vt. 169, 112 Am. St. Rep. 900, 62 Atl. 50.

Virginia. Owens v. Boyd Land Co., 95 Va. 560, 28 S. E. 950; West Salem Land Co. v. Montgomery Land Co., 89 Va. 192, 15 S. E. 524.

Washington. Shertzer v. Hillman Inv. Co., 52 Wash. 492, 100 Pac. 982; McKinley v. Mineral Hill Consol. Min. Co., 46 Wash. 162, 89 Pac. 495; Chilcott v. Washington State Colonization Co., 45 Wash. 148, 88 Pac. 113; Kirwin

not beneficial, and will be held to have ratified the whole.⁴⁸ In some states this rule is adopted by statute.⁴⁹

Of course this rule does not apply unless the money or property is received by the corporation, or appropriated to its use through some corporate agency.⁵⁰ If benefits have been accepted, the corporation cannot disaffirm the contract without returning or offering to return the benefits received or otherwise placing the other party to the contract in statu quo.⁵¹ But the retention of money paid to the corporation does not work a ratification where the corporation promptly rejects the contract and so informs the other party who acquiesces in the retention of the money pending further dealings.⁵² The acceptance of the fruits of a contract and the use thereof, without knowledge of the terms of the contract, is not necessarily a ratification, where the contract is repudiated as soon as its terms are discovered.⁵³

v. Washington Match Co., 37 Wash. 225, 79 Pac. 928; *Windsor v. St. Paul, M. & M. R. Co.*, 37 Wash. 156, 3 Ann. Cas. 62, 79 Pac. 613; *Dexter, H. & Co. v. Long*, 2 Wash. 435, 26 Am. St. Rep. 867, 27 Pac. 271.

Wisconsin. *Petersen v. Elholm*, 130 Wis. 1, 109 N. W. 76, 1034; *Bullen v. Milwaukee Trading Co.*, 109 Wis. 41, 85 N. W. 115; *Hubbard v. Haley*, 96 Wis. 578, 71 N. W. 1036; *Kickland v. Menasha Wooden-Ware Co.*, 68 Wis. 34, 60 Am. Rep. 831, 31 N. W. 471.

Wyoming. *Frank v. Hicks*, 4 Wyo. 502, 35 Pac. 475, 1025.

See, generally, 1 Clark & Skyles, Agency, § 140.

A building society which has accepted a note given by a member to the secretary in settlement of arrearages cannot afterwards deny the secretary's authority to make the contract extending the time of payment. *Drescher v. Fulham*, 11 Colo. App. 62, 52 Pac. 685.

A contract between the president and a railroad corporation for the construction of a switch track to the plant of a corporation was deemed ratified by the acceptance of the benefits thereof by the corporation. *Michigan Cent. R. Co. v. Chicago, K. & S.*

R. Co., 132 Mich. 324, 93 N. W. 882.

⁴⁸ 1 Clark & Skyles, Agency, § 140.

The corporation cannot retain the benefits of a portion of the contract and reject the balance. *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370, 91 N. W. 376.

⁴⁹ *Mills v. Boyle Min. Co.*, 132 Cal. 95, 64 Pac. 122; *Colpe v. Jubilee Min. Co.*, 2 Cal. App. 393, 84 Pac. 324; *Hunt v. Northwestern Mortg. Trust Co.*, 16 S. D. 241, 92 N. W. 23.

⁵⁰ If money or property paid to or received by an officer under a contract made by him for the corporation, without authority, is not received by the corporation, nor appropriated to its use through any corporate agency, failure of the corporation to repay the money or return the property is not a ratification of the contract, and does not estop it. *Franco-Texan Land Co. v. McCormick*, 85 Tex. 416, 34 Am. St. Rep. 815, 23 S. W. 123.

⁵¹ *Fidelity Ins. Co. v. German Sav. Bank*, 127 Iowa 591, 103 N. W. 958.

⁵² *Bessler v. Derby*, 80 Ore. 513, 157 Pac. 791.

⁵³ *Outcault Advertising Co. v. Sherman Dry Goods Co.*, 28 S. D. 307, 133 N. W. 254.

This general rule applies not only to the acceptance of the benefits of unauthorized contracts of directors,⁵⁴ but also the unauthorized contracts of the president of the corporation⁵⁵ or of a stockholder⁵⁶ or contracts made by its attorney.⁵⁷ It has been frequently applied to unauthorized contracts of employment where the services were accepted.⁵⁸ So an unauthorized act whereby certain money is placed in the corporate treasury will be deemed ratified by use of the money by the corporation with knowledge of the facts.⁵⁹ This is often illustrated by holding that there is a ratification where money borrowed,⁶⁰

⁵⁴ *Blanck v. Commonwealth Amusement Corporation*, 19 Cal. App. 720, 127 Pac. 805.

⁵⁵ *Coney Island Co. v. McIntyre-Paxton Co.*, 200 Fed. 901; *Southern Bitulithic Co. v. Hughston*, 177 Ala. 559, 58 So. 450; *Ocilla Southern R. Co. v. Morton*, 13 Ga. App. 504, 79 S. E. 480; *Michigan Cent. R. Co. v. Chicago, K. & S. R. Co.*, 132 Mich. 324, 93 N. W. 882, 9 Det. L. N. 627.

Rule applied to employment of attorney. *Goodwin v. Central Broadway Bldg. Co.*, 21 Cal. App. 376, 131 Pac. 896.

⁵⁶ *Ulrich v. Pateros Water Ditch Co.*, 67 Wash. 328, 332, 121 Pac. 818.

⁵⁷ *Hartford Deposit Co. v. Calkins*, 109 Ill. App. 579.

⁵⁸ *United States v. McCartney v. Clover Valley Land & Stock Co.*, 232 Fed. 697; *Domenico v. Alaska Packers' Ass'n*, 112 Fed. 554.

Arkansas v. Newport Ice & Cold Storage Co. v. Lunyon, 69 Ark. 287, 62 S. W. 1047.

Illinois v. Rosehill Cemetery Co. v. Dempster, 223 Ill. 567, 79 N. E. 276, aff'g 121 Ill. App. 143.

Louisiana v. J. D. Pace & Co. v. Alexandria Elec. Rys. Co., 138 La. 879, 70 So. 867.

Michigan v. Fuchs v. Standard Thermometer Co., 178 Mich. 37, 144 N. W. 484.

New York v. Pescia v. Societa Co-Operativa Corleonese Francesco Ben-tivegna, 91 App. Div. 506, 86 N. Y. Supp. 952.

Oregon v. Wehrung v. Portland Country Club & Live Stock Ass'n, 61 Ore. 48, 120 Pac. 747.

Texas v. Peach River Lumber Co. v. Ayers, 41 Tex. Civ. App. 334, 91 S. W. 387.

It applies to the employment of an attorney. *Bernstein v. Lisenard Realty Co.*, 53 N. Y. Misc. 273, 103 N. Y. Supp. 210.

⁵⁹ *Marion Trust Co. v. Crescent Loan & Investment Co.*, 27 Ind. App. 451, 87 Am. St. Rep. 257, 61 N. E. 688; *Murray v. Beal*, 23 Utah 548, 65 Pac. 726.

The acts of its cashier in selling notes given by him to the bank as an individual and as treasurer of another company will be deemed ratified where the bank has received and retained the proceeds. *German Sav. Bank v. Des Moines Nat. Bank*, 122 Iowa 737, 98 N. W. 606.

⁶⁰ *Hireen v. R. W. English Lumber Co.*, 46 Colo. 216, 104 Pac. 84.

Where the corporation receives the benefit and uses the proceeds of a loan, it cannot contend that its manager who borrowed the money had no power to do so. *R. W. English Lumber Co. v. Hireen*, 25 Colo. App. 199, 136 Pac. 475.

So if a corporation appropriates to its own use money borrowed, it is no defense to an action to recover the loan that the meeting of the board of directors was illegal. *J. K. Siphon Ventilator Co. v. Hutton*, 116 Ark. 545, 175 S. W. 30.

or in case the proceeds of a note⁶¹ or bond⁶² or mortgage⁶³ are accepted and retained by the corporation. So a corporation ratifies an agreement relating to subscriptions to stock, whereby the subscribers are to have certain privileges, by retaining the money paid.⁶⁴ And the acceptance of the proceeds of a sale of stock under an agreement to repurchase at par precludes it from objecting to the agreement to repurchase as beyond the power of the selling officer or agent.⁶⁵

So, also, a corporation will be deemed to have ratified an unauthorized act, whereby it has acquired property, by retention and use thereof.⁶⁶ Taking and retaining possession, without dissent, of property obtained by a contract irregularly executed is a ratification.⁶⁷ The rule applies also to an unauthorized lease by a corporate officer or agent of property belonging to a third person.⁶⁸ Likewise the act

⁶¹ Phillips v. Sanger Lumber Co., 130 Cal. 431, 62 Pac. 749; Topeka Capital Co. v. March, 10 Kan. App. 40, 61 Pac. 876.

Thus it is held that the execution of a promissory note for value by a corporation through its president, but without the signature of the treasurer, as required by the by-laws of the corporation, is binding upon the corporation where it has received the benefit of its proceeds and the note is in the hands of a bona fide holder. National Spraker Bank of Canajoharie v. George C. Treadwell Co., 80 Hun (N. Y.) 363, 30 N. Y. Supp. 77; Bigelow Co. v. Automatic Gas Producer Co., 56 N. Y. Misc. 389, 107 N. Y. Supp. 894.

The acceptance and retention of the proceeds of a promissory note executed by the president of a corporation renders the corporation liable on the note regardless of the power of the president to execute it. William v. S. M. Smith Ins. Agency, 75 W. Va. 494, Ann. Cas. 1917 A 813, 84 S. E. 235.

⁶² Pomeroy v. New York Smelting & Refining Co. (N. J. Ch.), 48 Atl. 395.

This rule has been applied to the receipt of the proceeds of mortgage bonds although the mortgage was not authorized by a proper resolution of

the board of directors. Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America, 82 Fed. 124.

If the corporation has accepted the proceeds of its bonds, it cannot question their validity because of the want of proper notice of the directors' meeting authorizing them. Lowe v. Los Angeles Surbarban Gas Co., 24 Cal. App. 367, 141 Pac. 399.

⁶³ Clark v. Elmendorf (Tex. Civ. App.), 78 S. W. 538.

⁶⁴ Wisconsin Lumber Co. v. Greene & W. Tel. Co., 127 Iowa 350, 69 L. R. A. 968, 109 Am. St. Rep. 387, 101 N. W. 742.

⁶⁵ Garon v. Credit Foncier Canadien, 37 R. I. 273, 92 Atl. 561.

⁶⁶ Blood v. La Serena Land L. & Water Co., 134 Cal. 361, 66 Pac. 317. Braxmar v. Stanton, 110 N. Y. App. Div. 167, 96 N. Y. Supp. 1096.

Likewise, a corporation cannot question the authority of an officer to act for it in certain matters and, at the same time, claim title to property involved in such transactions. Sprague Canning Machinery Co. v. Fuller, 158 Fed. 588.

⁶⁷ Silsby v. Strong, 38 Ore. 36, 62 Pac. 633.

⁶⁸ McQuaide v. Enterprise Brewing Co., 14 Cal. App. 315, 111 Pac. 927.

of directors of a telephone company in purchasing a telephone line, although unauthorized, is ratified where the company uses the purchased line for several years.⁶⁹ And a corporation which has used the subject-matter of a contract for a long time is estopped to claim that it did not execute the contract which was signed by its president in his individual name.⁷⁰

The failure to notify one of the directors of a special meeting of the directors does not invalidate the acts of the board at a meeting which such director did not attend, where the corporation accepted the benefits of the acts of the board at such meeting.⁷¹

In applying this rule, it is also held that where a corporation accepts and retains the benefits of a transaction induced by the fraudulent representations of its agent, made by him while acting within the scope of his authority, it is liable to the party injured thereby.⁷²

§ 2200. Recognition or adoption of act or contract by affirmative acts as ratification—In general. Unless some particular form or mode of ratification is necessary,⁷³ ratification of an unauthorized act or contract will be implied, if the corporation, or officers having authority in the matter, act upon the same, or otherwise perform acts which in effect recognize it as binding.⁷⁴ Thus a corporation

⁶⁹ *Ege v. Centerville Tel. Exch. Co.*, 33 S. D. 648, 147 N. W. 70.

⁷⁰ *Belzoni Oil Co. v. Yazoo & M. Val. R. Co.*, 94 Miss. 58, 47 So. 468.

⁷¹ *Union Trust Co. v. Electric Park Amusement Co.*, 163 Mich. 687, 130 N. W. 306.

⁷² *First Nat. Bank v. Exchange Bank of Ong*, 90 Neb. 225, 133 N. W. 237.

⁷³ See § 2194, *supra*.

⁷⁴ *United States. McKenzie v. Poorman Silver Mines of Colorado*, 88 Fed. 111. *Leroy & Coney Val. Air Line R. Co. v. Sidell*, 66 Fed. 27.

California. Porter v. Lassen County Land & Cattle Co., 127 Cal. 261, 59 Pac. 563; *Shaver v. Bear River & A. Water & Mining Co.*, 10 Cal. 396.

Colorado. Freeman Improvement Co. v. Osborn, 14 Colo. App. 488, 60 Pac. 730.

Connecticut. Smith v. New Hart-

ford Water Co., 73 Conn. 626, 48 Atl. 754; *Perry v. Simpson Waterproof Mfg. Co.*, 37 Conn. 520.

District of Columbia. Washington Times Co. v. Wilder, 12 App. Cas. 62.

Georgia. Singleton v. Bank of Monticello, 113 Ga. 527, 38 S. E. 947.

Illinois. Lake St. El. R. Co. v. Carmichael, 184 Ill. 348, 56 N. E. 372, *aff'g* 82 Ill. App. 344; *Beach v. Miller*, 130 Ill. 162, 17 Am. St. Rep. 291, 22 N. E. 464, *rev'g* 23 Ill. App. 151; *Hull v. Glover*, 126 Ill. 122, 18 N. E. 198; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439.

Iowa. Shaver v. Hardin, 82 Iowa 378, 48 N. W. 68.

Kentucky. Herring v. Dix River & L. Turnpike Road Co., 23 Ky. L. Rep. 642, 63 S. W. 576.

Louisiana. Poche v. New Orleans Home Inv. Co., 52 La. Ann. 1287, 27 So. 797.

will be deemed to have ratified an attempted contract of its president by demanding performance thereof.⁷⁵ So if the higher corporate

Massachusetts. *Simmons v. Shaw*, 172 Mass. 516, 52 N. E. 1087; *Burrill v. Nahant Bank*, 2 Metc. 163, 35 Am. Dec. 395.

Nebraska. *German Nat. Bank of Hastings v. First Nat. Bank of Hastings*, 59 Neb. 7, 80 N. W. 48.

New Jersey. *Durar v. Hudson County Mut. Ins. Co.*, 24 N. J. L. 171; *Pomeroy v. New York Smelting & Refining Co. (N. J. Eq.)*, 48 Atl. 395; *Hoyt v. Bridgewater Copper-Min. Co.*, 6 N. J. Eq. 253.

New York. *Great Western Turnpike Co. v. Shafer*, 57 App. Div. 331, 68 N. Y. Supp. 5; *Carr v. National Bank & Loan Co. of Watertown*, 43 App. Div. 10, 59 N. Y. Supp. 618, aff'd 167 N. Y. 375, 60 N. E. 649; *Simmons v. Thompson*, 29 App. Div. 559, 51 N. Y. Supp. 1018; *New Britain Nat. Bank v. Cleveland Co.*, 91 Hun 447, 36 N. Y. Supp. 387, aff'd 158 N. Y. 722, 53 N. E. 1128; *Seymour v. Spring Forest Cemetery Ass'n*, 64 Hun 632, 19 N. Y. Supp. 94; *Manne v. Siegel-Cooper Co.*, 20 Misc. 592, 46 N. Y. Supp. 352.

Pennsylvania. *Mohrfeld v. Second German S. E. Bldg. Ass'n*, 194 Pa. St. 488, 45 Atl. 335; *Dallas v. Columbia Iron & Steel Co.*, 158 Pa. St. 444, 27 Atl. 1055.

South Carolina. *Moyer v. East Shore Terminal Co.*, 41 S. C. 300, 25 L. R. A. 48, 44 Am. St. Rep. 709, 19 S. E. 651.

Tennessee. *Stainback v. Junk Bros. Lumber & Manufacturing Co.*, 98 Tenn. 306, 39 S. W. 530.

Virginia. *Richmond Union Passenger Ry. Co. v. Richmond, F. & P. R. Co.*, 96 Va. 670, 32 S. E. 787.

Washington. *Western Timber Co. v. Kalama River Lumber Co.*, 42 Wash. 620, 6 L. R. A. (N. S.) 397, 114 Am. St. Rep. 137, 7 Ann. Cas. 667, 85 Pac. 338.

Wisconsin. *Johnson v. Weed & Gumaer Mfg. Co.*, 103 Wis. 291, 79 N. W. 236; *Hubbard v. Haley*, 96 Wis. 578, 71 N. W. 1036.

Wyoming. *Matthews v. Nefsy*, 13 Wyo. 458, 110 Am. St. Rep. 1020, 81 Pac. 305.

Where a corporation with knowledge executes mortgages, in which recital is made of the execution by it of bonds to which such mortgages are collateral, the execution of the bonds will be deemed to have been ratified, although issued originally under questionable authority. *Pomeroy v. New York Smelting & Refining Co. (N. J. Ch.)*, 48 Atl. 395.

Where the congregation of a church takes possession of property purchased by its trustees, and gives a mortgage to secure the purchase price, they will be deemed to have ratified the act of the trustees in making the purchase. *Roundtree v. Blount*, 129 N. C. 25, 39 S. E. 631.

An officer of a mortgagee corporation executed an assignment of a note and mortgage without previous authority. The mortgagee corporation was deemed to have ratified his act by delivery of the papers. *Matthews v. Nefsy*, 13 Wyo. 458, 110 Am. St. Rep. 1020, 81 Pac. 305.

In California, however, where bonds secured by mortgage are non-negotiable, a corporation issuing bonds secured by mortgage, a part of which were delivered to the trustee to take up other bonds, is not estopped to set up their invalidity, although an officer of the trustee wrongfully obtained possession and sold them to third persons. *Kohn v. Sacramento Electric, Gas & Railroad Co.*, 168 Cal. 1, 141 Pac. 626.

⁷⁵ *Mebins & Drescher Co. v. Mills*, 150 Cal. 229, 88 Pac. 917.

officers or agents recognize the act or contract as binding by proceeding, with knowledge of the facts, to perform the obligations imposed thereby, there is a ratification.⁷⁶ For instance, where all of the directors and all of the stockholders have knowledge of the facts, the corporation is bound by an agreement partly carried out by them and recognized by them as binding.⁷⁷ In like manner, a contract made by the president of a corporation is ratified where the corporation, with full knowledge, acts upon the assumption of the existence of the contract for several years and at no time signifies its dissent.⁷⁸

The indorsement by the president and general manager of a corporation of notes executed by an unauthorized person to its debtor is a ratification of the execution of the notes.⁷⁹ Renewal by proper authority of notes executed without authority is a ratification of the original notes.⁸⁰ When the property of a corporation is sold by an officer, without authority, in payment of its notes, the corporation ratifies the sale by taking up and retaining the canceled notes.⁸¹ A manager's unauthorized employment of a person for a year is ratified, where the company allows him to perform services and asks for his resignation for cause.⁸² The unauthorized borrowing of money is ratified by the act of the corporation in voting to issue stock to the lender in payment of the loan.⁸³ Collection of certificates of deposit received as consideration for a transfer is a ratification of the transfer.⁸⁴ An officer's unauthorized purchase or lease of premises, to be used as an office, is ratified by the directors or trustees if they acquiesce and hold their meetings there.⁸⁵ Obtaining an extension of time to pay the debt incurred by the contract is a ratification.⁸⁶

Acceptance of payments may constitute ratification.⁸⁷ Thus, the

⁷⁶ *Kincheloe Irrigation Co. v. Hahn Bros. & Co.*, 105 Tex. 231, 146 S. W. 1187, *aff'g*—Tex. Civ. App.—, 132 S. W. 78.

⁷⁷ *First Trust Co. v. Miller*, 160 Wis. 336, 151 N. W. 813.

⁷⁸ *McKell v. Chesapeake & O. Ry. Co.*, 175 Fed. 321, 20 Ann. Cas. 1097.

⁷⁹ *Washington Times Co. v. Wilder*, 12 App. Cas. (D. C.) 62.

⁸⁰ *Smith v. New Hartford Water Co.*, 73 Conn. 626, 48 Atl. 754.

⁸¹ *Beach v. Miller*, 130 Ill. 162, 17 Am. St. Rep. 291, 22 N. E. 464, *rev'g* 23 Ill. App. 151.

⁸² *Moyer v. East Shore Terminal Co.*, 41 S. C. 300, 25 L. R. A. 48, 44 Am. St. Rep. 709, 19 S. E. 651.

⁸³ *Quinn v. American Bankers' Assur. Co.*, 183 Mo. App. 8, 165 S. W. 823.

⁸⁴ *Fidelity Ins. Co. v. German Sav. Bank*, 127 Iowa 591, 103 N. W. 958.

⁸⁵ *Shaver v. Bear River & A. Water & Mining Co.*, 10 Cal. 396.

⁸⁶ *Lake St. El. R. Co. v. Carmichael*, 184 Ill. 348, 56 N. E. 372, *aff'g* 82 Ill. App. 344.

⁸⁷ *Lewisville Light & Water Co. v. Lester*, 109 Ark. 545, 160 S. W. 861.

acceptance of rent is a ratification of a lease.⁸⁸ And the acceptance of payments on a contract after notice of certain stipulations therein is a ratification of such stipulations.⁸⁹

§ 2201. — **Payments by corporation.** Ordinarily, payments made by the corporation, with knowledge of the facts, is a ratification of the contract on which they are made, although the contract was executed irregularly or without authority.⁹⁰ This rule has been applied to part payment for services rendered under a contract of employment,⁹¹ payment of rent,⁹² payment of interest,⁹³ and the

⁸⁸ *Clement v. Young-McShea Amusement Co.*, 69 N. J. Eq. 347, 60 Atl. 419, rev'd on other grounds 70 N. J. Eq. 677, 118 Am. St. Rep. 747, 67 Atl. 82.

⁸⁹ *Rowley v. Hager*, 63 Ore. 246, 127 Pac. 36.

⁹⁰ *Fourth Nat. Bank of St. Louis, Missouri v. Camden Lumber Co.*, 142 Fed. 257; *Owyhee Land & Irrigation Co. v. Tantphas*, 121 Fed. 343; *Birch v. Glasgow Sav. Bank*, 114 Mo. App. 711, 90 S. W. 746; *Van Norden Trust Co. v. L. Rosenberg*, 62 N. Y. Misc. 285, 114 N. Y. Supp. 1025; *Carstens Packing Co. v. Lewis C. Troughton, Inc.*, 90 Wash. 196, 155 Pac. 758.

The act of directors in making a payment under a contract made without authority by the president of the corporation is a ratification. *Cox v. Baltimore & O. S. W. R. Co.*, 180 Ind. 495, 50 L. R. A. (N. S.) 453, 103 N. E. 337.

⁹¹ *Klinck v. Chicago City R. Co.*, 262 Ill. 280, Ann. Cas. 1915 B 177, 104 N. E. 669, aff'g 177 Ill. App. 165; *Birch v. Glasgow Sav. Bank*, 114 Mo. App. 711, 90 S. W. 746.

Payment of the salary of an employee for several months under an employment contract for a year has been held a ratification of the contract for the entire term. *Miller v. Sealy Oil Mill & Manufacturing Co.*, — Tex. Civ. App. —, 166 S. W. 1182. So ratification of contract of employ-

ment is evidenced by the acceptance and payment for services for a week, although the contract was for a long period. *Latiner v. Wonderland Amusement Co.*, 161 N. Y. App. Div. 554, 146 N. Y. Supp. 779.

But payment of salary, is not necessarily a ratification of a contract of employment where the validity of the contract was questioned as soon as its existence was discovered by the corporation. *Laird v. Michigan Lubricator Co.*, 153 Mich. 52, 17 L. R. A. (N. S.) 177, 116 N. W. 534, 15 Det. L. N. 344.

⁹² *Anchor Steam Bottling Works v. Baumle*, — Okla. —, 155 Pac. 518.

Where a corporation, with full knowledge of the facts, acquiesced in the act of its officer in renewing a lease in its name, by continuing to occupy the premises and the payment of rent pursuant to the renewal agreement, a sufficient ratification is shown. *Fudickar v. Glenn*, 237 Fed. 808.

⁹³ *Lake St. El. R. Co. v. Carmichael*, 184 Ill. 348, 56 N. E. 372, aff'g 82 Ill. App. 344; *Anchor Steam Bottling Works v. Baumle*, — Okla. —, 155 Pac. 518; *Mohrfeld v. Second German S. E. Bldg. Ass'n*, 194 Pa. St. 488, 45 Atl. 335; *Rice v. Shealey*, 71 S. C. 161, 50 S. E. 868.

Payment by the corporation of interest on its bonds for several years estops it to deny the authority of an officer to deliver them. *McCormick v.*

execution of a note to cover all or a part of the debt incurred.⁹⁴ However, payment on account is not necessarily a ratification of a sale by a director to the corporation so far as the purchase price is concerned, but may be considered, it has been held, as a ratification merely of an implied liability to pay what the property sold is worth, rather than the contract price.⁹⁵

§ 2202. — Bringing suit. The attempt by a corporation to enforce a contract is a ratification of it and of the authority of the officer to sign it.⁹⁶ A corporation ratifies a contract made by an officer without authority by bringing an action upon it.⁹⁷ As said by Professor Mechem, "one of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action at law based upon the validity of such act."⁹⁸ Thus, suing upon a note taken by an officer is a ratification of the agreement under which the note was taken.⁹⁹ And the bringing of an action to recover possession of property transferred to it is a ratification of the transfer.¹ Also the bringing of an action by the corporation to recover the value of property sold by the general manager of a company to himself constitutes a ratification of the contract.²

§ 2203. Evidence to show ratification—In general. Where the act of a corporate officer or agent was unauthorized or irregular, any competent and material evidence is admissible which tends to show a subsequent ratification by officers having authority to ratify or

Unity Co., 239 Ill. 306, 87 N. E. 924, aff'g 142 Ill. App. 159.

The act of the secretary of a corporation in signing a note is ratified by the payment of interest thereon and the retention of property received thereunder. *Sesnon v. Lindeberg*, 66 Wash. 1, 118 Pac. 900.

⁹⁴ The execution of notes for deferred payments on a contract is a ratification. The act of one assuming to act as agent of a corporation negotiating a certain contract which involves the execution of notes by the corporation will be deemed ratified by the actual execution of the notes. *Western Timber Co. v. Kalama River Lumber Co.*, 42 Wash. 620, 6 L. R. A. (N. S.) 397, 114 Am. St. Rep. 137, 7 Ann. Cas. 667, 85 Pac. 338.

⁹⁵ *Oliver v. Rahway Ice Co.*, 64 N. J. Eq. 596, 54 Atl. 460.

⁹⁶ *Mebius & Drescher Co. v. Mills*, 150 Cal. 229, 88 Pac. 917.

⁹⁷ *U. S. Fire Apparatus Co. v. G. W. Baker Mach. Co.*, — Del. —, 95 Atl. 294; *Singleton v. Bank of Monticello*, 113 Ga. 527, 38 S. E. 947; *Niagara Woolen Co. v. Pacific Bank*, 141 N. Y. App. Div. 265, 126 N. Y. Supp. 890.

⁹⁸ 1 Mechem, Agency (2nd Ed.), § 446. See also 1 Clark & Skyles, Agency, § 142.

⁹⁹ *Simmons v. Thompson*, 29 N. Y. App. Div. 559, 51 N. Y. Supp. 1018.

¹ *New England Mut. Life Ins. Co. v. Wing*, 191 Mass. 192, 77 N. E. 376.

² *Argo Mfg. Co. v. Parker*, 52 Wash. 100, 105, 100 Pac. 188.

by stockholders where they may ratify.³ If the ratification was express, then of course the records are the best evidence. If the ratification is alleged to have been implied from the acts and conduct of the corporate officers or stockholders, then evidence of such acts or conduct is admissible.⁴

As to the sufficiency of the evidence to show ratification, no general rule can be laid down, each case depending upon its own facts.⁵ The facts necessary to be shown may, however, be established by circumstantial evidence, in case of an implied ratification.⁶ Of course the evidence must show directly or indirectly all the necessary elements of ratification such as knowledge of the facts, etc.

§ 2204. — Presumptions. If the unauthorized act of an agent is clearly beneficial to the corporation, a presumption of ratification will arise from slight circumstances.⁷ As said by Justice Story in a federal decision, "grants and proceedings beneficial to the corporation are presumed to be accepted; and slight acts on their part, which can be reasonably accounted for only upon the supposition of such accept-

³ For instance, see *Salem Iron Co. v. Commonwealth Iron Co.*, 119 Fed. 593; *Central Lumber Co. v. Kelter*, 201 Ill. 503, 66 N. E. 543, aff'g 102 Ill. App. 333; *Topeka Capital Co. v. March*, 10 Kan. App. 40, 61 Pac. 876; *Peach River Lumber Co. v. Ayers*, 41 Tex. Civ. App. 334, 91 S. W. 387.

⁴ While the fact that a contract made by the corporate officers on behalf of the corporation has not been objected to by the directors may not be sufficient to prove ratification, it may nevertheless be introduced as tending to show same. *Salem Iron Co. v. Commonwealth Iron Co.*, 119 Fed. 593.

⁵ Sufficiency of evidence in particular cases see the following:

Illinois. *Strawn Farmers' Elevator Co. v. West*, 189 Ill. App. 213.

Montana. *Spelman v. Gold Coin Mining & Milling Co.*, 26 Mont. 76, 55 L. R. A. 640, 91 Am. St. Rep. 402, 66 Pac. 597.

New Hampshire. *Smith v. Bank of New England*, 72 N. H. 4, 54 Atl. 385.

New Jersey. *Audenried v. East Coast Milling Co.*, 68 N. J. Eq. 450, 59 Atl. 577.

Oregon. *McMahan v. Canadian Ry. Co.*, 40 Ore. 148, 66 Pac. 708.

⁶ *Brooklyn Heights R. Co. v. Brooklyn City R. Co.*, 151 N. Y. App. Div. 465, 135 N. Y. Supp. 990; *Topolewski v. Plankinton Packing Co.*, 143 Wis. 52, 126 N. W. 554.

⁷ *Ham & Ham Lead & Zinc Inv. Co. v. Catherine Lead Co.*, 251 Mo. 721, 158 S. W. 369; *Washington Sav. Bank v. Butchers' & Drovers' Bank*, 107 Mo. 133, 28 Am. St. Rep. 405, 17 S. W. 644; *Pierce City Nat. Bank v. Hughlett*, 84 Mo. App. 268; *Canadian Long Distance Tel. Co. v. Selber*, — Tex. Civ. App. —, 159 S. W. 897; *Knowles v. Northern Texas Traction Co.* (Tex. Civ. App.), 121 S. W. 232.

Very slight circumstances suffice to establish a ratification where the benefits have all inured to the advantage of the corporation. *Love v. Metropolitan Church Ass'n*, 184 Ill. App. 102.

ance, are admitted as presumptions of the fact.”⁸ The rule has been laid down by Justice Carroll of the Kentucky court as follows: “Where the unauthorized act is beneficial to the corporation, and the directors have individual knowledge of it, slight evidence will be sufficient to establish ratification by acquiescence or failure to repudiate, and this upon the theory that a party who accepts benefits will be deemed to have done so with a knowledge of the conditions and circumstances surrounding the transaction out of which the act creating the benefit arose, and must take the burdens with the benefits. But where the corporation does not derive any benefit from an unauthorized act, or when it is doubtful if it has derived benefit, and no third party or innocent party has suffered a loss, evidence of ratification by mere individual acquiescence or failure to repudiate must be clearly shown, and this upon the ground that a party is not to be bound by an act that he did not authorize when he has received no benefits from it, and when the other party or an innocent party has not suffered any loss.”⁹ Mr. Morawetz, in his work on corporations, states the rule as follows: “If a contract or other act of an agent of a corporation appears to have been manifestly to the injury of the company at the time of the alleged ratification, clear evidence of ratification should be required; but if a ratification would apparently have been beneficial to the company, a contrary presumption is but reasonable. Thus, very slight evidence of acquiescence is sufficient to give validity to a transfer of real or personal property to an agent who was not authorized to receive it; and ratification may even be presumed without evidence.”¹⁰

§ 2205. — Burden of proof. The burden of showing ratification is on the party claiming it.¹¹ This rule is too well established to require any extensive citation of authorities.

§ 2206. Question for jury. The question as to whether a corporation has ratified a contract made by one of its officers or agents is generally one of fact for the jury.¹² And it is error for the court to

⁸ *Bank of United States v. Dan-
drige*, 25 U. S. 64, 6 L. Ed. 552.

⁹ *Elk Valley Coal Co. v. Thompson*,
150 Ky. 614, 624, 150 S. W. 817.

¹⁰ 2 Morawetz, *Corporations* (2nd
Ed.), § 629.

¹¹ *Marqusee v. Insurance Co. of
North America*, 211 Fed. 903; *De
Forest v. Northwest Townsite Co.*, 236

Pa. 125, 84 Atl. 674; *National Bank of
Western Pennsylvania v. Lake Erie
Asphalt Block Co.*, 233 Pa. 421, 82
Atl. 773.

¹² *United States v. Salem Iron Co. v.
Lake Superior Consol. Iron Mines*, 112
Fed. 239.

*Arkansas Merchants' & Farmers'
Bank v. Harris Lumber Co.*, 103 Ark.

withdraw from the jury evidence tending to show acquiescence by the corporation in the acts of an officer alleged by it to have been unauthorized.¹³

On the other hand, whether there is any evidence legally sufficient tending to establish ratification is a question of law for the court,¹⁴ and the same is true where the evidence is such that only one conclusion could be drawn therefrom by reasonable men.¹⁵

§ 2207. Effect of ratification—General rules. Except as to intervening rights of strangers, ratification by a corporation of an unauthorized act or contract by its officers or others relates back to the time of the act or contract ratified, and is equivalent to original authority. The corporation and the other party to the transaction are in precisely the same position as if the act or contract had been authorized at the time.¹⁶ A corporation may enforce an unauthorized

283, Ann. Cas. 1914 B 713, 146 S. W. 508.

Massachusetts. Beacon Trust Co. v. Souther, 183 Mass. 413, 67 N. E. 345.

Minnesota. Matteson v. United States & Canada Land Co., 112 Minn. 190, 127 N. W. 829, aff'd on rehearing 127 N. W. 997.

Montana. Trent v. Sherlock, 26 Mont. 85, 66 Pac. 700, aff'g 24 Mont. 255, 61 Pac. 650.

Nebraska. Alexander v. Culbertson Irrigation & Water Power Co., 61 Neb. 333, 85 N. W. 283.

Rhode Island. Ward v. J. Samuels & Bro., 37 R. I. 438, 93 Atl. 649; Hall v. New York, N. H. & H. R. Co., 27 R. I. 525, 65 Atl. 278.

¹³ Alexander v. Culbertson Irrigation & Water Power Co., 61 Neb. 333, 85 N. W. 283.

¹⁴ Bank of Commerce v. Bernero, 17 Mo. App. 313.

¹⁵ Marqusee v. Insurance Co. of North America, 211 Fed. 903.

Throp v. Payne Bros., 86 N. J. L. 304, 90 Atl. 1048.

¹⁶ United States. Fleckner v. Bank of United States, 8 Wheat. 338, 5 L. Ed. 631.

Alabama. Perryman & Co. v. Farmers' Union Ginning & Manufactur-

ing Co., 167 Ala. 414, 52 So. 644.

Colorado. Lincoln Mountain Gold Min. Co. v. Williams, 37 Colo. 193, 85 Pac. 844.

Illinois. Ohio & M. R. Co. v. Middleton, 20 Ill. 629.

Iowa. Kimball Bros. Co. v. Citizens Gas & Electric Co., 141 Iowa 632, 118 N. W. 891.

Kansas. Neosho Valley Inv. Co. v. Hannum, 63 Kan. 621, 66 Pac. 631.

Louisiana. Jackson Brewing Co. v. Canton, 118 La. 823, 43 So. 454.

Missouri. Browning v. North Missouri Cent. R. Co., 188 S. W. 143; First Nat. Bank of Springfield v. Fricke, 75 Mo. 178, 42 Am. Rep. 397; Kilay v. Forsee, 57 Mo. 390.

New Jersey. In re West Jersey Traction Co., 59 N. J. Eq. 63, 45 Atl. 282.

New York. New York Security & Trust Co. v. Saratoga Gas & Electric Light Co., 88 Hun 569, 34 N. Y. Supp. 890, aff'd 157 N. Y. 689, 51 N. E. 1092; Dupignac v. Bernstrom, 37 Misc. 677, 76 N. Y. Supp. 381.

Oklahoma. Derr v. Fisher, 22 Okla. 126, 98 Pac. 978.

Pennsylvania. Gordon v. Preston, 1 Watts 385, 26 Am. Dec. 75.

Texas. West Texas Supply Co. v.

contract made on its behalf which it has ratified, provided it is not ultra vires.¹⁷

But ratification cannot relate back so as to defeat intervening rights of strangers to the transaction, such as attaching or execution creditors, purchasers of the subject-matter of the transaction, etc. "Although the general rule is, that the ratification relates back to the time of the inception of the transaction, and has a complete retroactive efficacy, or as the maxim is, *Omnis ratihabitio retro trahitur*, yet this doctrine is not universally applicable. Thus, if third persons acquire rights, after the act is done and before it has received the sanction of the principal, the ratification cannot operate retrospectively so as to overreach and defeat those rights."¹⁸ For example, ratification by the board of directors of a corporation of an unauthorized assignment by an officer for the benefit of creditors, after a creditor of the corporation has commenced suit by attachment and summoned the assignee as garnishee, cannot affect the rights of the attaching creditor.¹⁹

It has been held in some jurisdictions that ratification of an unauthorized assignment of a chose in action after suit is commenced by the assignee will not relate back to the date of the assignment, so as to support the action.²⁰ The better opinion, however, is to the contrary.²¹

A resolution by the board of directors of a corporation which is trustee under a mortgage, ratifying and approving the act of its

Dunivan, — Tex. Civ. App. —, 182 S. W. 425; Peach River Lumber Co. v. Ayers, 41 Tex. Civ. App. 334, 91 S. W. 387; W. F. Taylor Co. v. Baines Grocery Co., 31 Tex. Civ. App. 385, 72 S. W. 260.

West Virginia. Third Nat. Bank v. Laboringman's Mercantile & Manufacturing Co., 56 W. Va. 446, 49 S. E. 554.

17 W. B. Clarkson & Co. v. Gans Steamship Line, — Tex. Civ. App. —, 187 S. W. 1106.

18 Wood v. McCain, 7 Ala. 800, 42 Am. Dec. 612.

Where the directors, at a meeting legally held, confirm a mortgage previously executed pursuant to a resolution which was void because adopted at an unauthorized meeting, their action, while it renders the mortgage

valid, cannot affect the rights acquired by attaching creditors after the execution of the mortgage, and before the ratification. State Nat. Bank of St. Joseph v. Union Nat. Bank of Chicago, 168 Ill. 519, 48 N. E. 82, aff'g 68 Ill. App. 25.

19 Calumet Paper Co. v. Haskell Show Printing Co., 144 Mo. 331, 66 Am. St. Rep. 425, 45 S. W. 1115. See also Vaught v. Ohio County Fair Co., 20 Ky. L. Rep. 1471, 49 S. W. 426.

20 Read v. Buffum, 79 Cal. 77, 12 Am. St. Rep. 131, 21 Pac. 555; Wittenbrock v. Bellmer, 57 Cal. 12.

21 Persons v. McKibben, 5 Ind. 261, 61 Am. Dec. 85. See also New York Security & Trust Co. v. Saratoga Gas & Electric Light Co., 88 Hun (N. Y.) 569, 34 N. Y. Supp. 890, aff'd 157 N. Y. 689, 51 N. E. 1092.

secretary in giving notice that the corporation exercised its option under the mortgage to declare the principal sum due, is a sufficient confirmation or ratification of the secretary's act to support an action to foreclose the mortgage, although not passed until after commencement of the action.²³

§ 2208. — **Ratification of part.** It is well settled that the corporation cannot ratify in part or repudiate in part, but that it must either repudiate or ratify the whole transaction.²³ Thus, express ratification of a sale by a broker of corporate property not only ratifies the sale but also the employment of the broker.²⁴ However, it has been held that payment of wages does not ratify that part of a contract of employment calling for payment of the employee's house rent in addition, where the company had no notice of such agreement.²⁵ Moreover, simple acceptance of services of one so employed may be deemed to be ratification of the employment without ratification of the amount of compensation promised by the officer, where knowledge of the amount of the compensation agreed upon never came to the ratifying officer.²⁶ Likewise, ratification of a lease of property is not a ratification of an alleged sale created by a separate and distinct contract in writing.²⁷

§ 2209. — **Ratifications as creating apparent power.** If the corporation has acquiesced in the past in the exercise of power by a corporate officer or agent beyond the scope of his express authority, the corporation is estopped to deny the existence of the apparent power which the officer or agent has been clothed with. This rule has already been considered at length.²⁸

²³ *New York Security & Trust Co. v. Saratoga Gas & Electric Light Co.*, 157 N. Y. 689, 51 N. E. 1092, aff'g 88 Hun 569, 34 N. Y. Supp. 890.

²⁴ *Mulford v. Torrey Exploration Co.*, 45 Colo. 81, 100 Pac. 596; *Windsor v. St. Paul, M. & M. R. Co.*, 37 Wash. 156, 3 Ann. Cas. 62, 79 Pac. 613, where the acceptance of land purchased by an officer was held to ratify his agreement to pay a sum in addition to the consideration recited in the deed.

A corporation cannot contend that to the extent that an act of its agent is beneficial it has ratified same, while denying ratification of that portion

of his conduct which it deems injurious. *Third Nat. Bank of Cumberland v. Laboringman's Mercantile & Manufacturing Co.*, 56 W. Va. 446, 49 S. E. 544.

²⁴ *Henderson v. Raymond Syndicate*, 183 Mass. 443, 67 N. E. 427.

²⁵ *Savannah, F. & W. Ry. Co. v. Humphreys*, 114 Ga. 681, 40 S. E. 711.

²⁶ *Colpe v. Jubilee Min. Co.*, 2 Cal. App. 393, 84 Pac. 324.

²⁷ *McKibbin v. Hulton Dyeing & Finishing Co.*, 227 Pa. 153, 75 Atl. 1038.

²⁸ See §§ 1917-1926, *supra*.

§ 2210. Estoppel of officers, agents or stockholders. An officer of a corporation may himself be estopped, as well as the corporation, by his acts or conduct.²⁹ He may be estopped to deny his own authority,³⁰ as where he executes a deed of corporate property.³¹ So one who joins in a deed of trust in favor of enumerated creditors, as an officer of one of the creditors, is estopped to attack the validity of the deed.³² But officers legally appointed or elected are not estopped to deny the unlawful acts of persons not even *de facto* officers.³³

Likewise, stockholders, in acting for the corporation, may be estopped. For instance, a stockholder may be estopped to urge that a contract to which he had consented was not made by an authorized officer.³⁴ Moreover, in equity the stockholders are in substance the corporation, and what will estop the stockholders will ordinarily estop the corporation.³⁵ Failure of corporate officers to state the proper ground for the refusal to deliver corporate stock does not estop the corporation from relying upon the proper ground where it is sued to recover the stock.³⁶

XXIII. NOTICE TO OR KNOWLEDGE OF OFFICERS OR AGENTS AS CHARGEABLE TO CORPORATION

§ 2211. General considerations—Scope of subdivision. This subdivision treats of the effect of notice to or knowledge of officers or agents of a corporation, on the corporation itself. In other words, whether the knowledge of a corporate officer or agent, obtained either by expressly notifying him of a certain fact or facts as a representative of the corporation or indirectly in connection with the exercise of the powers and duties of his office or agency, is to be imputed to the corporation itself so that it cannot say it had no notice or knowledge merely because the facts were not communicated to the stockholders as a body or to the board of directors, notwithstanding one or more of its officers or agents had knowledge of the facts.

²⁹ *Pendleton v. Harris-Emery Co.*, 124 Iowa 361, 100 N. W. 117.

³⁰ *Manchester St. Ry. v. Williams*, 71 N. H. 312, 52 Atl. 461.

³¹ *Aransas Pass Harbor Co. v. Manning*, 94 Tex. 558, 63 S. W. 627.

³² *Forbes v. Bowman*, 87 S. C. 495, 70 S. E. 165.

³³ *Exline-Reimers Co. v. Lone Star Life Ins. Co.*, — Tex. Civ. App. —, 171 S. W. 1060.

³⁴ *Ebelhar v. Nave*, — Ky. L. Rep. —, 119 S. W. 1176.

³⁵ *Chicago R. R. Equipment Co. v. National Hollow Brake-Beam Co.*, 123 Ill. App. 533, rev'd 226 Ill. 28, 80 N. E. 556.

³⁶ *Lyon v. Dailey Copper, Mining & Smelting Co.*, 46 Mont. 108, 126 Pac. 931.

§ 2212. — Applicability of rules governing where principal not a corporation. As has already been observed in case of ratification of acts of corporate officers and agents, that the law in regard thereto is almost wholly an application of the rules governing agents in general without regard to whether the principal is a corporation, or a firm or an individual,³⁷ so it is with the law as to the effect of notice to, or knowledge of, a corporate officer or agent, as imputable to the corporation. The governing principles, with the conflict in the decisions in some respects, as applied to agents in general, have been admirably stated and discussed at length in Professor Mechem's work on Agency³⁸ as well as in other well known treatises on the law of agency.³⁹ It is therefore beyond the scope of this work to consider at any great length the basic rules governing the question; and only the application thereof to corporations and corporate officers and agents will be noticed.

"A corporation cannot see or know anything except by the eyes or intelligence of its officers;"⁴⁰ and it has been said that "there are peculiar and urgent reasons for a more stringent enforcement of the rule against corporations than against individual principals, from the fact that the only way of communicating actual notice to a corporation is through its agents."⁴¹

§ 2213. — Rules applicable in tort actions as well as in actions on contracts. The rule applies where the corporation is sued for damages from a tort as well as in actions on contracts.⁴²

§ 2214. Rules governing without regard to whether principal is a corporation. For a clear understanding of the general rules governing the following statement is made.

1. General rule. Notice to, or knowledge of, an agent while acting within the scope of his authority and in reference to a matter over which his authority extends, is notice to, or knowledge of, the principal.⁴³ Note, however, that the knowledge must be acquired while

³⁷ See § 2177, *supra*.

³⁸ 2 Mechem, Agency (2nd Ed.), §§ 1802-1854.

³⁹ See 1 Clark & Skyles, Agency, §§ 474-490.

⁴⁰ Factors' & Traders' Ins. Co. v. Marine Dry Dock & Shipyard Co., 31 La. Ann. 149.

⁴¹ Orme v. Baker, 74 Ohio St. 337,

113 Am. St. Rep. 968, 78 N. E. 439.

⁴² See *Denver v. Sherret*, 88 Fed. 226; *Houston Biscuit Co. v. Dial*, 135 Ala. 168, 33 So. 268; *Neal v. Cincinnati Union Stock Yards Co.*, 25 Ohio Cir. Ct. 299.

⁴³ Rule applied to corporate principals, see § 2215, *infra*.

acting (a) within the scope of his authority and (b) in reference to a matter over which his authority extends.

2. Subrule. Generally the notice to, or knowledge of, the agent must have been acquired during the period the agency existed, subject to certain exceptions.⁴⁴

3. Exceptions to general rule as classified by Professor Mechem: a. Where notice or knowledge is such as it is the agent's duty not to disclose;⁴⁵ b. Where the agent's relations to the subject-matter are so adverse as to practically destroy the relation of agency;⁴⁶ c. Where the person claiming the benefit of the notice, or those whom he represents, colluded with the agent to cheat or defraud the principal.⁴⁷

4. Exception to exception. The exception already noted as to adverse interest (3b) does not apply, it is generally held, where the agent, although he acts for himself or for a third person, is the sole representative of the principal, to whom notice is sought to be imputed, in the transaction in question.⁴⁸

§ 2215. General statement of rule as applied to corporations. Subject to certain qualifications and exceptions hereinafter noted in this subdivision, it is well settled that if an officer or agent of a corporation acquires or possesses knowledge of facts, in the course of his employment, and as to matters which are within the scope of his authority, his knowledge is imputable to the corporation.⁴⁹ This

⁴⁴ See §§ 2222-2225, *infra*.

⁴⁵ See § 2219, *infra*.

⁴⁶ Rule applied to corporations, see §§ 2243-2253, *infra*.

⁴⁷ 2 Mechem, *Agency* (2nd Ed.), § 1813 et seq., and see § 2228, *infra*.

⁴⁸ Rule applied to corporations, see § 2251, *infra*.

⁴⁹ **United States.** *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 35 L. Ed. 1063; *Duncan v. Jaudon*, 15 Wall. 165, 21 L. Ed. 142; *Issaquah Coal Co. v. United States Fidelity & Guaranty Co.*, 126 Fed. 89; *Zeiss v. Potter*, 105 Fed. 671; *Denver v. Sherret*, 88 Fed. 226; *Niblack v. Cosler*, 80 Fed. 596, *aff'd* 74 Fed. 1000; *Golden Reward Min. Co. v. Buxton Min. Co.*, 79 Fed. 868; *Ditty v. Dominion Nat. Bank*, 75 Fed. 769; *Louisville Trust Co. v. Louisville, N. A. & C. Ry. Co.*, 75 Fed. 433; *Howison v. Alabama*

Coal & Iron Co., 70 Fed. 683; *Waynesville Nat. Bank v. Irons*, 8 Fed. 1; *New England Car-Spring Co. v. Union India Rubber Co.*, 4 Blatchf. 1, Fed. Cas. No. 10,153.

Alabama. *Lea v. Iron Belt Mercantile Co.*, 147 Ala. 421, 8 L. R. A. (N. S.) 279, 119 Am. St. Rep. 93, 42 So. 415; *Harris v. American Building & Loan Ass'n*, 122 Ala. 545, 25 So. 200; *Birmingham Trust & Savings Co. v. Louisiana Nat. Bank*, 99 Ala. 379, 20 L. R. A. 600, 13 So. 112; *Saint v. Wheeler & Wilson Mfg. Co.*, 95 Ala. 362, 36 Am. St. Rep. 210, 10 So. 539.

Arkansas. *Baker v. Brown Shoe Co.*, 78 Ark. 501, 95 S. W. 808.

California. *Montecito Valley Water Co. v. Santa Barbara*, 144 Cal. 578, 77 Pac. 1113; *Blood v. La Serena Land & Water Co.*, 134 Cal. 361, 66 Pac. 317; *Christie v. Sherwood*, 113 Cal.

rule is generally based either upon the fiction of identity of principal and agent, or else upon the presumption that the agent has done his duty and communicated his knowledge to the corporation, the prin-

526, 45 Pac. 820; *Sloane v. Southern California Ry. Co.*, 111 Cal. 668, 32 L. R. A. 193, 44 Pac. 320; *Witter v. McCarthy Co.*, 43 Pac. 969.

Colorado. *Denver, S. P. & P. R. Co. v. Conway*, 8 Colo. 1, 54 Am. Rep. 537, 5 Pac. 142; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 248, 565.

Connecticut. *New York & N. E. R. Co. v. New York, N. H. & H. R. Co.*, 52 Conn. 274; *Smith v. Board Water Com'rs City of Norwich*, 38 Conn. 208; *First Nat. Bank of New Milford v. Town of New Milford*, 36 Conn. 93; *Toll Bridge Co. v. Betsworth*, 30 Conn. 380; *Farmers' & Citizens' Bank v. Payne*, 25 Conn. 444, 68 Am. Dec. 362.

Georgia. *Holland v. McRae Oil & Fertilizer Co.*, 134 Ga. 678, 68 S. E. 555; *Singleton v. Bank of Monticello*, 113 Ga. 527, 38 S. E. 947; *Fouche v. Merchants' Nat. Bank of Rome*, 110 Ga. 827, 36 S. E. 256; *Hager v. National German-American Bank*, 105 Ga. 116, 31 S. E. 141; *Brobston v. Penniman*, 97 Ga. 527, 25 S. E. 350; *Guarantee Co. of North America v. East Rome Town Co.*, 96 Ga. 511, 51 Am. St. Rep. 150, 23 S. E. 503; *Merchants' Nat. Bank of Savannah v. Guilmartin*, 93 Ga. 503, 44 Am. St. Rep. 182, 21 S. E. 55; *White v. Barlow*, 72 Ga. 887; *Bank of St. Mary's v. Mumford*, 6 Ga. 44; *Georgia Burial Corporation v. Herrin*, 12 Ga. App. 53, 76 S. E. 753.

Illinois. *Merchants' Bldg. Improvement Co. v. Chicago Exch. Bldg. Co.*, 210 Ill. 26, 102 Am. St. Rep. 145, 71 N. E. 22; *Indiana, I. & I. R. Co. v. Swannell*, 157 Ill. 616, 30 L. R. A. 290, 41 N. E. 989; *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655, 25 Am. St. Rep. 401, 26 N. E. 640; *Quincy Coal Co. v. Hood*, 77 Ill. 68; *Waters v. West*

Chicago St. R. Co., 101 Ill. App. 265; *Delbridge v. Lake, H. P. & C. B. & L. Ass'n*, 82 Ill. App. 388; *Home Savings & State Bank v. Wheeler*, 74 Ill. App. 261.

Indiana. *Brookville & C. Turnpike Co. v. Pumphrey*, 59 Ind. 78, 26 Am. Rep. 76; *Pittsburgh, Ft. W. & C. Ry. Co. v. Ruby*, 38 Ind. 294, 10 Am. Rep. 111; *Brotherhood of Painters, Decorators & Paper Hangers of America v. Moore*, 36 Ind. App. 580, 76 N. E. 262.

Iowa. *Wicks v. German Loan & Investment Co.*, 150 Iowa 112, 129 N. W. 744; *Eckert v. Century Fire Ins. Co.*, 147 Iowa 507, 124 N. W. 170; *Anderson v. Kinley*, 90 Iowa 554, 58 N. W. 909; *Liebfritz v. Dubuque Street Ry. Co.*, 48 Iowa 709.

Kentucky. *Baries v. Louisville Elec. Light Co.*, 118 Ky. 830, 27 Ky. L. Rep. 653, 85 S. W. 1186, 80 S. W. 814; *Trapp v. Fidelity Nat. Bank*, 101 Ky. 485, 43 S. W. 470, 41 S. W. 577; *Grant County Deposit Bank v. Points*, 22 Ky. L. Rep. 105, 56 S. W. 662; *Citizens' Sav. Bank v. Walden*, 21 Ky. L. Rep. 739, 52 S. W. 953; *Connecticut Mut. Life Ins. Co. v. Scott*, 5 Ky. L. Rep. 639; *Pittsburgh, C. & St. L. R. Co. v. Woolley*, 12 Bush 451; *Bank of America v. McNeil*, 10 Bush 54.

Louisiana. *Union Nat. Bank of New Orleans v. Manhattan Life Ins. Co.*, 52 La. Ann. 36, 26 So. 800; *Factors' & Traders' Ins. Co. v. Marine Dry Dock & Shipyard Co.*, 31 La. Ann. 149; *Pontchartrain R. Co. v. Heirne*, 2 La. Ann. 129.

Maine. *Fairfield Sav. Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 319.

Maryland. *Maryland Trust Co. v. National Mechanics' Bank*, 102 Md. 608, 63 Atl. 70; *Boyd v. Chesapeake & O. Canal Co.*, 17 Md. 195, 79 Am. Dec. 646; *Hoffman Steam Coal Co. v.*

cipal. "The rule that notice to the agent is constructive notice to the principal," said the California court, "is based on the presumption that the agent has communicated to the principal the facts connected with the subject-matter of his agency which came to his

Cumberland Coal & Iron Co., 16 Md. 456, 77 Am. Dec. 311.

Massachusetts. Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 268, 9 Am. St. Rep. 698, 17 N. E. 496; Loring v. Brodie, 134 Mass. 453; National Security Bank v. Cushman, 121 Mass. 490; Fall River Union Bank v. Sturtevant, 12 Cush. 372.

Michigan. Detroit Motor Co. v. Third Nat. Bank, 111 Mich. 407, 69 N. W. 726.

Missouri. Moore v. Atlantic Mut. Ins. Co., 56 Mo. 343; Mechanics' Bank v. Schaumburg, 38 Mo. 228; City Bank of Columbus v. Phillips, 22 Mo. 85, 64 Am. Dec. 254; Steam Stonecutter Co. v. Myers, 64 Mo. App. 527; George v. Wabash Western Ry. Co., 40 Mo. App. 433; Carroll v. People's Ry. Co., 14 Mo. App. 490; Central Nat. Bank v. Levin, 6 Mo. App. 543; Clerks' Sav. Bank v. Thomas, 2 Mo. App. 367.

New Hampshire. Campbell v. Merchants' & Farmers' Mut. Fire Ins. Co., 37 N. H. 35, 72 Am. Dec. 324; Marshall v. Columbian Mut. Fire Ins. Co., 27 N. H. 157.

New Jersey. Easton Nat. Bank v. American Brick & Tile Co., 69 N. J. Eq. 326, 60 Atl. 54; Ransom v. Brinkerhoff, 56 N. J. Eq. 140, 38 Atl. 919; Willard v. Denise, 50 N. J. Eq. 482, 35 Am. St. Rep. 788, 26 Atl. 29; Combs v. Shrewsbury Mut. Fire Ins. Co., 34 N. J. Eq. 403; Gaston v. American Exch. Nat. Bank, 29 N. J. Eq. 98; Trenton Banking Co. v. Woodruff, 2 N. J. Eq. 117.

New Mexico. United States v. San Pedro & Canon del Agua Co., 4 N. M. 405, 17 Pac. 337.

New York. Cragie v. Hadley, 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537; Eggleston v. Columbia Turnpike Road

Co., 82 N. Y. 278; Holden v. New York & E. Bank, 72 N. Y. 286; New Hope & D. Bridge Co. v. Phenix Bank, 3 N. Y. 156; Cottrell v. Albany Card & Paper Mfg. Co., 142 App. Div. 148, 126 N. Y. Supp. 1070; Mason v. United Press of Illinois, 94 App. Div. 617, 88 N. Y. Supp. 99; Getman v. Second Nat. Bank of Oswego, 23 Hun 498; Beinert v. William M. Tivoli & Co., 62 Misc. 616, 116 N. Y. Supp. 4; National Discount Co. v. United States Fidelity & Guaranty Co., 47 Misc. 678, 94 N. Y. Supp. 457; Cumberland Coal & Iron Co. v. Sherman, 30 Barb. 553; Bank of United States v. Davis, 2 Hill 451; Van Leuvan v. First Nat. Bank of Kingston, 6 Lans. 373.

North Carolina. Follette v. Mutual Acc. Ass'n, 110 N. C. 377, 15 L. R. A. 668, 28 Am. St. Rep. 693, 14 S. E. 923.

Ohio. Orme v. Baker, 74 Ohio St. 337, 113 Am. St. Rep. 968, 78 N. E. 439; Conant v. Reed, 1 Ohio St. 298; Gaw v. Glassboro Novelty Glass Co., 20 Ohio Cir. Ct. 416, 11 Ohio Cir. Dec. 32; Alt v. Weber, 20 Cinc. L. Bul. 467.

Oregon. Farmers' Bank v. Saling, 33 Ore. 394, 54 Pac. 190.

Pennsylvania. Pottsville Bank v. Minersville Water Co., 211 Pa. 566, 61 Atl. 119; Patterson v. Pittsburg & C. R. Co., 76 Pa. St. 389, 18 Am. Rep. 412; People's Ins. Co. v. Spencer, 53 Pa. St. 353, 91 Am. Dec. 217; Bank of Pittsburgh v. Whitehead, 10 Watts 397, 36 Am. Dec. 186; Boggs v. Lancaster Bank, 7 Watts & S. 331; Harrisburg Bank v. Taylor, 3 Watts & S. 373.

Rhode Island. Petition of Sweet, 20 R. I. 557, 40 Atl. 502.

South Carolina. American Freehold Land Mortg. Co. of London v. Felder,

notice. * * * Where others than the principal and agent are concerned, the presumption that the agent has discharged his duty to his principal in communicating facts of which he has notice, is as conclusive as the presumption that the principal remembers the

44 S. C. 478, 22 S. E. 598; Union Bank v. Wando Min. & Mfg. Co., 17 S. C. 339.

South Dakota. Huron Printing & Bindery Co. v. Kittleson, 4 S. D. 520, 57 N. W. 233.

Tennessee. Merchants' & Planters' Bank v. Penland, 101 Tenn. 445, 47 S. W. 693; Heinz v. Fourth Nat. Bank of Chattanooga (Tenn. Ch. App.), 48 S. W. 133; Winslow v. Harriman Iron Co. (Tenn. Ch. App.), 42 S. W. 698; Nashville & C. R. Co. v. Elliott, 1 Cold. 611, 78 Am. Dec. 506; Myers v. Ross, 3 Head. 59; Union Bank v. Campbell, 4 Humph. 394; Bank of Rome v. Haselton, 15 Lea 216.

Texas. Farmers' & Merchants' State Bank & Trust Co. v. Cole, — Tex. Civ. App. —, 195 S. W. 949; Flynt v. Taylor (Tex. Civ. App.), 94 S. W. 864; Smith v. Boatman Sav. Bank, 1 Tex. Civ. App. 115, 20 S. W. 1119.

Utah. Argentine Min. Co. v. Benedict, 18 Utah 183, 55 Pac. 559.

Vermont. Brink v. Merchants' & Mechanics' Ins. Co., 49 Vt. 442; Hart v. Farmers' & Mechanics' Bank, 33 Vt. 252; Smith v. South Royalton Bank, 32 Vt. 341, 76 Am. Dec. 179; Porter v. Bank of Rutland, 19 Vt. 410.

Virginia. Atlantic Trust & Safe Deposit Co. v. Union Trust & Title Corporation, 111 Va. 574, 69 S. E. 975; Standard Oil Co. v. Wakefield's Adm'r, 102 Va. 824, 66 L. R. A. 792, 47 S. E. 830.

Wisconsin. Kamp v. Cox Bros. & Co., 122 Wis. 206, 99 N. W. 366; Johnson v. First Nat. Bank of Ashland, 79 Wis. 414, 24 Am. St. Rep. 722, 48 N. W. 712; Walker v. Grand Rapids Flouring-Mill Co., 70 Wis. 92, 35 N.

W. 332; Mihills Mfg. Co. v. Camp, 49 Wis. 130, 5 N. W. 1; Bass v. Chicago & N. W. Ry. Co., 42 Wis. 654, 24 Am. Rep. 437; May v. Buckeye Mut. Ins. Co., 25 Wis. 291, 3 Am. Rep. 76; Beal v. Park Fire Ins. Co., 16 Wis. 241, 82 Am. Dec. 719.

England. In re Carew's Estate Act, 31 Beav. 39; Ex parte Agra Bank, 3 Ch. App. 555; Gale v. Lewis, 9 Q. B. 730.

It was the duty of an employee of an electric company to look after the removal of the electric current from houses that were being painted. The knowledge of this employee that painters were at work on a certain house was held knowledge of the corporation and equivalent to notice. Baries v. Louisville Elec. Light Co., 27 Ky. L. Rep. 653, 85 S. W. 1186.

Where a general agent had customarily sent notes of his corporation to the bank for collection, the bank crediting the corporation as collections were made, this course of action continuing for a period of two years, it will be deemed, prima facie, that the corporation had knowledge thereof by reason of the knowledge of its agent. McCormick Harvesting Mach. Co. v. Yankton Sav. Bank, 15 S. D. 196, 87 N. W. 974.

"The defendant, a corporation, is of course chargeable with the knowledge and conduct of its officers intrusted with the transaction of its business as a manufacturer of shoes for the retail trade, as well as with notice of the entries on its books of account. Allen v. Puritan Trust Co., 211 Mass. 409, 97 N. E. 916, L. R. A. 1915 C, 518." Donnelly v. Levers & Sargent Co., — Mass. —, 115 N. E. 252.

facts brought home to him personally.”⁵⁰ As limiting this rule, it must be kept in mind, however, as hereinafter stated, that (1) the person through whom the knowledge is sought to be imputed must actually be the agent of the corporation, at least at the time of acquiring the knowledge or afterwards;⁵¹ (2) that the fact or facts sought to be imputed must be material;⁵² (3) that the knowledge must be acquired while acting officially and within the scope of the duties of the corporate officer or agent, subject to certain exceptions in some jurisdictions as to knowledge acquired before the creation of the agency or while not engaged in the business of the corporation, but where the knowledge is present in the mind of the agent at the time of the transaction in regard to which notice is sought to be imputed;⁵³ (4) that the knowledge must be acquired after the creation of the agency and before its termination, or, as held in some jurisdictions, if it was acquired before the creation of the agency, it must have been in the mind of the agent at the time of the transaction as to which notice is sought to be imputed;⁵⁴ and (5) that the agent must not be adversely interested to the principal.⁵⁵

§ 2216. — “Notice” to corporate officers or agents as distinguished from their “knowledge.” The term “notice” is often used as equivalent to “knowledge,” and vice versa, but in some respects the two are often different. Where “notice” is required to be given by statute, contract or the like, the knowledge of the party to whom it was to have been given is sometimes considered the equivalent of notice, but in many cases it has not the same effect. So far as the effect of “notice to” a corporate officer or agent as against “knowledge of” a corporate officer or agent is concerned, there is no question but that there may be a difference between the effect of “notice” expressly given an officer or agent of a corporation, as binding the corporation, and “knowledge” acquired by such an officer or agent. Doubtless, however, it is unnecessary, for the most part, to distinguish between the two so far as their effect to bind the corporation is concerned; and the courts have almost entirely ignored any such distinction and treat the effect of “notice to” as equivalent to “knowledge of” corporate officers or agents, without in any way noticing that the rule may be different according to whether it is the one or the other.

⁵⁰ *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 160.

⁵¹ See § 2217, *infra*.

⁵² See 1 *Clark & Skyles, Agency*, § 478.

⁵³ See §§ 2218-2225, *infra*.

⁵⁴ See §§ 2222-2225, *infra*.

⁵⁵ See § 2243 *et seq.*, *infra*.

It seems that the only practical difference is this: knowledge casually acquired by an agent affects the principal with notice only in those transactions in which that agent acts for him; but a notice expressly given to an agent, within the scope of his authority, binds the principal as fully as if it were given to the principal directly, whether the agent has communicated the notice or not.⁵⁶ In other words, "notice" may be given to a corporate officer or agent so as to bind the corporation at a time when the officer or agent is not acting in regard to the particular matter to which the notice relates, provided the notice is as to a matter within the scope of the authority of the officer or agent to whom given; while, on the other hand, mere "knowledge" of a corporate officer or agent does not, according to the general rule, bind the company unless it (1) relates to a matter within the scope of the authority of the officer or agent, and, according to some decisions, (2) is obtained at the time and while the officer or agent was engaged in the particular transaction to which it relates.⁵⁷

Applying these rules, it is held that notice given to an officer or agent of a corporation having express or implied authority to receive such notice is notice to the corporation, whether he communicates the same to the corporation or not. For the purpose of the notice he represents the corporation.⁵⁸ So notice to an agent of a corporation relating to

⁵⁶ 1 Morawetz, *Private Corporations* (2nd Ed.), § 540b.

⁵⁷ See §§ 2218, 2223, *infra*.

⁵⁸ *United States*. *Zeis v. Potter*, 105 Fed. 671; *New England Car-Spring Co. v. Union India Rubber Co.*, 4 Blatchf. 1, Fed. Cas. No. 10,153.

Alabama. *Branch Bank at Huntsville v. Steele*, 10 Ala. 915.

California. *Love v. Anchor Raisin Vineyard Co.*, 45 Pac. 1044.

Connecticut. *Smith v. Board Water Com'rs City of Norwich*, 38 Conn. 208.

Delaware. *McKenney v. Diamond State Loan Ass'n*, 8 Houst. 557.

Georgia. *Hobbs v. Georgia Lumber & Turpentine Co.*, 74 Ga. 371; *Bank of St. Mary's v. Mumford*, 6 Ga. 44.

Illinois. *Parmly v. Buckley*, 103 Ill. 115; *Quincy Coal Co. v. Hood*, 77 Ill. 68; *Home Savings & State Bank v. Wheeler*, 74 Ill. App. 261.

Missouri. *Mechanics' Bank v. Schaumburg*, 38 Mo. 228.

New Jersey. *State v. Felton*, 52 N. J. L. 161, 19 Atl. 123; *Ransom v. Brinkerhoff*, 56 N. J. Eq. 149, 38 Atl. 919; *Trenton Banking Co. v. Woodruff*, 2 N. J. Eq. 117.

New York. *Village of Port Jervis v. First Nat. Bank of Port Jervis*, 96 N. Y. 550; *Olcott v. Tioga R. Co.*, 27 N. Y. 546, 84 Am. Dec. 298; *New Hope & D. Bridge Co. v. Phenix Bank*, 3 N. Y. 166; *Conro v. Port Henry Iron Co.*, 12 Barb. 27; *Bank of United States v. Davis*, 2 Hill 451; *Fulton Bank v. New York & S. Canal Co.*, 4 Paige 127.

Oregon. *Dillard v. Olalla Min. Co.*, 52 Ore. 126, 96 Pac. 678, 94 Pac. 966.

Pennsylvania. *Patterson v. Pittsburgh & C. R. Co.*, 76 Pa. St. 389, 18 Am. Rep. 412; *Danville Bridge Co. v. Pomroy*, 15 Pa. St. 151.

Tennessee. *Bank of Rome v. Haseltan*, 15 Lea 216.

Vermont. *Porter v. Bank of Rutland*, 19 Vt. 410.

any matter of which he has the management and control is notice to the corporation.⁵⁹ Of course, a notice given to the board of directors of a corporation is notice to the corporation.⁶⁰ And notice given to a single director officially has been held notice to the corporation.⁶¹ Likewise, notice given to the cashier of a bank, or to the president of a bank or other officer or agent having general supervision and control over the management of its business, or to any other managing officer or agent, as to any matter within the scope of his authority, is notice to the corporation, whether it is communicated to the directors of the corporation or not;⁶² and notice given in the office of the general manager of a corporation, to one in apparent charge in the absence of the manager, is notice to the company.⁶³ Notice sent to the treasurer of a corporation that the writer held certain of its stock as collateral has been held sufficient to charge the corporation with notice thereof.⁶⁴

On the other hand, notice given to an officer or agent of a corporation in relation to a matter which is not within the scope of his duties or authority is not notice to the corporation unless he communicates it to the proper authorities.⁶⁵ And when a formal notice to a corporation is necessary, a notice given to an officer before he became such is not good.⁶⁶

Where notes were signed by a corporation by its president, and

Wisconsin. *Bass v. Chicago & N. W. Ry. Co.*, 42 Wis. 654, 24 Am. Rep. 437.

⁵⁹ *Huber Mfg. Co. of Marion, Ohio v. Blessing*, 51 Ind. App. 89, 99 N. E. 132; *Indiana Union Traction Co. v. Scribner*, 47 Ind. App. 621, 93 N. E. 1014.

⁶⁰ See § 2232, *infra*.

⁶¹ *Boyd v. Chesapeake & O. Canal Co.*, 17 Md. 195, 79 Am. Dec. 646; *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381; *Bank of United States v. Davis*, 2 Hill (N. Y.) 451. See also § 2232, *infra*.

⁶² *Smith v. Board Water Com'rs City of Norwich*, 38 Conn. 208; *Quincy Coal Co. v. Hood*, 77 Ill. 68; *Trenton Banking Co. v. Woodruff*, 26 N. J. Eq. 117; *Village of Port Jervis v. First Nat. Bank of Port Jervis*, 96 N. Y. 550; *New Hope & D. Bridge Co. v. Phenix Bank*, 3 N. Y. 166.

Where the president of a bank is such in name only, and its cashier has entire charge of the business of the bank, service of notice on the cashier by the surety on a note will be deemed service on the bank. *Skillern v. Baker*, 82 Ark. 86, 118 Am. St. Rep. 52, 12 Ann. Cas. 243, 100 S. W. 764.

⁶³ *Canadian Collieries (Dunsmuir), Ltd. v. Humphrey*, 85 Wash. 457, 148 Pac. 573.

⁶⁴ *White River Sav. Bank v. Capital Sav. Bank & Trust Co.*, 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197.

⁶⁵ *Camp v. Southern Banking & Trust Co.*, 97 Ga. 582, 25 S. E. 362; *Goodloe v. Godley*, 13 Smedes & M. (Miss.) 233, 51 Am. Dec. 159; *Bank of Virginia v. Craig*, 6 Leigh (Va.) 399; *Congar v. Chicago & N. W. Ry. Co.*, 24 Wis. 157, 1 Am. Rep. 164.

⁶⁶ *The Admiral*, 18 Law Rep. 91, Fed. Cas. No. 84.

by its secretary and treasurer, and the authority of the latter to sign was admitted, the attorneys for the payee may serve a written notice of intention to file suit and to claim attorney's fees, according to the practice in Georgia, upon the secretary and treasurer.⁶⁷

§ 2217. Necessity for existence of agency. The first question which presents itself, in case of corporations, is whether the person with the knowledge was really an agent. Ordinarily the person having the knowledge or to whom the notice is given must be an officer or other agent of the corporation at the time the knowledge was obtained or the notice given,⁶⁸ subject to certain qualifications recognized in some jurisdictions, as hereinafter stated.⁶⁹

§ 2218. Knowledge obtained outside scope of duties or while not acting officially—Statement of rule. The general rule is that knowledge acquired or possessed by an officer or agent of a corporation otherwise than in the course of his employment, or in relation to a matter which is not within the scope of his authority, is not notice to the corporation.⁷⁰ "This is clear," it was said in a New York

⁶⁷ *Lamar College v. Wells*, 144 Ga. 114, 86 S. E. 223.

⁶⁸ *Bunker v. Manchester Real Estate & Manufacturing Co.*, 75 N. H. 131, 71 Atl. 866.

⁶⁹ See § 2224, *infra*.

⁷⁰ *United States v. American Surety Co. v. Pauly*, 170 U. S. 133, 42 L. Ed. 977; *Craig v. Continental Ins. Co.*, 141 U. S. 638, 35 L. Ed. 886; *Hadden v. Dooley*, 92 Fed. 274, rev'g 84 Fed. 80; *Holm v. Atlas Nat. Bank*, 84 Fed. 119; *Hatch v. Ferguson*, 66 Fed. 668; *In re Dunn*, 53 Fed. 341; *Waynesville Nat. Bank v. Irons*, 8 Fed. 1; *McComb v. Chicago, St. L. & N. O. R. Co.*, 19 Blatchf. 69, 7 Fed. 426.

Alabama. *Frenkel v. Hudson*, 82 Ala. 158, 60 Am. Rep. 736, 2 So. 758; *Reid v. Bank of Mobile*, 70 Ala. 199.

Colorado. *Franklin Min. Co. v. O'Brien*, 22 Colo. 129, 55 Am. St. Rep. 118, 43 Pac. 1016.

Connecticut. *Marsh, Merwin & Lemmon v. Wheeler*, 77 Conn. 449, 107 Am. St. Rep. 40, 59 Atl. 410; *Platt v. Birmingham Axle Co.*, 41 Conn. 255;

Farrel Foundry v. Dart, 26 Conn. 376; *Farmers' & Citizens' Bank v. Payne*, 25 Conn. 444, 68 Am. Dec. 362.

Florida. *Aycock Bros. Lumber Co. v. First Nat. Bank of Dothan*, 54 Fla. 604, 45 So. 501.

Georgia. *Camp v. Southern Banking & Trust Co.*, 97 Ga. 582, 25 S. E. 362.

Illinois. *Chicago, B. & Q. R. Co. v. Hammond*, 210 Ill. 187, 71 N. E. 576; *Seaverns v. Presbyterian Hospital*, 173 Ill. 414, 64 Am. St. Rep. 125, 50 N. E. 1079.

Iowa. *McDonald Mfg. Co. v. Thomas*, 53 Iowa 558, 5 N. W. 737; *Keenan v. Dubuque Mut. Fire Ins. Co.*, 13 Iowa 375.

Kansas. *Wickersham v. Chicago Zinc Co.*, 18 Kan. 481, 26 Am. Rep. 784; *Hart Pioneer Nurseries v. Coryell*, 8 Kan. App. 496, 55 Pac. 514.

Kentucky. *Taylor v. Bank of Kentucky*, 2 J. J. Marsh. 564.

Louisiana. *Louisiana State Bank v. Senecal*, 13 La. 525; *Mercier v. Canonage*, 8 La. Ann. 37.

case, "from the ground and reason upon which the doctrine of notice to the principal through the agent rests. The principal is chargeable with this knowledge for the reason that the agent is substituted in his place, and represents him in the particular transaction; and as this relation, strictly speaking, exists only while the agent is acting

Maine. *Fairfield Sav. Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 319.

Maryland. *Gemmell v. Davis*, 75 Md. 546, 32 Am. St. Rep. 412, 23 Atl. 1032; *Brown v. Bankers' & Brokers' Tel. Co.*, 30 Md. 39; *General Ins. Co. v. United States Ins. Co.*, 10 Md. 517, 69 Am. Dec. 174; *Winchester v. Baltimore & S. R. Co.*, 4 Md. 231; *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381.

Massachusetts. *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 716, 1 N. E. 282; *National Security Bank v. Cushman*, 121 Mass. 490; *Housatonic Bank v. Martin*, 1 Mete. 308.

Michigan. *Stevenson v. Bay City*, 26 Mich. 44; *Great Western Ry. of Canada v. Wheeler*, 20 Mich. 419.

Minnesota. *Ft. Dearborn Nat. Bank of Chicago v. Seymour*, 71 Minn. 81, 73 N. W. 724; *Dorr v. Life Ins. Clearing Co.*, 71 Minn. 38, 70 Am. St. Rep. 309, 73 N. W. 635.

Mississippi. *Goodloe v. Godley*, 13 Smedes & M. 233, 51 Am. Dec. 159.

Missouri. *Kearney Bank v. Froman*, 129 Mo. 427, 50 Am. St. Rep. 456, 31 S. W. 769; *Merchants' Nat. Bank of Kansas City v. Lovitt*, 114 Mo. 519, 35 Am. St. Rep. 770, 21 S. W. 825; *Johnston v. Shortridge*, 93 Mo. 227, 6 S. W. 64; *Mechanics' Bank v. Schaumburg*, 38 Mo. 228.

Montana. *Helena Nat. Bank v. Rocky Mountain Tel. Co.*, 20 Mont. 379, 63 Am. St. Rep. 628, 51 Pac. 829.

Nebraska. *State Bank of O'Neill v. Mathews*, 45 Neb. 659, 50 Am. St. Rep. 565, 63 N. W. 930; *Koehler v. Dodge*, 31 Neb. 328, 28 Am. St. Rep. 518, 47 N. W. 913; *Nehawka Bank v.*

Ingersoll, 2 Neb. (Unoff.) 617, 89 N. W. 618.

New Hampshire. *Bohanan v. Boston & M. E. R.*, 70 N. H. 526, 49 Atl. 103.

New Jersey. *Hartdorn v. Webb Mfg. Co. (N. J. L.)*, 75 Atl. 893; *Graham v. Orange County Nat. Bank*, 59 N. J. L. 225, 35 Atl. 1053; *Canada Mfg. Co. v. Inhabitants of Woodbridge Township*, 58 N. J. L. 134, 32 Atl. 66; *First Nat. Bank of Hightstown v. Christopher*, 40 N. J. L. 435, 29 Am. Rep. 262; *Vulcan Detinning Co. v. American Can. Co.*, 70 N. J. Eq. 588, 62 Atl. 881; *Willard v. Denise*, 50 N. J. Eq. 482, 35 Am. St. Rep. 788, 26 Atl. 29; *Stratton v. Allen*, 16 N. J. Eq. 229.

New Mexico. *Wells, Fargo & Co.'s Express v. Walker*, 9 N. M. 456, 54 Pac. 875.

New York. *Merchants' Nat. Bank of Gardner v. Clark*, 139 N. Y. 314, 36 Am. St. Rep. 710, 34 N. E. 910; *Casco Nat. Bank of Portland v. Clark*, 139 N. Y. 307, 36 Am. St. Rep. 705, 34 N. E. 908; *Constant v. Rochester University*, 111 N. Y. 604, 2 L. R. A. 734, 7 Am. St. Rep. 769, 19 N. E. 631; *New York v. Tenth Nat. Bank*, 111 N. Y. 446, 18 N. E. 618; *Miller v. Illinois Cent. R. Co.*, 24 Barb. 312; *Bank of United States v. Davis*, 2 Hill 451; *National Bank v. Norton*, 1 Hill 572.

North Dakota. *Red River Valley Land & Investment Co v. Smith*, 7 N. D. 236, 74 N. W. 194.

Ohio. *Greeley Bros. Co. v. Zeithaml*, 25 Ohio Cir. Ct. 451; *Alt v. Weber*, 20 Cinc. L. Bul. 467.

Pennsylvania. *Bard v. Penn Mut.*

in the business thus delegated to him, it is proper to limit it to such occasions." ⁷¹ "If notice to an agent is relied upon, it must be to an agent who is acting within the scope of his authority, and must concern some matter which it is his duty to communicate to his principal." ⁷² In this connection it is said by Professor Mechem that "an agent may be put forward for the express purpose of receiving notice, or be referred to as the one to whom notice may be given, and in such a case, of course, no further evidence of authority to receive it would be required. An agent may also be put in such a position of general authority, in such a managerial or directing situation,—as in the case of the chief officer of a corporation or of an individual, that notice to him will be notice to his principal because it must be deemed within his authority to receive it, even though he never personally acts in respect of the matters to which the notice relates. But in other cases, notice binds the principal because the receipt of

Fire Ins. Co., 153 Pa. St. 257, 34 Am. St. Rep. 704, 25 Atl. 1124; **Houseman v. Girard Mut. Building & Loan Ass'n**, 81 Pa. St. 256; **Inland Insurance & Deposit Co. v. Stauffer**, 33 Pa. St. 397; **Wilson v. McCullough**, 23 Pa. St. 440, 62 Am. Dec. 347; **Custer v. Tompkins County Bank**, 9 Pa. St. 27.

South Carolina. **Knobelock v. Germania Sav. Bank**, 50 S. C. 259, 27 S. E. 962.

South Dakota. **National Bank of Commerce of Pierre v. Feeney**, 9 S. D. 550, 46 L. R. A. 732, 70 N. W. 874.

Tennessee. **Smith v. Carmack**, 64 S. W. 372; **Memphis Nat. Bank v. Sneed**, 97 Tenn. 120, 34 L. R. A. 274, 56 Am. St. Rep. 788, 36 S. W. 716; **Lambreth v. Clarke**, 10 Heisk. 32.

Texas. **Texas Banking & Insurance Co. v. Hutchins**, 53 Tex. 61, 37 Am. Rep. 750; **Grayson County Nat. Bank v. Hall** (Tex. Civ. App.), 91 S. W. 807; **Taylor v. Callaway**, 7 Tex. Civ. App. 461, 27 S. W. 934; **Mathis v. Pridham**, 1 Tex. Civ. App. 58, 20 S. W. 1015.

Utah. **Victor Gold & Silver Min. Co. v. National Bank**, 15 Utah 391, 49 Pac. 826.

Virginia. **Bank of Virginia v. Craig**, 6 Leigh 399.

Washington. **Washington Nat. Bank v. Pierce**, 6 Wash. 491, 36 Am. St. Rep. 174, 33 Pac. 972.

Wisconsin. **Congar v. Chicago & N. W. Ry. Co.**, 24 Wis. 157, 1 Am. Rep. 164.

England. **Powles v. Page**, 3 C. B. 16.

Rule applied to state agent of insurance company. **Jackson v. Mutual Ben. Life Ins. Co.**, 79 Minn. 43, 82 N. W. 366, 81 N. W. 545.

An employee of a railway was charged with the duty of cleaning, waiting on and keeping up the fires in the waiting room in one of the railway's depots. The evidence failed to show that he exercised any authority over the depot or that looking after the safety and comfort of the passengers was any part of his duties. The court held that notice to the employee of the infliction of injury on a passenger in the said depot was not notice to the corporation. **Tate v. Illinois Cent. R. Co.**, 26 Ky. L. Rep. 309, 341, 81 S. W. 256.

⁷¹ **Bank of United States v. Davis**, 2 Hill (N. Y.) 451.

⁷² **Robertson Lumber Co. v. Anderson**, 96 Minn. 527, 105 N. W. 972.

it can be deemed to be an incident to the act which the agent is authorized to perform, and it can not be notice unless it is such an incident. In other words, the knowledge or notice must come to an agent who has authority to deal in reference to those matters which the knowledge or notice affects, and whose duty it therefore is to communicate it to his principal. The fact that some other agent, employed in reference to different and distinct transactions, may have had notice or knowledge will not affect the principal."⁷³

Many cases are disposed of by the courts, in holding that knowledge was not imputable to the corporation in the particular case, by merely stating that the knowledge was acquired in a transaction outside the scope of the powers and duties of the officer or agent claimed to possess the knowledge,⁷⁴ or by stating that it was acquired when not acting for the corporation but while acting individually for himself.⁷⁵ Both of these alternatives are in effect acts beyond the scope of authority since in the latter case if the officer or agent is acting for himself he certainly cannot be said to be acting within the scope of his authority. A corporate officer or agent, when acting for himself in his private capacity, may or may not act adversely to the interests of the corporation. If he is dealing with the corpora-

⁷³ 2 Mechem, Agency (2nd Ed.), § 1831.

⁷⁴ See supra, this section.

⁷⁵ *United States*. *Reed v. Munn*, 148 Fed. 737, 754.

Colorado. *National Fire Ins. Co. v. Denver Consol. Elec. Co.*, 16 Colo. App. 86, 63 Pac. 949.

Florida. *Aycock Bros. Lumber Co. v. First Nat. Bank of Dothan*, 54 Fla. 604, 45 So. 501.

Iowa. *Chaffee v. Berkley*, 118 N. W. 267.

Kansas. *First Nat. Bank of Arkansas City v. Skinner*, 10 Kan. App. 517, 62 Pac. 705.

Missouri. *Goodwin v. Columbia Tel. Co.*, 157 Mo. App. 596, 138 S. W. 940; *Penfield Inv. Co. v. Bruce*, 132 Mo. App. 257, 111 S. W. 888. Compare *Vandagriff v. Bates County Inv. Co.*, 144 Mo. App. 77, 128 S. W. 1007, holding rule not applicable where all the officers of a corporation have the same knowledge of a fact.

Texas. *Teagarden v. R. B. Godley Lumber Co.*, 105 Tex. 616, 154 S. W. 973, aff'g — *Tex. Civ. App.* —, 135 S. W. 1109; *Grayson County Nat. Bank v. Hall* (*Tex. Civ. App.*), 91 S. W. 807.

Knowledge acquired as an individual and not as a corporate officer or agent is not imputed to the corporation. *Curtice v. Crawford County Bank*, 110 Fed. 880.

"The prevailing rule upon this subject in the federal courts is that notice to an officer of a corporation is not such notice to the corporation as to affect its rights, unless such notice or knowledge of the officer is in regard to a matter coming within the sphere of his duty while attending to the business of the company, and acquired while acting in regard to the same." *McDermott v. Hayes*, 197 Fed. 129, rev'g on other grounds 194 Fed. 902.

tion as the other party to the contract, then, of course, his interests are adverse to those of the corporation; but if he is dealing on his own account, entirely independent of corporate affairs, with a third person, his interests are not necessarily adverse to those of the corporation so as to bring the case within the rule as to adverse interest hereafter stated.⁷⁶

§ 2219. — Further classification. The courts for the most part content themselves with such general statements, without further analysis of the question. However, a more complete analysis is helpful. First, knowledge acquired in the course of corporate business but beyond the scope of the authority of the particular officer or agent conducting the business or entirely beyond the scope of the powers of the corporation.

Second, knowledge acquired casually outside of business hours or otherwise by a corporate officer or agent, when no corporate business was being transacted.⁷⁷ In this connection, the following instruction has been approved: "You are further instructed that knowledge obtained by an officer of a corporation in his private or social affairs is not imputed to the corporation, and is not the knowledge of that corporation, unless such knowledge was present and in the mind of the officer while transacting the corporation's business, or such knowledge was communicated to the officer under such circumstances as to lead a reasonable person to conclude that such knowledge must have been present to his mind and memory when transacting the corporation's business."⁷⁸

Third, knowledge obtained in connection with a transaction with third persons in which the corporate officer or agent does not even pretend to represent the corporation but instead is acting individually.⁷⁹ Individual knowledge of an officer of a corporation, acquired

⁷⁶ See § 2245, *infra*.

⁷⁷ Knowledge of a foreman of an injury to an employee is not notice to the corporation where acquired while acting for himself and not for the corporation. *Frankfort Marine, Accident & Plate Glass Ins. Co. v. John B. Stevens & Co.*, 220 Fed. 77, where foreman called at home of employee in the evening and after working hours.

Rule applied to notice given to secretary of insurance company, on the

street, by third person, of facts increasing an insured risk. *Texas Banking & Insurance Co. v. Hutchins*, 53 Tex. 61, 69, 37 Am. Rep. 750.

⁷⁸ *Oliver v. Grande Ronde Grain Co.*, 72 Ore. 46, 142 Pac. 541. See also *Farmers' Bank v. Saling*, 33 Ore. 394, 406, 54 Pac. 190.

⁷⁹ "There is no doubt whatever that, where the information, acquired in the course of a previous transaction to which the corporation is a stranger, is not present to the director's mind,

in the transaction of his own business, while dealing as if he had no official relation to the corporation, is not imputable to the corporation.⁸⁰ This rule applies equally well to officers of a bank.⁸¹ If the president of a corporation acquires knowledge while dealing in his private capacity and in his own behalf with third persons, it is not imputable to the company.⁸²

Fourth, knowledge acquired while acting as agent for another.⁸³ Whether knowledge acquired by the cashier of a bank while he was acting as agent for another was notice to the bank has been held, in California, to depend "upon whether the previous transaction was present in his mind at the time the loan was made by the bank";⁸⁴ and the same rule was applied in a later case in that state to the president of a bank.⁸⁵ So it has been held that notice acquired as bookkeeper of a firm, of dissolution of the firm, is not imputable to a bank, although he was assistant cashier and bookkeeper of such bank, where notice was not acquired while working for the bank.⁸⁶

Fifth, knowledge obtained in connection with a transaction between the corporate officer or agent, as an individual, and the corporation,

it does not affect the company." *Asbury Park Building & Loan Ass'n v. Shepherd* (N. J. Eq.), 50 Atl. 65.

Where the information has been acquired in a previous transaction in which the corporation had no part, and is not present in the directors' minds at the time at which the corporation is sought to be charged with knowledge, the general rule imputing to a corporation knowledge of its officers does not apply. *Asbury Park Building & Loan Ass'n v. Shepherd* (N. J. Eq.), 50 Atl. 65.

⁸⁰ *Bruce v. Citizens' Nat. Bank of Lineville*, 185 Ala. 221, 64 So. 82.

⁸¹ *Perry Naval Stores Co. v. Caswell*, 63 Fla. 552, 57 So. 660.

⁸² *People's Bank of Talbotton v. Exchange Bank*, 116 Ga. 820, 94 Am. St. Rep. 144, 43 S. E. 269.

⁸³ Knowledge acquired while acting as officer or agent of another company is not imputable. *Union State Bank of Shawnee, Oklahoma v. First Nat. Bank of Huntsville, Arkansas*, 122 Ark. 612, 184 S. W. 411.

"The fact, that Brown was president of the safe deposit company and also treasurer of the railway company, and that he had, as president, personal knowledge of the insolvency of the safe deposit company, does not make that knowledge imputable to the railway company. He did not control the money of the railway company, nor cause it to be deposited in the safe deposit company, nor have power to do so. That matter was controlled by the latter's board of directors. The duties of Brown as treasurer of the railway company gave him no knowledge of the insolvency of the safe deposit company. His knowledge was not communicated to the former, and therefore cannot be charged to it." *Utah Const. Co. v. Western Pac. R. Co.*, 174 Cal. 156, 162 Pac. 631.

⁸⁴ *Christie v. Sherwood*, 113 Cal. 526, 45 Pac. 820.

⁸⁵ *Cooke v. Mesmer*, 164 Cal. 332, 128 Pac. 917.

⁸⁶ *Morris v. First Nat. Bank of Samson*, 162 Ala. 301, 50 So. 137.

in which case the rule as to adverse interest, hereinafter noticed, governs.⁸⁷

§ 2220. — Applications of rule. Applications of these rules are of little value, for the most part, since if the rule be conceded, the application of it presents very little if any difficulty.⁸⁸ Knowledge acquired by the director of a bank in his private capacity and not while acting for or on behalf of the bank, is not imputable to the bank.⁸⁹ So knowledge of a bank president not in active management, acquired while acting in matters apart from the interests of the bank, that a stockholder has made a pledge of his stock to a third party, is not notice to the bank in matters affecting the priority of its lien over the lien of a third party.⁹⁰ Notice to the president of a bank in regard to a matter in which the bank was acting as a mere stakeholder and had no interest, and which he therefore was under no duty to communicate to the bank, is not imputable to the bank.⁹¹ Where an officer having full power to represent the corporation in a particular matter, refers a third person to another, according to custom, knowledge of the latter acquired in connection with such transaction is imputable to the bank.⁹² Notice to an employee of a bank will not be deemed notice to the bank in the absence of evidence as to the scope of the authority of such employee.⁹³ This general rule is held to apply even though the officer obtaining the knowledge was, at the time, the managing agent of the corporation.⁹⁴

On the other hand, if knowledge is acquired in the course of one's duty as to a matter in connection with a transaction, the notice is imputed to the corporation some time later when engaged in a connected transaction, although the officer or agent acquiring the information and conducting the first transaction had nothing to do with the second transaction. For instance, knowledge of the president of a bank acquired in the course of his duty, as to a pledge

⁸⁷ See §§ 2243-2253, *infra*.

⁸⁸ Where a note is discounted not by the board of directors, but by the president himself without authority from the board, the corporation is not chargeable with the knowledge of the president. *Lanning v. Johnson*, 75 N. J. L. 259, 69 Atl. 490.

⁸⁹ *First Denton Nat. Bank v. Kenney*, 116 Md. 24, Ann. Cas. 1913 B 1337, 81 Atl. 227.

⁹⁰ *Curtice v. Crawford County Bank*, 110 Fed. 830.

⁹¹ *Organized Charities Ass'n v. Mansfield*, 82 Conn. 504, 508, 135 Am. St. Rep. 285, 74 Atl. 781.

⁹² *Zeis v. Potter*, 105 Fed. 671.

⁹³ *Marsh, Merwin & Lemmon v. Wheeler*, 77 Conn. 449, 107 Am. St. Rep. 40, 59 Atl. 410.

⁹⁴ *Gregmoore Orchard Co. v. Gilmour*, 159 Mo. App. 204, 140 S. W. 763.

of stock, charges the bank with notice thereof in connection with a loan to the pledgor some two years later, although the president had nothing to do with the loan.⁹⁵

§ 2221. — Qualification of rule where agent subsequently acts in regard to matter concerning which he obtained knowledge outside the scope of his duties. However, what is said in a subsequent section in regard to the effect of knowledge acquired before the creation of the agency is equally applicable to knowledge acquired at a time when the corporate agent is not acting as such or when not acting within the scope of his authority.⁹⁶ The rule now adopted in most jurisdictions is this: "Any knowledge or information possessed by an agent at the time of acting as agent for a corporation, with respect to the matter upon which he is to act, is notice to the corporation, whenever and however such knowledge or information may have been acquired, except in cases where express formal notice is required to charge the principal. The point to be regarded is whether the agent actually had the knowledge or information at the time of acting. There is no practical distinction between individual knowledge and official knowledge in such cases."⁹⁷ In other words, if knowledge is acquired by an agent while not acting for the corporation, but afterwards he acts for the corporation in a matter in which it becomes his duty to communicate the fact, his knowledge is imputed to the corporation. This rule has been applied to certain directors who acted at a board meeting, where the jury had a right to infer from the circumstances that such directors remembered at the board meeting certain information formerly acquired.⁹⁸ In Tennessee, it was conceded that where an agent obtains knowledge while acting for his principal and thereafter fails to communicate his knowledge when acting further for his principal, the principal was bound as fully as if the communication had actually been made, but it was contended that the rule was otherwise where the knowledge of the agent was obtained while acting for himself. Chief Justice Nicholson, in delivering the opinion of the court said, in regard to the latter proposition: "Why, then, if the agent, in acting for himself, becomes possessed of knowledge as to a transaction which affects his principal, is he not bound to communicate that knowledge when it becomes his duty afterward to act in his agency in reference to the very transaction about which he obtained

⁹⁵ *Curtice v. Crawford County Bank*, 118 Fed. 390. 36 Am. Dec. 188, 190, and see *supra*, two preceding sections.

⁹⁶ See § 2224, *infra*.

⁹⁸ *Union Bank v. Campbell*, 4

⁹⁷ Note by Mr. A. C. Freeman in *Humph. (Tenn.)* 394.

knowledge that would affect his principal. In each case he is under all the obligations of an agent, and in each case he has knowledge which involves the interest of his principal. Surely there is no reason why the obligation to disclose his knowledge is not as strong when he derives that knowledge in a transaction for his own benefit, as in a transaction for the benefit of his principal." Continuing, the whole matter is summed up by stating that "knowledge" in an agent, "when acting for his principal, is notice to the principal, however that knowledge may have been acquired. The material fact, therefore which binds the principal, is the 'knowledge' which the agent possesses when he comes to act, and the principal is bound in such case whether the knowledge is communicated or not, and without regard to the manner in which the agent acquires his knowledge."⁹⁹ Professor Mechem states that the question depends upon the considerations as to whether (1) the officer is such a general managerial one that notice to him is notice to the corporation merely by virtue of his position, and (2) whether, although the knowledge is not imputable per se, it becomes notice because the agent afterward acts with reference to the subject-matter with the knowledge present in his mind. Continuing, he says: "Suppose an agent, who regularly and habitually acts, during business hours, with reference to a certain subject, during the evening, while away from his place of business and at his home or in some social gathering, receives in his 'private and individual capacity' information pertinent and material to the subject upon which he has been acting during the day and upon which he resumes action at the opening of business on the morrow, with this information actually in his mind, would it be contended, under either rule, that this information would not be imputed to his principal?"¹ In New Jersey, the rule that "the knowledge of the agent is chargeable upon his principal whenever the principal, if acting for himself, would have received notice of the matters known to the agent," as laid down in an early case,² has been held, in a comparatively recent case, to be "the rule to be applied whenever the presumption of imputed knowledge becomes pertinent to the rights or remedies of litigating parties,"³ rather than the rule laid down in another case that "where information is casually ob-

⁹⁹ *Tagg v. Tennessee Nat. Bank*, 9 Heisk. (Tenn.) 479, 483, approving *Union Bank v. Campbell*, 4 Humph. (Tenn.) 394.

¹ 2 Mechem, Agency (2nd Ed.), § 1848.

² *Sooy v. State*, 41 N. J. L. 394.

³ *Vulcan Detinning Co. v. American Can Co.*, 72 N. J. Eq. 387, 12 L. R. A. (N. S.) 102, 67 Atl. 339.

tained by an agent of a corporation, the corporation is not charged with notice from the mere fact of its agent's knowledge; but, if the corporation acts through such agent in a matter where the information possessed by him is pertinent, the knowledge of the agent will be imputed to the principal."⁴

§ 2222. Time of obtaining knowledge or receiving notice—General rules. The decisions are in conflict as to whether information obtained before a person became an officer or agent is imputable to the company after he has become such officer or agent, and this conflict extends to other like cases. There are several sets of facts in this connection, all of which are governed by the same rules of law. First, the fact may be that knowledge was acquired or notice given by or to one who was not a corporate agent at the time but who afterwards became such and acted in a matter where such information was material.⁵ Second, the fact may be that the information was obtained while the agent was acting for himself or outside the scope of his duties; but afterwards it becomes material in a transaction wherein the agent acts within the scope of his powers.⁶ Third, the fact may be that the information was obtained while acting, within the scope of his powers, but in a different transaction from the one to which the information relates, but afterwards the agent acts in connection with the transaction to which the information relates.⁷ Generally, except as hereinafter stated, notice to, or knowledge of, corporate officers or agents, in order to be imputable to the corporation, must have been received or acquired during the existence of the agency⁸ and while acting in the particular transaction to which the notice or knowledge relates.⁹ However, according to the better rule and the decided weight of authority, knowledge "possessed" by an agent while he occupies that relation and is executing the authority conferred upon him, as to matters within the scope of his authority, is notice to his principal, although such knowledge was acquired (1) before the agency was created,¹⁰ or (2) while acting in a transaction not related to or connected with the subject-matter of the information,¹¹ or (3) while acting outside the scope of his duties or personally for himself, or merely when not acting for

⁴ Willard v. Denise, 50 N. J. Eq. 482, 483, 35 Am. St. Rep. 788, 26 Atl. 29.

⁵ See § 2224, *infra*.

⁶ See § 2221, *supra*.

⁷ See §§ 2221, 2223, *infra*.

⁸ See § 2217, *supra*, and § 2224, *infra*.

⁹ See § 2223, *infra*.

¹⁰ See § 2224, *infra*, and see generally 1 Clark & Skyles, Agency, § 481.

¹¹ See § 2223, *infra*.

the corporation, as when off duty.¹² In all of these cases, however, the majority rule is subject to the following qualifications: Knowledge acquired is not notice unless it is shown, or appears that the knowledge was present in the mind of the agent at the time he acted for the principal; but if the agent acquired the knowledge so recently, and the fact was of such a nature as to make it incredible that he should have forgotten it, the principal will be bound, at least unless it is affirmatively shown that the agent had forgotten it.¹³

§ 2223. — Necessity that knowledge be obtained while acting in particular transaction. It is sometimes said that the knowledge of an agent, in order to be imputable to the principal, must be received during the course of the particular transaction.¹⁴ This rule seems to have been assumed as unquestioned law by Lord Chancellor Hardwicke in 1745,¹⁵ but in 1838, in England, it was said that notice received by the agent in another transaction should not affect the principal unless the agent actually had the knowledge at the time of the second transaction.¹⁶ In this country, the Supreme Court of the United States adopted this modification in a case decided in 1870.¹⁷ In Pennsylvania, however, the rule still is that knowledge of the president acquired outside the particular transaction which it affects and to which his authority extends, is not imputable to the corporation.¹⁸ This old rule is, however, seldom strictly applied, and is generally rejected.¹⁹ Thus, in a Missouri case, it was unsuccessfully con-

¹² See § 2218, *supra*.

¹³ 2 Mechem, Agency (2nd Ed.), §§ 1808-1810; 1 Clark & Skyles, Agency, § 482a.

¹⁴ Congar v. Chicago & N. W. Ry. Co., 24 Wis. 157, 1 Am. Rep. 164.

¹⁵ Warrick v. Warrick, 3 Atk. 291, 294.

¹⁶ Nixon v. Hamilton, 2 Dr. & Wal. 364.

¹⁷ The Distilled Spirits, 11 Wall. (U. S.) 356, 20 L. Ed. 167.

¹⁸ Bangor & P. Ry. Co. v. American Bangor Slate Co., 203 Pa. 6, 52 Atl. 40, reviewing question at length.

¹⁹ "It is generally accepted doctrine that the private individual knowledge of the officer of a corporation, acquired in the transaction of his own business, while dealing as if he had no official relation to the cor-

poration, will not operate as notice to the corporation. *Bruce v. Citizens' National Bank*, 185 Ala. 221, 64 South. 82. As president and director, West was an active officer and agent of the appellant bank; not as active perhaps as he might or should have been, but an officer and agent who had duties to perform in respect to the business of the bank and in part at least performed them, and through him notice was chargeable to the bank. The communications between Lamar, West, and Mann on the subject of Mann's indebtedness to the bank at Pensacola, of which Lamar was at the time president, and his pledge of his Florala bank stock to secure the same, concerned a matter in which the Bank of Florala was interested, viz. the ownership of its stock, and was prima

tended that notice to an agent of an insurance company could not operate as notice to the company unless received while he was actually engaged in the transaction of the very business to which the notice related or unless it was shown that it was communicated by the agent to the company.²⁰ In New York, the Court of Appeals held in 1878 that "where the agency is continuous, and concerned with a business made up of a long series of transactions of a like nature, of the same general character, it will be held that knowledge acquired as agent in that business in any one or more of the transactions, making up from time to time the whole business of the principal, is notice to the agent and to the principal, which will affect the latter in any other of those transactions in which that agent is engaged, in which that knowledge is material."²¹ In a later New York Court of Appeals decision, Justice Andrews said that "the general rule is well established that notice to an agent of a bank, or other corporation intrusted with the management of its business, or of a particular branch of its business, is notice to the corporation, in transactions conducted by such agent, acting for the corporation, within the scope of his authority, whether the knowledge of such agent was acquired in the course of the particular dealing, or on some prior occasion."²² It is to be noted, however, that the rule as thus stated is limited by its language to notice to the general or branch manager of a corporation.

§ 2224. — Knowledge acquired before creation of agency. In some of the cases it has been held that notice to or knowledge acquired by an officer or agent of a corporation before he becomes such

facie within the scope and line of West's duty and authority at the time to know. Notwithstanding it is the general rule, applicable alike to individuals and to corporations, that the knowledge acquired, or the notice received by an agent, which will affect and bind the principal, must have been acquired or received by the agent acting within the line and scope of his duty and authority, Judge Thompson has well observed in his work on Corporations, § 1647, that: "There is no rule of law requiring the person communicating the notice to wait until he can catch the agent acting about the particular business to which the notice relates, in order to

charge his principal. If such were the rule, the cases would be very few indeed in which notice could ever be communicated by a stranger to a corporation." *Bank of Florida v. American Nat. Bank of Pensacola*, — Ala. —, 75 So. 310.

²⁰ *Hayward v. National Ins. Co.*, 52 Mo. 181, 14 Am. Rep. 400.

²¹ Per Justice Folger in *Holden v. New York & E. Bank*, 72 N. Y. 286, 292. For lengthy review of question, see *Constant v. University of Rochester*, 111 N. Y. 604, 2 L. R. A. 734, 7 Am. St. Rep. 769, 19 N. E. 631.

²² *Cragie v. Hadley*, 99 N. Y. 131, 134, 52 Am. Rep. 9, 1 N. E. 537.

is not notice to the corporation after he becomes such, or, in other words, that he must acquire the knowledge while the relation exists.²³ This is the rule in Pennsylvania where it is said that "notice" to an agent "twenty-four hours before the relation commenced is no more notice than twenty-four hours after it has ceased would be."²⁴ This is also the rule in Alabama subject to the exception that "if the jury find that the knowledge was present in the agent's mind during the execution of the agency, then they must find as matter of law that the principal was duly informed, unless they are reasonably satisfied to the contrary from other evidence before them;"²⁵ but even in that state the rule does not apply where the agent is the sole manager and practically the sole stockholder, and was jointly interested in the transaction.²⁶

This, however, is contrary to the weight of authority. According to the better opinion and the decided weight of authority, any knowledge "possessed" by an officer of a corporation as to matters within the scope of his authority, while he occupies such relation, is notice to the corporation, whensoever it may have been acquired.²⁷ "The existence of knowledge in an agent, when acting for his principal, is

²³ *Houseman v. Girard Mnt. Building & Loan Ass'n*, 81 Pa. St. 256. See also *The Admiral*, 18 Law Rep. 91, Fed. Cas. No. 84; *John T. Moore Planting Co. v. Morgan's Louisiana & T. R. & S. S. Co.*, 126 La. 840, 53 So. 22.

See, generally, 2 *Mechem, Agency* (2nd Ed.), § 1808; 1 *Clark & Skyles, Agency*, § 480.

Knowledge of a stockholder or director prior to the time a corporation is organized will not ordinarily be deemed knowledge of the corporation. *Reed v. Munn*, 148 Fed. 737. Notice given before the organization of a corporation to one afterwards becoming an officer or agent or stockholder of the company is not notice to the corporation. *Brennan v. Emery-Bird-Thayer Dry-Goods Co.*, 99 Fed. 971.

²⁴ *Houseman v. Girard Mut. Building & Loan Ass'n*, 81 Pa. St. 256.

²⁵ *Hall & Brown Woodworking Mach. Co. v. Haley Furniture & Man-*

ufacturing Co., 174 Ala. 190, 56 So. 726, overruling on this point *Lea v. Iron Belt Mercantile Co.*, 147 Ala. 421, 8 L. R. A. (N. S.) 279, 119 Am. St. Rep. 93, 42 So. 415.

²⁶ *Lea v. Iron Belt Mercantile Co.*, 147 Ala. 421, 8 L. R. A. (N. S.) 279, 119 Am. St. Rep. 93, 42 So. 415.

Where an officer is to all practical intents and purposes the alter ego of the corporation, and has absolute control over the corporate affairs, knowledge possessed by him prior to the existence of his agency may be imputed to the corporation. *Lea v. Iron Belt Mercantile Co. (Ala.)*, 42 So. 415.

²⁷ *Connecticut. Bridgeport Bank v. New York & N. H. R. Co.*, 30 Conn. 231.

Illinois. Snyder v. Partridge, 138 Ill. 173, 32 Am. St. Rep. 130, 29 N. E. 851, rev'g 38 Ill. App. 228.

Maine. Fairfield Sav. Bank v. Chase, 72 Me. 226, 39 Am. Rep. 319.

Missouri. George v. Wabash Western Ry. Co., 40 Mo. App. 433.

notice to the principal, however that knowledge may have been acquired.”²⁸ This does not apply, of course, where an express or formal notice is necessary to charge the corporation. Furthermore, a corporation is not chargeable with notice because of knowledge acquired by an officer or agent before he became such, unless the knowledge is shown to have been present in his mind at the time of his acting for the corporation, or unless the circumstances, including the time which had elapsed since he acquired the knowledge, are such that this can be presumed.²⁹

§ 2225. — Knowledge acquired after termination of agency. It is elementary that a principal is not charged with information received by an agent after the termination of his agency; and this rule applies equally well to information obtained by a corporate officer or agent after he has ceased to be such officer or agent.

§ 2226. Effect of subsequent termination of office or agency of person having knowledge. “The rule is that a bank or other corporation, being once charged with notice of the character of a transaction, continues to be affected by such notice whatever changes may occur in the personnel of its working force.”³⁰ In other words, if notice to or knowledge of a corporate officer is such as to be imputable to the corporation, the subsequent death, discharge, removal,

New Jersey. Willard v. Denise, 50 N. J. Eq. 482, 35 Am. St. Rep. 788, 26 Atl. 29.

New York. Cragie v. Hadley, 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537.

Tennessee. Tagg v. Tennessee Nat. Bank, 9 Heisk. 479; Union Bank v. Campbell, 4 Humph. 394.

Vermont. Hart v. Farmers' & Mechanics' Bank, 33 Vt. 252.

“The safer and better rule” is that “the knowledge of an agent, obtained prior to his employment as agent, will be an implied or imputed notice to the principal, under certain limitations and conditions, which are these: The knowledge must be present to the mind of the agent when acting for the principal, so fully in his mind that it could not have been at the time forgotten by him; the knowledge or notice must be of a matter so material to the transaction as to make it the

agent's duty to communicate the fact to his principal; and the agent must himself have no personal interest in the matter which would lead him to conceal his knowledge from his principal, but must be at liberty to communicate it.” *Fairfield Sav. Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 319.

²⁸ *Union Bank v. Campbell*, 4 Humph. (Tenn.) 394.

²⁹ *Red River Valley Land & Investment Co. v. Smith*, 7 N. D. 236, 74 N. W. 194. And see *Dorr v. Life Ins. Clearing Co.*, 71 Minn. 38, 70 Am. St. Rep. 309, 73 N. W. 635.

For consideration of this phase of the question as applied to agents in general, see 2 Mechem, *Agency* (2nd Ed.), §§ 1809-1811; 1 Clark & Skyles, *Agency*, §§ 481-483.

³⁰ *United States Nat. Bank v. Forstедt*, 64 Neb. 855, 90 N. W. 919.

termination of office or the like, without any actual communication of the information to the corporation, does not affect the force of the imputation of notice.³¹ Thus, notice to a corporate officer of the incompetency of a servant is imputed to a corporation so as to make it liable for injuries to a fellow-servant resulting from such incompetency, notwithstanding that, at the time of the injury, the officer to whom the notice was given was dead or had left the employ of the company.³² A fortiori, notice to the board of directors of a fact, at the time of a transaction in regard thereto, is notice to the corporation, and no subsequent change of directors can require a new notice of such fact.³³

In Michigan, however, there is a decision which apparently sustains a contrary rule, although perhaps susceptible of explanation which will reconcile the seeming conflict.³⁴

§ 2227. Constructive notice to officer or agent as equivalent to actual knowledge or notice. Constructive notice, as well as actual knowledge, imputed to an officer or agent of the corporation is binding on the corporation. In other words, a corporation is chargeable with knowledge not only where its officer or agent has actual knowledge or notice but also where the circumstances are such as to put the officer or agent upon inquiry and charge him with constructive notice.³⁵ Thus, constructive notice, i. e., actual notice of circum-

³¹ When, at the time of a transaction, a corporation has notice by reason of the knowledge of an officer or agent, such notice is not affected by the subsequent death of the officer or agent, or other termination of the agency. *Birmingham Trust & Savings Co. v. Louisiana Nat. Bank*, 99 Ala. 379, 20 L. R. A. 600, 13 So. 112.

³² *Baird v. New York Cent. & H. River R. Co.*, 64 N. Y. App. Div. 14, 71 N. Y. Supp. 734.

³³ *Mechanics' Bank v. Seton*, 1 Pet. (U. S.) 299, 309, 7 L. Ed. 152.

³⁴ A consignee of goods on a railroad had an arbitrary mark to designate his goods, the mark being "W. W. W." Goods so shipped were not delivered and the consignee sued the railroad company to recover damages. The company claimed that they did not know who was intended by the

initials "W. W. W." Plaintiff testified that the agent of the railroad at the point of destination knew his mark, and that previous shipments so marked had been properly delivered, but the railroad company showed that the agent had been changed. It was claimed that the knowledge of the former agent was not imputable to the company, since he had left its service. The court agreed with this contention, apparently on the theory that the fact "that the mark upon the goods had been understood by former agents as the mark of the plaintiff below, was an isolated and transient one." *Great Western Ry. of Canada v. Wheeler*, 20 Mich. 419.

³⁵ *Arthur v. Harrington*, 211 Fed. 215, 219; *Thompson v. Village of Mecosta*, 141 Mich. 175, 104 N. W. 694.

stances sufficient to put a prudent man upon inquiry, to the president of a company, is notice to the company.³⁶ However, constructive notice to a corporate officer other than the one purchasing a bond is not, it seems, as to the bond, binding upon the company, where the purchasing officer was not chargeable with notice.³⁷

On the other hand, the question whether a corporation is chargeable with notice because part or all of its executive officers, who have no actual knowledge, are officers of another company to which notice is imputed because of the knowledge of other officers or agents, is answered in the negative.³⁸ Thus, in Kansas, the court said: "In other words, the bank must be held to have had constructive notice of the infirmity of the note, not because it or any of its officers or agents had actual notice thereof, or actual notice of any fact which might put them upon inquiry, but because one of its officers was a member of another corporation, which had an agent who had actual notice of such infirmity. We think this is carrying the doctrine of constructive notice too far. We think a corporation should be held to have constructive notice of only such facts as have been brought to the actual notice or attention of some one of its officers or agents, or of such facts only * * * as would naturally put the officer or agent upon inquiry."³⁹

What constitutes constructive notice to an officer or agent is to be determined by the law governing the particular transaction.⁴⁰

§ 2228. Who may rely on notice—Person in collusion with officer or agent. "If a person colludes with an agent to cheat the principal," said Chief Justice Church in a New York case, "the latter is not responsible for the acts or knowledge of the agent. The rule which charges the principal with what the agent knows is for the protection of innocent third persons, and not those who use the agent to further their own frauds upon the principal."⁴¹ To illustrate:

³⁶ *Lillis v. Silver Creek & P. Land & Water Co.*, 32 Cal. App. 668, 163 Pac. 1040.

³⁷ *Thompson v. Village of Mecosta*, 141 Mich. 175, 104 N. W. 694.

³⁸ *Mann v. Second Nat. Bank*, 34 Kan. 746, 10 Pac. 150; *Iowa Nat. Bank of Ottumwa v. Sherman & Bratager*, 17 S. D. 396, 106 Am. St. Rep. 778, 97 N. W. 12, rev'd on rehearing, but on other grounds, in 19 S. D. 238, 117 Am. St. Rep. 941, 103 N. W. 19; *Manufac-*

turers' Nat. Bank v. Newell, 71 Wis. 309, 37 N. W. 420.

³⁹ *Mann v. Second Nat. Bank*, 34 Kan. 746, 10 Pac. 150.

⁴⁰ For instance, if a negotiable instrument is concerned, the provisions of the Negotiable Instruments Law, enacted in nearly all the states, govern.

⁴¹ *National Life Ins. Co. v. Minch*, 53 N. Y. 144, 150.

Knowledge possessed by the cashier of a bank that a note given by a third person in part to take up the cashier's paper was accommodation paper and executed in part to deceive the bank examiner—a penal offense—is not imputable to the bank in favor of the maker of such paper, where the maker is not an innocent party.⁴³

§ 2229. — Right of officer or agent to rely on his own knowledge of his own act as notice to corporation. Upon the same theory, knowledge by an officer of an act of his own, which he seeks to make the basis of a recovery from his employer, is not notice of such act to the latter.⁴³ So knowledge of a corporate officer of his claim in fraud of its rights is not imputable to the company.⁴⁴

§ 2230. Applicability of rules to particular corporations. This rule that knowledge of or notice to a corporate officer or agent is imputable to the corporation, subject to the exceptions hereinafter noted, applies equally well to all corporations. The most frequent applications of the rule are in case of banking corporations⁴⁵ and insurance companies.⁴⁶ However, the rule is often applied to corporations which are common carriers, where a passenger is injured,⁴⁷ and to railroad companies, outside the relation of carrier. This rule is also applicable to building and loan associations as well as other corporations.⁴⁸

⁴³ *State Bank of Moore v. Forsyth*, 41 Mont. 249, 28 L. R. A. (N. S.) 501, 108 Pac. 914.

⁴³ *Sawyer v. Iowa Constitutional Prohibitory Amendment Ass'n*, 177 Iowa 218, 158 N. W. 679.

⁴⁴ *American Min. Co. v. Trask*, 28 Idaho 642, 156 Pac. 1136.

⁴⁵ See *Gray v. McClellan*, 214 Mass. 92, 100 N. E. 1093; *First Nat. Bank v. Shannon*, — Tex. Civ. App. —, 159 S. W. 398.

See, for instance, § 2236, *infra*, as to knowledge of cashiers and other inferior agents.

⁴⁶ This rule is often applied to insurance companies by imputing to the company the knowledge of, or notice to, an agent, and the only question in such case, outside of the matters discussed herein, is as to the scope of the agent's authority—as to which ref-

erence should be made to standard works on the law of insurance.

⁴⁷ *Wheeler v. Grand Trunk Ry. Co.*, 70 N. H. 607, 54 L. R. A. 955, 50 Atl. 103, holding railroad company chargeable with knowledge of servants in charge of a train as to injuries to passenger.

⁴⁸ *Armstrong v. Ashley*, 204 U. S. 272, 51 L. Ed. 482; *Dennis v. Atlanta Nat. Building & Loan Ass'n*, 136 Fed. 539, *rev'g* on other grounds 128 Fed. 293; *Inter-State Building & Loan Ass'n v. Ayers*, 177 Ill. 9, 52 N. E. 342, *aff'g* 71 Ill. App. 529.

Notice to a person who transacted negotiations for a loan association was deemed notice to the association, where the person was the local representative, adviser and both secretary and treasurer of the association at the city wherein the loan was made, and

§ 2231. **Application of general rules to particular officers, agents or other persons—In general.** It is not necessary, in order to show knowledge of a corporation, to show knowledge by its board of directors; it is sufficient to show knowledge by any officer or agent obtained while performing business for the corporation within the scope of his authority.⁴⁹ Moreover, of course, knowledge of agents who are not officers may be imputed to the corporation in a proper case.⁵⁰

within that territory, with reference to the loans of the association and its general policy, he possessed general supervision and advisory powers. *Dennis v. Atlanta Nat. Building & Loan Ass'n*, 136 Fed. 539.

⁴⁹ *Paul Steam System Co. v. Paul*, 129 Fed. 757; *Sunnyside Coal & Coke Co. v. Reitz*, 14 Ind. App. 478, 43 N. E. 46, 39 N. E. 541.

Where knowledge of certain facts is acquired by corporate officers in the course of their employment and within the scope of their duty, it is not necessary that the knowledge come to the board of directors as a body. *Paul Steam System Co. v. Paul*, 129 Fed. 757.

A corporation will be deemed to have received notice of facts within the knowledge of officers responsible for informing the corporation of facts affecting its interests. The agency of the officer or agent to whom the knowledge has come must be such, however, that the law will imply that the officer or agent will impart his knowledge to the corporation. See:

Illinois. *Chicago, B. & Q. R. Co. v. Hammond*, 210 Ill. 187, 71 N. E. 576.

Massachusetts. *Beacon Trust Co. v. Souther*, 183 Mass. 413, 67 N. E. 345.

Missouri. *Council v. St. Louis & S. F. R. Co.*, 123 Mo. App. 432, 100 S. W. 57.

New Jersey. *Vulcan Detinning Co. v. American Can Co.*, 70 N. J. Eq. 588, 62 Atl. 881.

New York. *Mason v. United Press of Illinois*, 94 App. Div. 617, 38 N. Y. Supp. 99.

However, in a federal decision, it

seems to be held that where a statute provided that all corporate control and management should be vested in and be exercised by a board of trustees, "the knowledge of a single officer or trustee or the president cannot be imputed to the corporation, unless it is affirmatively shown that his knowledge was brought home to the board of trustees." *American Bonding Co. of Baltimore v. Spokane Building & Loan Society*, 130 Fed. 737, 740. But it is doubtful whether this statement was intended as a separate statement of the law, it being capable of a proper construction in connection with other facts.

"The knowledge imputable to defendant is not limited to its president or to its vice president (who acted for it in the purchase of the barges), or to the officer who made the payments, but extends to other agents, such as the superintendent of transportation (whose duty it was to look over the empty barges and note their condition), the employee in charge of inspection and repair of the barges and their distribution to the coal mines, as well as the harbor masters, whose duty it was to see that the boats were in proper condition for use before loading." *Marmet Coal Co. v. People's Coal Co.*, 226 Fed. 646.

The knowledge of a corporate agent, who had authority to direct a servant to use a particular horse, that the horse was vicious is imputed to the corporation. *Wysocki v. Wisconsin Lakes Ice & Cartage Co.*, 121 Wis. 96, 98 N. W. 950.

⁵⁰ *American Exp. Co. v. Parcarello*,

So knowledge of a corporation of a violation of its rules, as evidence of acquiescence in the abrogation of the rule, need not be brought home to the president, general manager or directors of the corporation, but it is sufficient that there is knowledge on the part of other officers or agents charged with the enforcement of the rules.⁵¹ Likewise, knowledge of officers or agents other than the attorney in a suit, as to facts warranting an election of remedies for goods sold, binds the company and precludes it from claiming that the attorney's act in commencing the attachment suit was not an election of remedies.⁵² And it is held that the knowledge of the injured servant, reported by him to the master, of the condition of the place of work, is imputed to the company, at least where he was the sole employee present at the place of work representing the corporation.⁵³ In order to charge a corporation with notice of defects in machinery or the like, notice need not be given to the particular official designated by the company in its rules as the officer or officers to whom notice must be given.⁵⁴ Knowledge of a mere employee of the corporation is ordinarily not imputed to the company.⁵⁵

Subject to the general rule stated above as to when notice to or knowledge of a corporate officer or agent is imputable to the corporation, with its qualifications and exceptions,⁵⁶ it has been held, in particular cases, that the knowledge of the following persons was imputable to the corporation,⁵⁷ vice president,⁵⁸ secretary,⁵⁹ the treasurer-

— Tex. Civ. App. —, 162 S. W. 926.

⁵¹ *Central of Georgia R. Co. v. Mobley*, 6 Ga. App. 33, 64 S. E. 300.

⁵² *Baker v. Brown Shoe Co.*, 78 Ark. 501, 95 S. W. 808.

⁵³ *Shemwell v. Owensboro & N. R. Co.*, 117 Ky. 556, 78 S. W. 448.

⁵⁴ *Chicago & A. R. Co. v. Walters*, 217 Ill. 87, 75 N. E. 441.

⁵⁵ *Craig v. Continental Ins. Co.*, 141 U. S. 638, 647, 35 L. Ed. 886.

⁵⁶ See §§ 2215-2224, *supra*.

⁵⁷ Notice to an officer who collects freight charges and gives orders with respect to the delivery of cars at specified points is notice to the corporation where the information pertains to matters with respect to the delivery of freight in transit. *Faust v. Southern Ry.*, 74 S. C. 360, 54 S. E. 566.

⁵⁸ *First Nat. Bank of Tipton v.*

Peck, 180 Ind. 649, 103 N. E. 643; *Jacobus v. Jamestown Mantel Co.*, 149 N. Y. App. Div. 356, 134 N. Y. Supp. 418.

⁵⁹ *State Savings & Commercial Bank v. Winchester*, 25 Cal. App. 691, 145 Pac. 171; *McKenney v. Diamond Ass'n*, 8 Houst. (Del.) 557, 18 Atl. 905; *Pontchartrain R. Co. v. Heirne*, 2 La. Ann. 129.

Knowledge of the secretary of the corporation may be imputed to the company although neither the directors nor stockholders had any knowledge. *Minneapolis Plumbing Co. v. Arcade Inv. Co.*, 124 Minn. 317, 145 N. W. 37.

So notice to one who was both secretary and treasurer of an advisory board appointed by the board of directors of a building and loan asso-

er,⁶⁰ foreman in charge of work to which the notice or knowledge relates,⁶¹ attorney,⁶² shipping clerk,⁶³ conductor of train,⁶⁴ person in control of a train on which live stock was being shipped, as to danger of switching a car into a cholera district,⁶⁵ the deputy supreme commander of the Maccabees,⁶⁶ the supreme treasurer of the Royal Arcanum,⁶⁷

ciation, in connection with a loan, of an unrecorded mortgage, is notice to the association. *Inter-State Building & Loan Ass'n v. Ayers*, 177 Ill. 9, 52 N. E. 342, aff'g 71 Ill. App. 529.

Notice to the secretary of a home-stand loan association is in law notice to such association. *Schumacher v. Wolf*, 125 Ill. App. 81, 87.

⁶⁰ *New England Car Spring Co. v. Union India Rubber Co.*, Fed. Cas. No. 10,153; *Commercial Bank v. St. Croix Mfg. Co.*, 23 Me. 280; *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 9 Am. St. Rep. 698, 17 N. E. 496; *White River Sav. Bank v. Capital Sav. Bank & Trust Co.*, 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197.

⁶¹ *Lewis v. St. Louis & I. M. R. Co.*, 59 Mo. 495, 21 Am. Rep. 385, defects in railroad.

Notice of defects in machinery in his department to a foreman is imputed to the corporation. *Falkenau v. Abrahamson*, 66 Ill. App. 352; *Cudahy Packing Co. v. Hays*, 74 Kan. 124, 85 Pac. 811.

Knowledge of the foreman of defects in tools is imputed to the corporation. *Franklin v. Missouri, K. & T. R. Co.*, 97 Mo. App. 473, 71 S. W. 540.

Notice to or knowledge of a foreman who has power to discharge servants, of the incompetency of a servant, is notice to the corporation. *Johnson v. St. Paul & W. Coal Co.*, 126 Wis. 492, 105 N. W. 1048; *Kamp v. Cox Bros. & Co.*, 122 Wis. 206, 99 N. W. 366.

⁶² *Baldwin v. Davis*, 118 Iowa 36, 91 N. W. 778. Compare *Merchants' Bldg. Improvement Co. v. Chicago Exch. Bldg. Co.*, 210 Ill. 26, 102 Am.

St. Rep. 145, 71 N. E. 22, aff'g 106 Ill. App. 17.

⁶³ Notice to a shipping clerk in charge of employees, who directed the injured porter to use an elevator, of defects therein, is imputable to the company. *Larkin v. Washington Mills Co.*, 45 N. Y. App. Div. 6, 61 N. Y. Supp. 93.

⁶⁴ Knowledge of a conductor in charge of a train as to the incompetency of his engineer is imputable to the company although he had no power to discharge him. *East Tennessee, V. & G. R. Co. v. Wright*, 100 Tenn. 56, 42 S. W. 1065, which, however, is contrary to the weight of authority in making one a vice principal where he has no power to discharge.

Actual or constructive knowledge of the conductor or other agent of a railroad company whose duty it was to see to the proper loading of a car, is imputable to the company when sued for injuries resulting from overloading the car. *Louisville, H. & St. L. R. Co. v. Chandler's Adm'r*, 24 Ky. L. Rep. 998, 70 S. W. 666.

So, also, a railroad corporation will be deemed to have knowledge of injuries caused to a passenger by the operation of a train from notice thereof to the conductor and baggageman in charge thereof. *Wheeler v. Grand Trunk Ry. Co.*, 70 N. H. 607, 54 L. R. A. 955, 50 Atl. 103.

⁶⁵ *Council v. St. Louis & S. F. R. Co.*, 123 Mo. App. 432, 100 S. W. 57.

⁶⁶ *McMahon v. Supreme Tent Knights of Maccabees of World*, 151 Mo. 522, 52 S. W. 384.

⁶⁷ *Griffith v. Supreme Council of Royal Arcanum*, 182 Mo. App. 644, 166 S. W. 324.

mine boss⁶⁸ and timberman of mine as to condition of mine roof.⁶⁹

On the other hand, in particular cases, notice to or knowledge of the following persons was held not imputable to the corporation: medical examiner of an insurance company,⁷⁰ janitor of depot,⁷¹ collector,⁷² messenger boy⁷³ and hired hand on a farm.⁷⁴ So, also, notice to a section foreman of a claim of passageway is not notice to the corporation where it is not made to appear that it is within the scope of duty of the foreman to impart his knowledge in regard thereto to the corporation.⁷⁵ And it has been held that knowledge of a shift boss of a mine who had no power to hire or discharge servants, and who was a fellow-servant of the miners rather than a vice principal, as to the incompetency of a fellow-servant, is not to be imputed to the company.⁷⁶

⁶⁸ Knowledge of a mine boss, or of one filling his position, of unsafe condition of the mine, discovered while in the performance of his duty, is imputed to the company. *Wellston Coal Co. v. Smith*, 65 Ohio St. 70, 55 L. R. A. 99, 87 Am. St. Rep. 547, 61 N. E. 143.

⁶⁹ Notice of the condition of the roof of a coal mine is imputed to the company where actual notice thereof was given to the timberman whose duty it was to examine and fix the roof. *Consolidated Coal Co. v. Scheiber*, 65 Ill. App. 304, aff'd 167 Ill. 539, 47 N. E. 1052.

⁷⁰ Knowledge of the medical examiner of an insurance company, as to the falsity of representations made to him by the insured, is not imputed to the company where he was not authorized to enter into a contract of insurance or to make any waiver. *John Hancock Mut. Life Ins. Co. v. Houpt*, 113 Fed. 572; *Caruthers v. Kansas Mut. Life Ins. Co.*, 108 Fed. 487.

⁷¹ Notice to a janitor of a depot, with no duties as to looking after passengers, of injuries being inflicted on a passenger in the depot, is not notice to the company. *Tate v. Illinois Cent. R. Co.*, 26 Ky. L. Rep. 309, 341, 81 S. W. 256.

⁷² Notice to a collector of a corporation, without power to arrange either the terms or time of payments, of the retirement of a member of a firm indebted to the corporation, is not imputed to the corporation. *Schwabacher Bros. & Co. v. Murphine*, 74 Wash. 388, 133 Pac. 598. To same effect see *Cowan v. Roberts*, 133 N. C. 629, 45 S. E. 954.

⁷³ *Nehawka Bank v. Ingersoll* (Neb.), 89 N. W. 618.

A bank is not affected by notice given to one of its messengers by a member of a former partnership, to whom a draft on which the partnership is liable, and which has been renewed, is presented, that the partnership has been dissolved, and that the other partner is liable for its debts, where the agency of the messenger is confined to mere collections. *Camp v. Southern Banking & Trust Co.*, 97 Ga. 582, 25 S. E. 362.

⁷⁴ *Gregmoore Orchard Co. v. Gilmour*, 159 Mo. App. 204, 140 S. W. 763.

⁷⁵ *Chicago, B. & Q. R. Co. v. Hammond*, 210 Ill. 187, 71 N. E. 576.

⁷⁶ *Weeks v. Scharer*, 129 Fed. 333, 111 Fed. 330. Contra, see *Baltimore & O. R. Co. v. Henthorne*, 73 Fed. 634.

So far as notice to an agent of the incompetency of a servant is concerned, in order to bind the master, it is held in most states that the master is not chargeable with the knowledge of an employee who has no power to dismiss the incompetent employee;⁷⁷ and this rule applies to corporations as employers as well as to others.⁷⁸

Whether notice to or knowledge of an attorney is imputed to his client is governed by the general rules laid down herein, and there is nothing peculiar to the law of corporations where the client is a corporation. Therefore, reference should be made to textbooks relating to attorneys.⁷⁹

§ 2232. — Director or directors. In a preceding volume, it has been noticed that a director individually cannot bind the corporation, unless duly authorized to act as an agent;⁸⁰ and that ordinarily the directors collectively cannot bind the corporation except at a regular meeting.⁸¹ On the other hand, if a quorum is present, a majority of the quorum may act at a regular meeting.⁸² It follows that since the directors of a corporation collectively represent the corporation, and have general supervision and control over its affairs, a corporation clearly has notice of facts when knowledge thereof is communicated by one of them to the others, or by a third person, or knowledge is otherwise possessed by them, at a meeting of the board.⁸³ Moreover,

⁷⁷ 3 Labatt, Master & Servant (2nd Ed.), § 1052d.

So far as notice to a corporation, in order to bind it for injuries to an employee, is concerned, the general rule is that the knowledge of an employee who was a mere coservant of the injured person is not chargeable to the master, but that the master is charged with the knowledge of any servant who is a vice principal. 3 Labatt, Master & Servant (2nd Ed.), §§ 1050-1052.

⁷⁸ Baltimore Elevator Co. v. Neal, 65 Md. 438, 5 Atl. 338; Smith v. St. Louis & S. F. Ry. Co., 151 Mo. 391, 48 L. R. A. 368, 52 S. W. 378; Reiser v. Pennsylvania Co., 152 Pa. 38, 39, 34 Am. St. Rep. 620, 25 Atl. 175.

⁷⁹ See 1 Thornton, Attorneys at Law, § 151.

⁸⁰ See § 1854, supra.

⁸¹ See § 1854, supra.

⁸² See §§ 1882-1888, supra.

⁸³ Connecticut. Toll Bridge Co. v. Betsworth, 30 Conn. 380; Farmers' & Citizens' Bank v. Payne, 25 Conn. 444, 68 Am. Dec. 362.

Missouri. City Bank of Columbus v. Phillips, 22 Mo. 85, 64 Am. Dec. 254.

New York. Fulton Bank v. New York & S. Canal Co., 4 Paige 127.

Pennsylvania. Bank of Pittsburgh v. Whitehead, 10 Watts (Pa.) 397, 36 Am. Dec. 186.

Tennessee. Union Bank v. Campbell, 4 Humph. 394.

A corporation will be held chargeable with knowledge possessed by its directors that one of the corporate officers is to receive a commission from the sale of certain land to the corporation to the extent, at least, of barring it from objecting to the validity of a mortgage given by it to se-

notice to the directors with respect to matters which are within their general powers as the governing body is none the less notice to the corporation because they have appointed a committee or a particular officer to act in such matters.⁸⁴

On the other hand, whether or not a corporation is chargeable with notice of facts as to which individual directors have knowledge is not entirely clear, and the decisions on the question are conflicting. By the great weight of authority, however, since the directors do not individually represent the corporation, and have no power to bind it, except collectively and as a board, notice of facts casually acquired by individual directors, when they do not communicate their knowledge to the other directors or officers, and do not act officially in the matter, is not notice to the corporation.⁸⁵ In any event, knowledge of a di-

cure the purchase price of the property. *Blood v. La Serena Land & Water Co.*, 134 Cal. 361, 66 Pac. 317.

⁸⁴ *Bank of Pittsburgh v. Whitehead*, 10 Watts (Pa.) 397, 36 Am. Dec. 186.

⁸⁵ *United States Fidelity & Deposit Co. v. Courtney*, 186 U. S. 342, 46 L. Ed. 1193.

Alabama. *Lucas v. Bank of Darien*, 2 Stew. 280.

Colorado. *Murphy v. Gumaer*, 12 Colo. App. 472, 55 Pac. 951.

Connecticut. *New Haven, M. & W. R. Co. v. Town of Chatham*, 42 Conn. 465; *Farrel Foundry v. Dart*, 26 Conn. 376; *Farmers' & Citizens' Bank v. Payne*, 25 Conn. 444, 68 Am. Dec. 362.

Illinois. *Home Savings & State Bank v. Peoria Agricultural & Trotting Society*, 206 Ill. 9, 99 Am. St. Rep. 132, 69 N. E. 17.

Louisiana. *Louisiana State Bank v. Senecal*, 13 La. 525; *Mercier v. Cononge*, 8 La. Ann. 37.

Maine. *Fairfield Sav. Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 319.

Maryland. *Black v. First Nat. Bank*, 96 Md. 399, 423, 54 Atl. 88; *General Ins. Co. v. United States Ins. Co.*, 10 Md. 517, 69 Am. Dec. 174; *Winchester v. Baltimore & S. R. Co.*, 4 Md. 231; *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381.

Massachusetts. *Clarke v. Second*

Nat. Bank, 177 Mass. 257, 59 N. E. 121; *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710, 1 N. E. 282; *Sawyer v. Pawnors' Bank*, 6 Allen 207.

Michigan. *Shaw v. Clark*, 49 Mich. 384, 43 Am. Rep. 474, 13 N. W. 786.

Missouri. *Southern Commercial Sav. Bank v. Slaterry's Adm'r*, 166 Mo. 620, 66 S. W. 1066.

Nebraska. *Buffalo County Nat. Bank v. Sharpe*, 40 Neb. 123, 58 N. W. 734.

Nevada. *Edwards v. Carson Water Co.*, 21 Nev. 469, 34 Pac. 381.

New Hampshire. *Buttrick v. Nashua & L. R. Co.*, 62 N. H. 413, 13 Am. St. Rep. 578.

New Jersey. *Thomson v. Central Passenger R. Co.*, 83 N. J. L. 777, 85 Atl. 201; *First Nat. Bank of Hightstown v. Christopher*, 40 N. J. L. 435, 29 Am. Rep. 262.

New York. *Casco Nat. Bank of Portland v. Clark*, 139 N. Y. 307, 36 Am. St. Rep. 705, 34 N. E. 908; *Mayor, etc., of New York v. Tenth Nat. Bank*, 111 N. Y. 446, 18 N. E. 618; *Westfield Bank v. Cornen*, 37 N. Y. 320, 93 Am. Dec. 573; *Shattuck v. Guardian Trust Co.*, 145 App. Div. 734, 130 N. Y. Supp. 658; *Atlantic State Bank v. Savery*, 18 Hun 36, 82 N. Y. 291; *Bank of United States v. Davis*, 2

rector of a bank of facts affecting bills of exchange discounted by the bank is not notice to the bank, where he is not acting for the bank when he acquires such knowledge, and is not present at the directors' meeting when the bills are discounted and does not communicate his knowledge to any other director or officer of the bank.⁸⁶ So knowledge of a defective deed acquired by a director while examining the records on his own behalf merely, and not officially, is not notice to the corporation, where he does not communicate his knowledge to the board of directors or other officers.⁸⁷

It has been held, however, that where notice is expressly given to a director of a corporation officially, for the purpose of its being communicated to the board, it is notice to the corporation, whether it is communicated to the board or not.⁸⁸ However, it is difficult to recon-

Hill 451; *National Bank v. Norton*, 1 Hill 572; *Fulton Bank v. New York & S. Canal Co.*, 4 Paige 127.

North Carolina. *Anthony v. Jeffress*, 172 N. C. 378, 90 S. E. 414.

Pennsylvania. *Bard v. Penn Mut. Fire Ins. Co.*, 153 Pa. St. 257, 34 Am. St. Rep. 704, 25 Atl. 1124.

Tennessee. *Jones v. Planters' Bank*, 9 Heisk. 455.

Texas. *Luling Oil & Manufacturing Co. v. Lane & Bodley Co.*, 49 Tex. Civ. App. 534, 109 S. W. 445.

Virginia. *Raven Red Ash Coal Co. v. Herron*, 114 Va. 103, 75 S. E. 752.

England. *Powles v. Page*, 3 C. B. 16.

Compare Pittsburgh, C. & St. L. R. Co. v. Woolley, 12 Bush (Ky.) 451.

And see the note on this subject in 6 South. Law Rev. (N. S.) 45.

Knowledge obtained by a director, while not acting for the corporation, ordinarily is not imputable to the company. *Gilkeson v. Thompson*, 210 Pa. 355, 59 Atl. 1114.

Notice to a director, when acting solely in his own private interest, is not notice to the corporation. *Allmon v. Salem Building & Loan Ass'n*, 275 Ill. 336, 114 N. E. 170.

Mechem states the rule as follows: "But it is well settled, as a general rule, that the mere private knowledge

of one or more individual directors concerning any business of the corporation (as to which such director has then no special duty or authority to act, or upon which he does not subsequently act with such knowledge in his mind, and which he does not communicate to the board) is not to be imputed to the corporation." 2 Mechem, Agency (2nd Ed.), § 1852.

⁸⁶ *Farmers' & Citizens' Bank v. Payne*, 25 Conn. 444, 68 Am. Dec. 362.

⁸⁷ *Farrel Foundry v. Dart*, 26 Conn. 376. This would seem to follow as a matter of course. He was not acting officially as a director but merely as an individual, and hence it would seem that he comes within the rule already stated that knowledge acquired as an individual is not imputable to the corporation. However, if such director, although acquiring his knowledge merely as an individual, had acted as director at a board meeting, soon thereafter, in regard to a matter as to which such knowledge was material, it would probably be held that the knowledge would be imputed to the corporation, under the rule laid down supra in § 2222.

⁸⁸ *Pittsburgh, C. & St. L. R. Co. v. Woolley*, 12 Bush (Ky.) 451; *Boyd v. Chesapeake & O. Canal Co.*, 17 Md. 195, 79 Am. Dec. 646; *General Ins. Co.*

cile this last rule with what has already been stated. Inasmuch as a director of a corporation is not, acting alone, its agent, unless appointed to act as such or allowed to so act, it would seem that notice given to him should not be imputed to the corporation unless he is actually its agent.⁸⁹

Moreover, by the weight of authority, knowledge possessed by a director, who is present and acting at a meeting of the board, whensoever or howsoever it may have been acquired, is notice to the corporation, whether he communicates his knowledge to the board or not, since in such a case he has the knowledge while acting officially, and it is his duty to communicate it;⁹⁰ but it is otherwise where the director is himself dealing as the other party to the contract with the corporation.⁹¹

v. United States Ins. Co., 10 Md. 517, 69 Am. Dec. 174; United States Ins. Co. v. Shriver, 3 Md. Ch. 381; Bank of United States v. Davis, 2 Hill (N. Y.) 451.

⁸⁹ Thus, in *Custer v. Tompkins County Bank*, 9 Pa. St. 27, in an action on a corporate note, the corporation offered to show that the note was made to be discounted for a special purpose, and that before it was discounted, a director of a bank had notice not to use the note, and that no consideration had been given for it, and that when discounted by plaintiff bank the director was present. The court held that notice to the director was not notice to the corporation, "unless he were constituted an organ of communication between it and those who deal with it."

In support of this criticism, see also extended discussion by Justice Story in his work on Agency, §§ 140a-140d.

"It is a question whether it is just, in case of a composite agency like the board of directors, to hold the bank bound by the knowledge of one, any more than by the other individual conduct of one. Since the power and agency is in the board, and is intrusted to individuals, it would seem proper that, to affect the bank, the knowledge should be that of the

board, or of so many that its action would not stand after taking away the votes of those having notice." 1 Morse, Banks & Banking (4th Ed.), § 112.

⁹⁰ Connecticut. Toll Bridge Co. v. Betsworth, 30 Conn. 380.

Kentucky. Pittsburgh, C. & St. L. R. Co. v. Woolley, 12 Bush 451.

Massachusetts. National Security Bank v. Cushman, 121 Mass. 490.

Missouri. City Bank of Columbus v. Phillips, 22 Mo. 85, 64 Am. Dec. 254; Clerks' Sav. Bank v. Thomas, 2 Mo. App. 367.

New York. North River Bank v. Aymar, 3 Hill 262; Bank of United States v. Davis, 2 Hill 451.

Tennessee. Union Bank v. Campbell, 4 Humph. 394.

"A distinction has been taken between knowledge of illegality or want of consideration of a note, by a director who acts with the board in discounting it, and such knowledge on the part of a director who is not present and acting with the board when the discount is made. In the former case it has been held that the bank is bound by his knowledge; in the latter it is not." First Nat. Bank v. Christopher, 40 N. J. L. 435, 437, 29 Am. Rep. 262.

⁹¹ See § 2243, *infra*.

Furthermore, it is settled that notice to or knowledge possessed by an individual director is notice to the corporation when it relates to a matter as to which he is acting as its authorized agent.⁹² This, however, is not merely because he is a director, but because of his agency.

Whether notice to, or knowledge of, a director is imputable to the corporation where his interests are adverse to those of the corporation is considered hereafter.⁹³

§ 2233. — Officer who is in effect the corporation. Where the officer to whom notice is given or by whom knowledge is acquired is in effect the corporation, the notice is generally imputed to the corporation.⁹⁴ Thus, knowledge of one of the organizers of a corporation who is the principal stockholder and also director and treasurer has been held imputable to the company.⁹⁵ Other illustrations of this rule have already been noted.⁹⁶

§ 2234. — General manager or superintendent. Ordinarily notice to, or knowledge of, the general manager or superintendent of a corporation, at least where acquired in connection with corporate business and while acting as manager, is imputable to the corporation.⁹⁷ Thus,

92 United States. *Davis Improved Wrought Iron Wagon Wheel Co. v. Davis Wrought Iron Wagon Co.*, 20 Fed. 699.

Connecticut. *Farmers' & Citizens' Bank v. Payne*, 25 Conn. 444, 68 Am. Dec. 362.

New York. *Dunham v. Troy Union R. Co.*, 1 Abb. Dec. 565.

Vermont. *Smith v. South Royalton Bank*, 32 Vt. 341, 76 Am. Dec. 179.

England. *Dr. Jaeger's Sanitary Woollen System Co. v. Walker*, 77 L. T. (N. S.) 180.

Where a bank bought an order assigning the profits of a contract, and the director of the corporation was aware that no consideration for the order had been received by the maker thereof, the court held the corporation charged with the knowledge of the director. *Bank of Spring City v. Rhea County* (Tenn. Ch. App.), 59 S. W. 442.

⁹³ See § 2243, *infra*.

⁹⁴ "The plaintiff, the California

Consolidated Mining Company, a corporation, is only another name for Keane, so far as this transaction was concerned. He was the promoter, principal incorporator, manager, and resident director of the company, and notice to him was notice to his alter ego, the corporation." *California Consol. Min. Co. v. Manley*, 10 Idaho 786, 81 Pac. 50.

⁹⁵ *Atlantic City v. Atlantic City Steel Pier Co.*, 62 N. J. Eq. 139, 49 Atl. 822.

⁹⁶ See §§ 2231, 2232, *supra*.

⁹⁷ *United States. Issaquah Coal Co. v. United States Fidelity & Guaranty Co.*, 126 Fed. 89.

Arkansas. *Graysonia-Nashville Lumber Co. v. Saline Development Co.*, 118 Ark. 192, 176 S. W. 120.

California. *Allen v. Los Molinos Land Co.*, 25 Cal. App. 206, 143 Pac. 253.

Illinois. *Riverton Coal Co. v. Shepherd*, 111 Ill. App. 294, *aff'd* 207 Ill. 395, 69 N. E. 921.

knowledge of accidents by a superintendent is generally notice to the corporation.⁹⁸ So, where one is the general manager of two corporations, his knowledge of the rights of third persons in a railroad crossing is imputed to the corporation purchasing a right of way from the other corporation.⁹⁹

Furthermore, inasmuch as the general manager has power to do any act in the ordinary conduct of the business,¹ it would seem that his powers are so broad that knowledge acquired even out of business hours or when acting solely for himself, where his interests are not adverse to those of the corporation in the transaction wherein the information is acquired, should be imputed to the corporation in a transaction in which he afterwards represents the corporation, provided the information is material thereto and acquired at a time not so far distant that it will be presumed he has forgotten it.²

§ 2235. — **President.** Notice to, or knowledge of, the president of a corporation, is ordinarily imputable to the corporation.³ This is

Kentucky. Continental Realty Co. v. Cardwell, 171 Ky. 644, 188 S. W. 777; Blue Grass Coal Corporation v. Combs, 168 Ky. 437, 182 S. W. 207.

Minnesota. Robertson Lumber Co. v. Anderson, 96 Minn. 527, 105 N. W. 972.

Rhode Island. Ward v. J. Samuels & Bro., 37 R. I. 438, 93 Atl. 649, notice of claims of physician who was treating injured employee.

Wisconsin. Petersen v. Elholm, 130 Wis. 1, 109 N. W. 76, 1034.

Knowledge of the general manager is presumed to be the knowledge of the corporation. McCormick Harvesting Mach. Co. v. Yankton Sav. Bank, 15 S. D. 196, 87 N. W. 974.

⁹⁸ **Oakland Motor Co. v. American Fidelity Co.**, 19 Mich. 74, 155 N. W. 729.

⁹⁹ **Louisville & N. R. Co. v. Central Kentucky Traction Co.**, 147 Ky. 513, Ann. Cas. 1915 A 857, 144 S. W. 739.

¹ See § 2098, *supra*.

² See, generally, on this subject, § 2222, *supra*.

³ **Alabama.** Alabama Securities Co. v. Dewey, 156 Ala. 530, 47 So. 55.

Arizona. Larkin v. Hagan, 14 Ariz. 63, 126 Pac. 268.

California. Dickinson v. Zubiate Min. Co., 11 Cal. App. 656, 106 Pac. 123.

Connecticut. Sullivan County R. R. v. Connecticut River Lumber Co., 76 Conn. 464, 57 Atl. 287.

Missouri. Common Sense Min. Co. v. Taylor, 247 Mo. 1, 152 S. W. 5.

New Jersey. Easton Nat. Bank v. American Brick & Tile Co., 69 N. J. Eq. 326, 60 Atl. 54, rev'd in part on other grounds in 70 N. J. Eq. 732, 8 L. R. A. (N. S.) 271, 10 Ann. Cas. 84, 61 Atl. 917.

New York. Apex Leasing Co. v. Litke, 93 Misc. 353, 158 N. Y. Supp. 21; Wright v. Clark, 81 Misc. 527, 142 N. Y. Supp. 812.

Texas. Weathersby v. Texas & O. Lumber Co., 107 Tex. 474, 180 S. W. 735, rev'g on other grounds — Tex. Civ. App. —, 146 S. W. 243; West Lumber Co. v. Chessher, — Tex. Civ. App. —, 146 S. W. 976.

Washington. Collins v. Hoffman, 74 Wash. 264, 133 Pac. 450.

This is especially true under the

equally true as to the knowledge of the president of a bank.⁴ Especially is the knowledge of the president of a corporation imputed to the company where he is in effect the general manager.⁵ Thus his knowledge of the insolvency of the company is imputable to the corporation,⁶ as is his knowledge of the insolvency of a debtor.⁷ So notice of defects in machinery, known to the president who had entire charge of the business, is imputed to the corporation in an action for injuries from such defects.⁸

However, a corporation is not always chargeable with the knowledge possessed by its president,⁹ as for instance in case of mere casual private knowledge as to a matter upon which he is not called to act¹⁰ or where he acts outside the scope of his powers. Thus, if the president makes an unauthorized contract, his knowledge of the transaction is not imputed to the corporation, nor will it be presumed that he communicated his unauthorized act to the board of directors.¹¹ On the other hand, if the president afterwards acts for the corporation in the matter with the knowledge in his mind, it is imputed to the corporation, although acquired unofficially.¹² Where the interests of the

later decisions in many states, holding that the president of a corporation ordinarily is to be deemed its general manager with more or less extensive powers. See §§ 2012-2031, *supra*, vol. 3.

⁴ **United States.** *Ditty v. Dominion Nat. Bank of Bristol, Virginia*, 75 Fed. 769.

Georgia. *Fouche v. Merchants' Nat. Bank of Rome*, 110 Ga. 827, 36 S. E. 256.

Missouri. *Central Nat. Bank v. Levin*, 6 Mo. App. 543.

South Dakota. *Atwood-Stone Co. v. Lake County Bank*, 38 S. D. 377, 161 N. W. 539; *First Nat. Bank of West Minneapolis v. Harvey*, 29 S. D. 284, 137 N. W. 365.

Tennessee. *Tagg v. Tennessee Nat. Bank*, 56 Tenn. 479.

Texas. *Central Bank & Trust Co. v. Ford*, — Tex. Civ. App. —, 152 S. W. 700.

Vermont. *Porter v. Bank of Rutland*, 19 Vt. 410, express notice to president sufficient to put him on inquiry.

In speaking of notice to the president of a bank, the Vermont court

said: "There is no other officer, or agent, to whom it could have been made with more propriety." *Porter v. Bank of Rutland*, 19 Vt. 410, 425.

⁵ *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 248, 261; *Scripture v. Francetown Soapstone Co.*, 50 N. H. 571, 584.

⁶ *Arthur v. Harrington*, 211 Fed. 215; *Reagan v. First Nat. Bank*, 157 Ind. 623, 62 N. E. 701, 61 N. E. 575.

⁷ *In re Gillette*, 104 Fed. 769.

⁸ *Houston Biscuit Co. v. Dial*, 135 Ala. 168, 33 So. 268.

⁹ *Watkins Salt Co. v. Mulkey*, 225 Fed. 739, 746.

¹⁰ *McCalmont v. Lanning*, 154 Fed. 353; *People's Bank of Talbotton v. Exchange Bank*, 116 Ga. 820, 94 Am. St. Rep. 144, 43 S. E. 269; *Mechanics' Bank v. Schaumburg*, 38 Mo. 228; *Miller v. Illinois Cent. R. Co.*, 24 Barb. (N. Y.) 312.

¹¹ *Watkins Salt Co. v. Mulkey*, 225 Fed. 739, 746.

¹² *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 75 Fed. 433, and see § 2222, *supra*.

president are adverse to those of the corporation, notice is not imputed to the corporation, just the same as in the case of other officers or agents;¹³ and this rule is often applied where the president is also the president or other officer of another corporation which seeks to charge the former corporation with notice through its president.¹⁴

§ 2236. — Cashier and inferior officers or agents of bank. The cashier of a bank, as noticed in a preceding volume,¹⁵ has very extensive powers. It follows that usually it is held that notice to, or knowledge of, the cashier is chargeable to the bank,¹⁶ subject, of course, to the general rules already laid down.¹⁷ A fortiori, knowledge of the general manager of a bank, who is also its cashier, is the knowledge of the bank;¹⁸ although usually the cashier of a bank is in effect its

¹³ See §§ 2243-2253, *infra*.

¹⁴ See § 2248, *infra*.

¹⁵ See §§ 2137-2158, *supra*.

¹⁶ *United States*. Pensacola State Bank v. Thornberry, 226 Fed. 611.

Alabama. Harris v. American Building & Loan Ass'n, 122 Ala. 545, 25 So. 200.

California. Christie v. Sherwood, 113 Cal. 526, 45 Pac. 820.

Kentucky. Grant County Deposit Bank v. Points, 22 Ky. L. Rep. 105, 56 S. W. 662; Citizens' Sav. Bank v. Walden, 21 Ky. L. Rep. 739, 52 S. W. 953.

Louisiana. Louisiana State Bank v. Senecal, 13 La. 525.

Massachusetts. Loring v. Brodie, 134 Mass. 453.

Missouri. Citizens' Bank of Senath v. Douglass, 178 Mo. App. 664, 161 S. W. 601; Million v. Commercial Bank of Boonville, 159 Mo. App. 601, 141 S. W. 453; Rhinehart v. People's Bank, 89 Mo. App. 511; Farmers' & Merchants' Bank v. Loyd, 89 Mo. App. 262.

New Jersey. Hunt v. Gray, 35 N. J. L. 227, 10 Am. Rep. 232.

North Dakota. Citizens' State Bank of Lankin v. Garceau, 22 N. D. 576, 134 N. W. 882.

Oregon. Farmers' Bank v. Saling, 33 Ore. 394, 54 Pac. 190.

Pennsylvania. Boggs v. Lancaster Bank, 7 Watts & S. 331.

South Dakota. Stebbins v. Lardner, 2 S. D. 127, 48 N. W. 847.

Texas. First Nat. Bank v. Ledbetter (Tex. Civ. App.), 34 S. W. 1042.

This rule was applied even where a cashier who was also general manager, on accepting a renewal note, altered the date of the new note, without authority, to correspond with the date of the note surrendered, the bank being held to have notice of the alteration. *Bodine v. Berg*, 82 N. J. L. 662, 40 L. R. A. (N. S.) 65, Ann. Cas. 1913 D 721, 82 Atl. 901.

A bank is chargeable with knowledge of the contents of letters by or to its cashier, relating to the business of the bank. *New Hope & D. Bridge Co. v. Phenix Bank*, 3 N. Y. 156.

Notice of fraud of the cashier is sometimes imputed to the corporation. *Winslow v. Harriman Iron Co.* (Tenn.), 42 S. W. 698.

¹⁷ See §§ 2215-2219, *supra*.

Effect of adverse interests, see, §§ 2243-2253.

¹⁸ *Metzger v. Southern Bank*, 98 Miss. 108, 54 So. 241.

"Where the cashier is made the chief executive officer and manager of the bank, his authority to receive notice is correspondingly increased." 2

general manager so as to make the rules as to notice to a general manager applicable.

Thus, his knowledge of bankruptcy proceedings as affecting property of a debtor of the bank will bind the bank.¹⁹ So if the cashier has any information sufficient to put him upon inquiry, the bank is bound to make the inquiry.²⁰ And service of notice on the cashier of a bank is service on the bank where he has entire charge of the business—the president being such in name only.²¹ But the rule that notice not acquired in the course of his agency, but in the course of another agency, is not imputable to the corporation, is applied to bank cashiers as well as to other agents.²² Notice to or knowledge of the cashier in regard to defects in or defenses to negotiable paper discounted by the bank is ordinarily imputed to the bank,²³ unless the cashier is adversely interested as where he owns the paper discounted or is interested in it as a member of a firm or a stockholder in another corporation.²⁴ His knowledge is imputable to the bank even when he is acting in fraud of a third person;²⁵ and knowledge of the cashier of a bank as to its insolvency, although caused by his prior defalcations, is the knowledge of the bank, so far as the rights of an innocent depositor in the bank are concerned.²⁶ On the other hand, where the purpose of the cashier is to defraud the bank, his knowledge is not imputable to it.²⁷

Conversely, want of knowledge of the cashier as to a matter solely

Mechem, Agency (2nd Ed.), § 1844, citing Merchants' & Planters' Bank v. Penland, 101 Tenn. 445, 47 S. W. 693.

¹⁹ Perry Naval Stores Co. v. Caswell, 63 Fla. 552, 57 So. 660.

²⁰ Groff v. Stitzer, 75 N. J. Eq. 452, 72 Atl. 970.

²¹ Skillern v. Baker, 82 Ark. 86, 118 Am. St. Rep. 52, 12 Ann. Cas. 243, 100 S. W. 764.

²² First Nat. Bank of Elk City v. Dikeman, 96 Kan. 765, 153 Pac. 559; criticising Willard v. Denise, 50 N. J. Eq. 482, 35 Am. St. Rep. 788, 26 Atl. 29.

²³ See §§ 2215-2220, supra.

²⁴ See §§ 2243-2253.

²⁵ Fishkill Sav. Institution v. National Bank of Fishkill, 80 N. Y. 162, 36 Am. Rep. 595. See, generally, § 2253, infra.

²⁶ Pennington v. Third Nat. Bank of Columbus, Georgia, 114 Va. 674, 45 L. R. A. (N. S.) 781, 77 S. E. 455, where contention, that the fact that the insolvency of the bank was due to the defalcation of the cashier repelled the presumption that he imparted the knowledge to the corporation, was not sustained.

"This bank was hopelessly insolvent when the deposit was made, made so apparently by the operations of a firm of which the president of the bank was a member. The knowledge of the president was the knowledge of the bank." St. Louis & S. F. R. Co. v. Johnston, 133 U. S. 566, 576, 33 L. Ed. 683.

²⁷ Hadden v. Dooley, 92 Fed. 274.

See, generally, § 2250, infra.

within his authority is *prima facie* sufficient to show want of knowledge by the bank.²⁸

In particular cases, notice has been imputed to a bank from knowledge of an assistant cashier,²⁹ teller³⁰ or bookkeeper.³¹

§ 2237. — Traveling salesman. Whether notice to or knowledge of a traveling salesman is to be imputed to the corporation for which he travels depends largely, of course, upon the extent of his powers and duties and the nature of the notice or knowledge.³² Notice of a change in the membership of a firm, given to a traveling salesman employed merely to take orders for goods but with no powers or duties as to giving credit, is not imputable to the corporation.³³

§ 2238. — Members or stockholders. Since the stockholders of a corporation, individually, are not its agents, and have no authority to bind it, the rule is well settled that notice to individual corporators or stockholders, or knowledge of facts possessed by them, is not notice to the corporation, where there are other stockholders, and where the persons having the knowledge are not also officers of the corporation.³⁴ Of course, if they are also officers, and the knowledge relates to matters in which they act for or represent the corporation, it is different.

²⁸ *Drovers' Nat. Bank v. Potvin*, 116 Mich. 474, 74 N. W. 724, applying rule to discount of note.

²⁹ *Clark Sparks & Sons Mule & Horse Co. v. Americus Nat. Bank*, 230 Fed. 738.

The knowledge of the assistant cashier of a bank who handled a draft, that said bank to which it was sent for collection was insolvent, when he made the collection, is imputable to the bank itself. *Clark Sparks & Sons Mule & Horse Co. v. Americus Nat. Bank*, 230 Fed. 738.

³⁰ *Zeis v. Potter*, 105 Fed. 671; *Lowndes v. City Nat. Bank of South Norwalk*, 82 Conn. 8, 22 L. R. A. (N. S.) 408, 72 Atl. 150.

³¹ *Lowndes v. City Nat. Bank of South Norwalk*, 82 Conn. 8, 22 L. R. A. (N. S.) 408, 72 Atl. 150.

³² See *Columbus Sewer Pipe Co. v. Ganser*, 58 Mich. 385, 55 Am. Rep. 697, 25 N. W. 377, where knowledge as to settlement on bond given by customer

was held imputable to the corporation.

³³ *Neal v. M. E. Smith & Co.*, 116 Fed. 20.

³⁴ *United States. Racine Seeder Co. v. Joliet Wire-Check Power Co.*, 27 Fed. 367; *The Admiral*, 18 Law Rep. 91, Fed. Cas. No. 84.

Colorado. Franklin Min. Co. v. O'Brien, 22 Colo. 129, 55 Am. St. Rep. 118, 43 Pac. 1016; *Murphy v. Gumaer*, 12 Colo. App. 472, 55 Pac. 951.

Illinois. Burt v. Batavia Paper Mfg. Co., 86 Ill. 66.

Massachusetts. Housatonic Bank v. Martin, 1 Metc. 294.

Minnesota. Mercantile Nat. Bank of Cleveland v. Parsons, 54 Minn. 56, 40 Am. St. Rep. 299, 55 N. W. 825.

Pennsylvania. Wilson v. McCullough, 23 Pa. St. 440, 62 Am. Dec. 347; *Bank of Pittsburgh v. Whitehead*, 10 Watts 397, 36 Am. Dec. 186; *Union Canal Co. v. Loyd*, 4 Watts & S. 393.

In such a case, the rules stated in the preceding sections apply.³⁵ And a corporation may be chargeable with notice of facts known to all the stockholders, or to a stockholder owning all the stock.³⁶ But it is not enough that some of the corporators, but not all, have notice.³⁷

The rule as to information possessed by promoters as being imputable to the corporation has already been stated,³⁸ and it has been noted that their knowledge is not ordinarily imputed to the corporation unless they and the corporation are practically identical.³⁹

³⁵ *Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456, 77 Am. Dec. 311; *Cumberland Coal & Iron Co. v. Sherman*, 30 Barb. (N. Y.) 553.

General rules as to effect of information acquired prior to creation of agency, see § 2224, *supra*.

Knowledge of a promoter, who becomes also director and manager, will be imputed to the corporation. *California Consol. Min. Co. v. Manley*, 10 Idaho 786, 81 Pac. 50. See also § 161.

A corporation will be deemed charged with the secret knowledge of one of its organizers, who becomes its president, that he held certain personal property, transferred to the corporation, merely as a factor. *Wyeth v. Renz-Bowles Co.*, 23 Ky. L. Rep. 2337, 66 S. W. 825. See also, as to the general principle involved, *Elberton v. Pearle Cotton Mills*, 123 Ga. 1, 50 S. E. 977.

³⁶ *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 35 L. Ed. 1063; *In re V. & M. Lumber Co., Inc.*, 182 Fed. 231, 236.

Knowledge of all the stockholders, especially where they are also the officers, of a company, is imputable to the company. *Elberton v. Pearle Cotton Mills*, 123 Ga. 1, 50 S. E. 977.

That the minutes fail to contain a formal resolution authorizing a certain illegal course of action on the part of the corporation is immaterial where the facts are such that all the directors and stockholders must have known thereof and participated there-

in. *American Handle Co. v. Standard Handle Co.* (Tenn. Ch. App.), 59 S. W. 709.

Where all the stock of a corporation, not legally dissolved, was acquired by a single individual, and he continued the business for his individual benefit, but in the corporate name, and the trustees, without resigning, ceased to act, it was held that a notice in reference to a contract of the corporation was properly served on the owner of the stock and his agents. *Orr Water Ditch Co. v. Reno Water Co.*, 19 Nev. 60, 6 Pac. 72. See also *National Conduit Mfg. Co. v. Connecticut Pipe Mfg. Co.*, 73 Fed. 491; *Anderson v. Kinley*, 90 Iowa 554, 58 N. W. 909; *Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456, 77 Am. Dec. 311; *Cumberland Coal & Iron Co. v. Sherman*, 30 Barb. (N. Y.) 553.

³⁷ *Seeger Refrigerator Co. v. American Car & Foundry Co.*, 171 Fed. 416. But see *Lea v. Iron-Belt Mercantile Co.*, 147 Ala. 421, 8 L. R. A. (N. S.) 279, 119 Am. St. Rep. 93, 42 So. 415, where knowledge of one who owned practically all the stock of the corporation was imputed to it.

³⁸ See § 161, vol. 1.

³⁹ Knowledge of a promoter is not imputed to the corporation thereafter formed through his efforts. *Kieffhaber Lumber Co. v. Newport Lumber Co.*, 15 Cal. App. 37, 113 Pac. 691. But see *Zeigler v. Valley Coal Co.*, 150 Mich. 82, 13 Ann. Cas. 90, 113 N. W. 775, 13 Det. L. N. 603.

§ 2239. Application of rules to knowledge of particular facts—In general. These general rules apply, of course, in a great variety of cases—in fact, in any case in which the question whether a corporation had notice of a particular fact is material. Thus, they apply when it is sought to charge a corporation with an officer's knowledge that a particular transaction was in fraud of third persons,⁴⁰ where it is sought to charge a corporation with an officer's knowledge of the insolvency or bankruptcy of a person from whom it has received a payment or a conveyance of property,⁴¹ or to charge the corporation with knowledge of bankruptcy proceedings, so far as the effect of failure to prove claims against the bankrupt under the federal act is concerned,⁴² or to charge the corporation with knowledge of its own insolvency,⁴³ or to charge it with an officer's knowledge that a loan was made by it in furtherance of an illegal purpose,⁴⁴ when it is sought to charge a corporation with notice of an unregistered transfer or pledge of its stock, because of an officer's knowledge thereof, for the purpose of defeating its claim of a lien on the stock for a debt of the person appearing on the books as owner, or for the purpose of holding it liable for recognizing a subsequent transfer by him, or for dividends, etc.,⁴⁵ where the knowledge of an officer of a bank as to the

Notice to one who afterwards organized a corporation of which he became the principal officer and stockholder is imputed to the corporation. *Montana Elec. Co. v. Northern Valley Min. Co.*, 51 Mont. 266, 153 Pac. 1017.

Where incorporators of a new corporation who "subscribed for eighty per cent. if not for all of the stock of the new corporation," and "became at once its officers and managers, knew certain things and acted in the incorporation under the influence of that knowledge to effect certain purposes for the unfair advantage of the corporation when formed," the corporation is affected with that knowledge. Equity in such a case will ignore to some extent the corporate entity by attributing to the corporation any disability in suing that the promoters would be under. *Great Western Live Stock Commission Co. v. Great Western Commission Co.*, 187 Ill. App. 196, 209.

⁴⁰ *Brobston v. Penniman*, 97 Ga. 527, 25 S. E. 350. See also § 2253, *infra*.

Where the president of a corporation obtained money in the name of the corporation for his individual benefit from a bank of which he was vice president and general manager, with the knowledge and connivance of the other officers of the bank, it was held that the bank could not hold the other corporation liable. *Trapp v. Fidelity Nat. Bank*, 101 Ky. 485, 43 S. W. 470, 41 S. W. 577.

⁴¹ *Arthur v. Harrington*, 211 Fed. 215; *Getman v. Second Nat. Bank of Oswego*, 23 Hun (N. Y.) 498.

⁴² *Perry Naval Stores Co. v. Caswell*, 63 Fla. 552, 57 So. 660.

⁴³ *Orme v. Baker*, 74 Ohio St. 337, 113 Am. St. Rep. 968, 78 N. E. 439.

⁴⁴ *Singleton v. Bank of Monticello*, 113 Ga. 527, 38 S. E. 947.

⁴⁵ *Guarantee Co. of North America v. East Rome Town Co.*, 96 Ga. 511, 51 Am. St. Rep. 150, 23 S. E. 503;

residence of an indorser of paper which it holds for collection is sought to be imputed to the bank to defeat its excuse, on the ground of ignorance in the matter, for failure to give the indorser notice of nonpayment.⁴⁶ So the rules have been applied to charge the corporation with notice of the pendency of an action,⁴⁷ notice of dissolution of a partnership,⁴⁸ notice of retirement of a member of a firm which is a debtor of the corporation,⁴⁹ notice of encroachments on property of the corporation,⁵⁰ and notice of transaction resulting in the compromise of a claim of the corporation.⁵¹ So, also, knowledge of the agent of a fire insurance company that a building insured is not occupied will be imputed to the company.⁵²

These rules also apply where knowledge and acquiescence on the part of a corporation is relied upon as a ratification of an unauthorized contract or act by an officer, or as the basis of an estoppel to deny the officer's authority.⁵³

§ 2240. — Application to defeat claim that purchase was without notice. The question arises oftener perhaps than in any other case, in connection with whether the corporation is chargeable with knowledge possessed by its officers or agents so as to prevent it from being a bona fide holder without notice of negotiable paper.⁵⁴ So it arises

Gemmell v. Davis, 75 Md. 546, 32 Am. St. Rep. 412, 23 Atl. 1032; *Dorr v. Life Ins. Clearing Co.*, 71 Minn. 38, 70 Am. St. Rep. 309, 73 N. W. 635.

⁴⁶ *Goodloe v. Godley*, 13 Smedes & M. (Miss.) 233, 51 Am. Dec. 159.

⁴⁷ *Continental Realty Co. v. Cardwell*, 171 Ky. 644, 188 S. W. 777.

⁴⁸ *Robertson Lumber Co. v. Anderson*, 96 Minn. 527, 105 N. W. 972.

⁴⁹ *Rodgers-Wade Furniture Co. v. Wynn*, — Tex. Civ. App. —, 156 S. W. 340.

⁵⁰ *Fresno St. R. Co. v. Southern Pac. R. Co.*, 135 Cal. 202, 67 Pac. 773.

⁵¹ *Metzger v. Southern Bank*, 98 Miss. 108, 54 So. 241.

The corporation will be deemed affected with knowledge possessed by its executive officer of an unauthorized settlement of corporate claims. *Petersen v. Elholm*, 130 Wis. 1, 109 N. W. 76, 1034.

⁵² *De Soto v. American Guaranty*

Fund Mut. Fire Ins. Co., 102 Mo. App. 1, 74 S. W. 1.

⁵³ See § 2185, *supra*.

⁵⁴ *Connecticut Farmers' & Citizens' Bank v. Payne*, 25 Conn. 444, 68 Am. Dec. 362.

Georgia. Fouche v. Merchants' Nat. Bank of Rome, 110 Ga. 827, 36 S. E. 256.

Kentucky. Citizens' Sav. Bank v. Walden, 21 Ky. L. Rep. 739, 52 S. W. 953.

Massachusetts. Loring v. Brodie, 134 Mass. 453.

Missouri. Merchants' Nat. Bank of Kansas City v. Lovitt, 114 Mo. 519, 35 Am. St. Rep. 770, 21 S. W. 825.

New Jersey. Gaston v. American Exch. Bank, 29 N. J. Eq. 98.

Pennsylvania. Harrisburg Bank v. Tyler, 3 Watts & S. 373.

Tennessee. Merchants' & Planters' Bank v. Penland, 101 Tenn. 445, 47 S. W. 693; *Memphis Nat. Bank v.*

in connection with the question as to whether the corporation is a bona fide purchaser or mortgagee of land, or purchaser, mortgagee or pledgee of goods, when there is an unrecorded deed, lease or mortgage, or other equities in favor of a third person.⁵⁵

§ 2241. — **Application of rules to establish negligence.** These rules also apply where it is sought to charge a corporation with an officer's knowledge of the untrustworthiness of a subordinate officer or agent, for the purpose of establishing negligence,⁵⁶ or where it is sought to charge a corporation with notice of defects in its works, etc., for the purpose of establishing negligence.⁵⁷

Sneed, 97 Tenn. 120, 34 L. R. A. 274, 56 Am. St. Rep. 788, 36 S. W. 716.

Vermont. *Porter v. Bank of Rutland*, 19 Vt. 410.

Notice to the cashier of a bank that a note discounted by the bank was obtained by fraud is notice to the bank. *Citizens' Sav. Bank v. Walden*, 21 Ky. L. Rep. 739, 52 S. W. 953.

But the fact that the president of a corporation for which a bank discounted notes in the usual course of business was also vice president of the bank, and that the secretary of the corporation, who represented it in the transaction, was also a director of the bank, does not charge the bank with notice of a secret infirmity in the notes, where neither of these officers represented the bank in the transaction. *Holm v. Atlas Nat. Bank*, 84 Fed. 119.

⁵⁵ **Alabama.** *Frenkel v. Hudson*, 82 Ala. 158, 60 Am. Rep. 736, 2 So. 758.

Connecticut. *Farrel Foundry v. Dart*, 26 Conn. 376.

Kansas. *Wickersham v. Chicago Zinc Co.*, 18 Kan. 481, 26 Am. Rep. 784.

Maryland. *General Ins. Co. v. United States Ins. Co.*, 10 Md. 517, 69 Am. Dec. 174.

Massachusetts. *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 382, 52 Am. Rep. 710, 1 N. E. 282.

Missouri. *Johnston v. Shortridge*, 93 Mo. 227, 6 S. W. 64.

Pennsylvania. *Wilson v. McCullough*, 23 Pa. St. 440, 62 Am. Dec. 347.

Wisconsin. *Walker v. Grand Rapids Flouring-Mill Co.*, 70 Wis. 92, 35 N. W. 332.

⁵⁶ *Merchants' Nat. Bank of Savannah v. Guilmartin*, 93 Ga. 503, 44 Am. St. Rep. 182, 21 S. E. 55.

⁵⁷ **Illinois.** *Quincy Coal Co. v. Hood*, 77 Ill. 68.

Indiana. *Brookville & C. Turnpike Co. v. Pumphrey*, 59 Ind. 78, 26 Am. Rep. 76.

Missouri. *George v. Wabash Western Ry. Co.*, 40 Mo. App. 438.

New York. *Eggleston v. Columbia Turnpike Road Co.*, 82 N. Y. 278.

Pennsylvania. *Patterson v. Pittsburgh & C. R. Co.*, 76 Pa. St. 389, 18 Am. Rep. 412.

Tennessee. *Nashville & C. R. Co. v. Elliott*, 1 Cold. 611, 78 Am. Dec. 506.

Texas. *Temple Elec. Light Co. v. Halliburton*, — Tex. Civ. App. —, 136 S. W. 584.

Wisconsin. *Johnson v. First Nat. Bank of Ashland*, 79 Wis. 414, 24 Am. St. Rep. 722, 48 N. W. 712; *Bass v. Chicago & N. W. Ry. Co.*, 42 Wis. 654, 24 Am. Rep. 437.

The discovery of a defect in an electric light pole by an employee of the company, while in the line of his em-

§ 2242. — **In actions on fidelity bond of officer or agent.** The rules also apply, according to some authorities, where it is sought to impute to a corporation an officer's or agent's knowledge of another officer's or employee's dishonesty, or other facts which should have been communicated to a surety, and the failure to communicate which is relied upon by the surety as a release.⁵⁸ With regard to the rule that the knowledge of an agent is the knowledge of his principal is intended for the protection of the party (actually or constructively) to a transaction, for and on account of the principal, had with such agent, it was said by Justice White in a case in the Supreme Court of the United States, "In the very nature of things, such a principle does not obtain in favor of a surety who has bonded one officer of a corporation, so as to relieve him from the obligations of his bond, by imputing to the corporation knowledge acquired by another employee subsequent to the execution of the bond (and from negligence or wrongful motives, not disclosed to the corporation), of a wrong committed by the official whose faithful performance of duty was guaranteed by the bond. As the rule of imputation to the principal of the knowledge of an agent does not apply to such a case, it must follow that it can only obtain as a consequence of an express provision of the contract of suretyship."⁵⁹

§ 2243. **Exception to general rule where officer or agent adversely interested—Statement of exception.** It has already been stated, as a part of the general rule, that notice to or knowledge of a corporate officer or agent acquired outside the scope of his powers or duties or when not acting for or in behalf of the corporation, is not imputable to the corporation.⁶¹ Now a corporate officer or agent may be given notice or acquire knowledge "outside" the scope of his agency under circumstances wherein it cannot be said that he is interested adversely to the corporation, or he may receive the notice or acquire the infor-

ployment, and where it is his duty to report it to the company or to his superiors; is notice thereof to the company, although he fails to report it. *Denver v. Sherret*, 88 Fed. 226.

⁵⁸ *Saint v. Wheeler & Wilson Mfg. Co.*, 95 Ala. 362, 36 Am. St. Rep. 210, 10 So. 539; *Charlotte, C. & A. R. Co. v. Gow*, 59 Ga. 685, 27 Am. Rep. 403; *Atlantic & P. Tel. Co. v. Barnes*, 64 N. Y. 385, 21 Am. Rep. 621.

Compare, however, *Taylor v. Bank*

of Kentucky, 2 J. J. Marsh. (Ky.) 565; *McShane v. Howard Bank*, 73 Md. 135, 20 Atl. 776; *Pittsburg, Ft. W. & C. Ry. Co. v. Schaeffer*, 59 Pa. St. 356.

⁶⁰ *Fidelity & Deposit Co. v. Courtney*, 186 U. S. 342, 362, 46 L. Ed. 1193, followed in *American Bonding Co. of Baltimore v. Spokane Building & Loan Society*, 130 Fed. 737.

⁶¹ See § 2218, *supra*.

mation either outside or within the scope of his agency but under such circumstances that his interests would be injured by reporting the knowledge acquired to the corporation, i. e., where he is interested adversely to the corporation of which he is an officer or agent. The doctrine that a principal is chargeable with notice of facts known to his agent is generally based upon the ground that it is the duty of the agent to communicate his knowledge to the principal, and that it is to be presumed that he has performed this duty; and, as a rule, this presumption is conclusive. No such presumption can arise, however, where the agent is dealing with the principal in his own interest, or where, for other reasons, his interest is adverse to that of his principal, so that it is to his own interest not to impart his knowledge to the principal; and in such a case the doctrine does not apply. It is well settled, therefore, as a general rule, that (1) where an officer is dealing with the corporation in his own behalf, or (2) is, for any other reason, interested in a transaction adversely to the corporation, knowledge possessed by him in the transaction is not imputable to the corporation.⁶⁸ "The general rule is based upon the principle,

⁶⁸ **United States.** *American Nat. Bank v. Miller*, 229 U. S. 517, 57 L. Ed. 1310; *Dunlap v. Twin City Power Co.*, 226 Fed. 161; *In re Senoia Duck Mills*, 193 Fed. 711; *Lamson v. Beard*, 94 Fed. 30, 45 L. R. A. 822; *Whittle v. Vanderbilt Mining & Milling Co.*, 83 Fed. 48; *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 75 Fed. 433; *Davis Improved Wrought Iron Wagon Wheel Co. v. Davis Wrought Iron Wagon Co.*, 20 Fed. 699.

Alabama. *Frenkel v. Hudson*, 82 Ala. 158, 60 Am. Rep. 736, 2 So. 758; *Whelan v. McCreary*, 64 Ala. 319. This rule, however, was apparently rejected in at least one case in Alabama, as a rule of substantive law, although the presumption that an agent informs his principal of material facts was held rebuttable. "Constructive notice to the principal through the actual knowledge of the agent is not a rule of evidence, but one of substantive law. Given notice to or knowledge of the agent, received while so acting, and the principal is conclusively bound by it; not because he ever knows it in

fact, because his actual knowledge is utterly immaterial, but because as to the thing the agent is doing the agent is in law the principal, and the principal is in law the agent. Their legal identity is complete. Nor can it matter, in this aspect of the rule, whether the agent has, or has not, private reasons or interests which make it likely or even certain that he will not inform his principal." *Hall & Brown Woodworking Mach. Co. v. Haley Furniture & Manufacturing Co.*, 174 Ala. 190, 56 So. 726.

Colorado. *Franklin Min. Co. v. O'Brien*, 22 Colo. 129, 55 Am. St. Rep. 118, 43 Pac. 1016; *First Nat. Bank of Granada v. Martin*, 27 Colo. App. 524, 150 Pac. 320.

Connecticut. *First Nat. Bank of Willimantic v. Bevin*, 72 Conn. 666, 45 Atl. 954; *Platt v. Birmingham Axle Co.*, 41 Conn. 255.

Georgia. *Union City Realty & Trust Co. v. Wright*, 145 Ga. 730, 89 S. E. 822; *Georgia Milk Producers' Ass'n v. Crane*, 137 Ga. 50, 72 S. E. 414; *English-American Loan & Trust*

that, as it is the duty of the agent to act upon the notice for his principal, or to communicate the information to his principal in the proper discharge of his trust as such agent, notice to the agent is likewise legal notice to his principal. This rule applies to the agents and officers of corporations, as well as others. This general rule has no application, however, to a case in which the one party does not act as agent, but avowedly for himself, and adversely to the interests of the other. In other words, neither the acts nor knowledge of an officer of a corporation will bind it in a matter in which the officer acts for himself, and deals with the corporation as if he had no official rela-

Co. v. Hiers, 112 Ga. 823, 38 S. E. 103; *Wallis v. Heard*, 16 Ga. App. 802, 86 S. E. 391.

Illinois. *Seaverns v. Presbyterian Hospital*, 173 Ill. 414, 64 Am. St. Rep. 125, 50 N. E. 1079; *Higgins v. Lanning*, 154 Ill. 301, 40 N. E. 362.

Indiana. *Peckham v. Hendren*, 76 Ind. 47.

Iowa. *Chaffee v. Berkley*, 118 N. W. 267; *Hummel v. Bank of Monroe*, 75 Iowa 689, 37 N. W. 954; *First Nat. Bank of Davenport v. Gifford*, 47 Iowa 575.

Kansas. *Wickersham v. Chicago Zinc Co.*, 18 Kan. 481, 26 Am. Rep. 784; *First Nat. Bank of Arkansas City v. Skinner*, 10 Kan. App. 517, 62 Pac. 705.

Kentucky. *Lyne v. Bank of Kentucky*, 5 J. J. Marsh. 545.

Louisiana. *Louisiana State Bank v. Senecal*, 13 La. 525; *Seixas v. Citizens' Bank*, 38 La. Ann. 424.

Maryland. *Gemmell v. Davis*, 75 Md. 546, 32 Am. St. Rep. 412, 23 Atl. 1032; *Winchester v. Baltimore & S. R. Co.*, 4 Md. 231.

Massachusetts. *Corcoran v. Snow Cattle Co.*, 151 Mass. 74, 23 N. E. 727; *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710, 1 N. E. 282; *Dickinson v. Central Nat. Bank*, 129 Mass. 279, 37 Am. Rep. 351; *West Boston Sav. Bank v. Thompson*, 124 Mass. 506; *Commercial Bank v. Cunningham*, 24 Pick. 270, 35 Am. Dec.

322; *Washington Bank v. Lewis*, 22 Pick. 24.

Michigan. *State Sav. Bank of Ionia v. Montgomery*, 126 Mich. 327, 85 N. W. 879; *International Wrecking & Transportation Co. v. McMorran*, 73 Mich. 467, 41 N. W. 510.

Minnesota. *E. S. Woodworth & Co. v. Carroll*, 104 Minn. 65, 115 N. W. 946, 112 N. W. 1054; *Ft. Dearborn Nat. Bank of Chicago v. Seymour*, 71 Minn. 81, 73 N. W. 724; *Dorr v. Life Ins. Clearing Co.*, 71 Minn. 38, 70 Am. St. Rep. 309, 73 N. W. 635; *Bang v. Brett*, 62 Minn. 4, 63 N. W. 1067.

Missouri. *Central Bank of Kansas City v. Thayer*, 184 Mo. 61, 82 S. W. 142; *Merchants' Nat. Bank of Kansas City v. Lovitt*, 114 Mo. 519, 35 Am. St. Rep. 770, 21 S. W. 825; *Johnston v. Shortridge*, 93 Mo. 227, 6 S. W. 64; *Kenneth Inv. Co. v. National Bank of Republic*, 96 Mo. App. 125, 70 S. W. 173; *Manhattan Brass Co. v. Webster Glass & Queensware Co.*, 37 Mo. App. 145; *State Sav. Ass'n v. Nixon-Jones Printing Co.*, 25 Mo. App. 642. *Compare Steam Stonecutter Co. v. Myers*, 64 Mo. App. 527, 2 Mo. App. 1038.

Nebraska. *State Bank of O'Neill v. Mathews*, 45 Neb. 659, 50 Am. St. Rep. 565, 63 N. W. 930; *Koehler v. Dodge*, 31 Neb. 328, 28 Am. St. Rep. 518, 47 N. W. 913.

New Jersey. *Graham v. Orange County Nat. Bank*, 59 N. J. L. 225, 35 Atl. 1053; *First Nat. Bank of Hights-*

tions with it." ⁶⁸ The rule that the knowledge acquired by the officers or agents of a corporation, while not acting for the corporation, but

town v. Christopher, 40 N. J. L. 435, 29 Am. Rep. 262; Barnes v. Trenton Gas Light Co., 27 N. J. Eq. 33.

New Mexico. Wells, Fargo & Co.'s Express v. Walker, 9 N. M. 456, 54 Pac. 875.

New York. Casco Nat. Bank of Portland v. Clark, 139 N. Y. 307, 36 Am. St. Rep. 705, 34 N. E. 908; Atlantic State Bank v. Savery, 82 N. Y. 291; Miller v. Central R. Co., 24 Barb. 312; La Farge Fire Ins. Co. v. Bell, 22 Barb. 54; Seneca County Bank v. Nease, 5 Den. 329.

Ohio. Loomis v. Eagle Bank of Rochester, 1 Disn. 285.

Oregon. Weber v. Richardson, 76 Ore. 286, 147 Pac. 522, 1199.

Pennsylvania. Gunster v. Scranton Illuminating, Heat & Power Co., 181 Pa. St. 327, 59 Am. St. Rep. 650, 37 Atl. 550.

South Carolina. Knoblock v. Germania Sav. Bank, 50 S. C. 259, 27 S. E. 962.

South Dakota. National Bank of Commerce of Pierre v. Feeney, 9 S. D. 550, 46 L. R. A. 732, 70 N. W. 874.

Tennessee. Wood v. Green, 131 Tenn. 583, 590, 175 S. W. 1139.

Utah. Victor Gold & Silver Min. Co. v. National Bank, 15 Utah 391, 49 Pac. 826.

Vermont. First Nat. Bank of Brandon v. Briggs' Assignees, 70 Vt. 594, 41 Atl. 580; Lyndon Mill Co. v. Lyndon Literary & Biblical Institution, 63 Vt. 581, 25 Am. St. Rep. 783, 22 Atl. 575.

Virginia. Martin v. South Salem Land Co., 94 Va. 28, 26 S. E. 591.

Wisconsin. In re Plankinton Bank, 87 Wis. 378, 58 N. W. 784.

England. In re European Bank, 5 Ch. App. 358.

See, generally, 2 Mechem, Agency (2nd Ed.), §§ 1815-1825.

"The rule has no application when the transaction is one in which the official is dealing with the corporation on his own account. He is not then a representative of the corporation, but a party contracting with the corporation as represented by others. His independent and adverse attitude is an essential and manifest feature of the transaction." Roberts v. W. H. Hughes Co., 86 Vt. 76, 83 Atl. 807.

Where the agent is engaged in doing an act against his principal's interest, this exception to the rule is applicable. Brooklyn Distilling Co. v. Standard Distilling & Distributing Co., 120 N. Y. App. Div. 237, 105 N. Y. Supp. 264.

⁶⁹ Horton, C. J., in Wickersham v. Chicago Zinc Co., 18 Kan. 481, 26 Am. Rep. 784.

The doctrine that knowledge of an officer is imputable to the corporation does not apply where work is done on corporate property under a contract with a director in his individual capacity, with the understanding that he shall be personally liable. Ayers v. Green Gold Min. Co., 116 Cal. 333, 48 Pac. 221.

"One feature or incident of agency to which appellant has adverted at considerable length is embraced in the term 'imputation of knowledge to plaintiff.' This, however, is nothing but a phase or circumstance of express, implied, or ostensible authority. The knowledge of the agent is considered and imputed as the knowledge of the principal only when the former acquires it in the course of his agency. If he does not acquire it while acting within the scope of his authority, the knowledge is no more to be imputed to the principal than to an utter stranger. The imputation has been

for themselves, is not imputable to the corporation, is merely another way of stating the adverse interest rule.

The notice or knowledge which is to be imputed to the principal is ordinarily that of extrinsic facts relating to the subject-matter of the agency as distinguished from the fact that the agent in acting has violated his duty or done an unauthorized act.⁶⁴ This would seem to follow from the rule that notice is not imputed where the agent acts adversely to the corporation.

§ 2244. — Reasons for exception. The reason most commonly given and relied upon for this exception to the rule is "that there is, from the circumstances, a presumption that the agent will not perform his duty. Another reason which has been suggested is that inasmuch as the pretended agent is, by the hypothesis, really acting on his own account, he does not receive the notice as agent and while acting within the scope of his authority. * * * Another, which is very similar, is that inasmuch as he is really acting in pursuance of a fraudulent design and committing an independent fraud, his whole act, including the notice, is beyond the scope of his employment

held to rest upon the presumption that the agent will communicate such knowledge to his principal. Manifestly no such presumption can exist where the agent is engaged in a transaction beyond his authority and in which he is interested adversely to his principal or in a scheme to defraud his principal. * * * An exception is recognized to the rule where the principal is in fact represented in the whole transaction solely by the party as agent. Herein plaintiff was not represented by Black in the matter of the loan to the investment company, since he dealt with respondent through its board of directors, its security committee and attorney. Respondent would not, therefore, be charged with constructive knowledge of Black's misapplication of the fund. But if the presumption existed it would be a disputable presumption, and the court has found, on sufficient evidence, that the plaintiff had no knowledge of these things. The doctrine manifestly cannot be applied to

the extent and end claimed by appellant. The contention resolves itself to this: That the principal, if he has knowledge of the exercise by the agent of certain powers, is bound by the act of the agent, and he must be held to have such knowledge from the fact that the agent knows of it himself. Such doctrine, of course, could not be maintained, as it would place it within the power of an agent to bind the principal to any course of conduct however foreign or obnoxious to the authority actually conferred." *Palo Alto Mut. Building & Loan Ass'n v. First Nat. Bank of Palo Alto*, — Cal. App. —, 164 Pac. 1124.

⁶⁴ 2 Mechem, Agency (2nd Ed.), § 1842.

"Sanford executed the note himself; and in undertaking, without authority, to impose an obligation on the company, he occupied a position adverse to it. He was not acting in its interest." *Sanford Cattle Co. v. Williams*, 18 Colo. App. 378, 71 Pac. 889.

and therefore neither the act nor the knowledge relating to it, as matter of law, can be imputed to his principal." These reasons, as stated by Professor Mechem, are analyzed at great length by him in his valuable work on the law of agency,⁶⁵ and he reaches the conclusion that the true basis of the rule is that, "under the circumstances, there was really no agency, and not upon the ground that the law presumes that the agent will violate his duty. It should be confined, therefore, to the cases which really fall within the reason; and notice should be imputed wherever there is agency or ratification."⁶⁶

§ 2245. — **When interests of officer or agent are deemed adverse.** This rule does not apply, however, where the interests of the corporation and of its officer or agent are in reality not adverse.⁶⁷ Ordinarily there is no presumption that an officer is acting adversely to the corporation and in his own interests, where there is nothing to show that he is appropriating for himself business legitimately belonging to his corporation.⁶⁸ In regard to this matter, it was said by Justice McKenna in a recent decision of the Supreme Court of the United States that "undoubtedly a corporation is, in law, a person or entity entirely distinct from its stockholders and officers. It may have interest distinct from theirs. Their interests, it may be conceived, may be adverse to its interest, and hence has arisen against the presumption that their knowledge is its knowledge, the counter presumption that, in transactions with it, when their interest is adverse, their knowledge will not be attributed to it. But while this presumption should be enforced to protect the corporation, it should not be carried so far as to enable the corporation to become a means of fraud or a means to evade its responsibilities. A growing tendency is therefore exhibited in the courts to look beyond the corporate form to the purpose of it,

⁶⁵ 2 Mechem, Agency (2nd Ed.), §§ 1816-1825.

⁶⁶ 2 Mechem, Agency (2nd Ed.), § 1822.

Reason for rule in Alabama, that agent is in law identified with principal, see *Hall & Brown Woodworking Mach. Co. v. Haley Furniture & Manufacturing Co.*, 174 Ala. 190, 197, 56 So. 726.

⁶⁷ *White Plains Coal Co. v. Teague*, 163 Ky. 110, 173 S. W. 360; *Miner v. Husted*, 191 Mich. 25, 157 N. W. 442.

Where a cashier had knowledge that

notes executed to the bank were usurious, and shortly after their execution a new bank with half or more of the stockholders and directors of the old bank and with the same cashier, was organized and said notes were indorsed over to the new bank, the knowledge of the cashier of the indorser bank is imputable to the indorsee bank. *First State Bank of Keota v. Bridges*, 39 Okla. 355, 135 Pac. 378.

⁶⁸ *Brite v. Penny*, 157 N. C. 110, 72 S. E. 964.

and to the officers who are identified with that purpose;" and it was held that knowledge on the part of the president of a corporation of fraud in a homestead entry, the land being conveyed by the patentee to the president and by him as one of the incorporators to the corporation, was imputable to the corporation, where he and his partner incorporated their business with himself as president and his partner as secretary, and they owned a large majority of the stock and had the entire management and control of the corporation, since in such case the interest of the corporators and the corporation were identical and not adverse.⁶⁹ Likewise, if the persons conveying property to a corporation are the sole owners of the capital stock of the corporation as well as of the property conveyed, there can be no adverse interest, so as to prevent their knowledge being imputable to the corporation.⁷⁰ On the other hand, the fact that the officer whose knowledge is sought to be imputed owned practically all the stock and was the general manager of another company which had borrowed money from the first corporation, makes the loan in his own interest and opposed to the interests of the lending company, so as to make his knowledge of preferential payments by the borrowing bankrupt company not imputable to the lending company.⁷¹

One acting for himself is, of course, acting adversely, where dealing with the corporation;⁷² and it follows that if the president or any other official of a corporation deals with the corporation at arm's length, the same as any other individual representing himself alone, and does not act as the representative of the corporation, his knowledge is not imputable to it.⁷³ There is not necessarily any adverse interest so as to prevent notice to directors of one corporation constituting notice to another corporation having the same directors.⁷⁴

Where a bank president, knowing that certain securities belonged to a fraternal insurance company, accepted them as collateral for a loan to an individual as such, his knowledge, including that of the fact that the individual had no authority to pledge them, is imputable to the bank notwithstanding he had a standing arrangement with the brokers who sold the securities to divide commissions on all business

⁶⁹ *J. J. McCaskill Co. v. United States*, 216 U. S. 504, 54 L. Ed. 590.

⁷⁰ *In re V. & M. Lumber Co., Inc.*, 182 Fed. 231, 236.

⁷¹ *High v. Opalite Tile Co.*, 184 Fed. 450.

⁷² *Metcalf v. Draper*, 98 Ill. App. 399.

⁷³ *People's Bank of Talbotton v. Exchange Bank*, 116 Ga. 820, 94 Am. St. Rep. 144, 43 S. E. 269.

⁷⁴ *First Nat. Bank of Louisville v. Chowning Elec. Co.*, 142 Ky. 624, 134 S. W. 1156.

brought by him, since "this was a collateral and incidental contract, which in no way prejudiced the bank, or was any reason for concealing from it the fraud practiced on" the insurance company in a transaction which the president was making for the bank entirely within the scope of his authority as president.⁷⁵

In a recent case decided by the Supreme Court of the United States, a depositor in a bank, and indebted to it on paper which would shortly mature, was in fact insolvent, and while in that condition he gave to another bank of which he was president a check on account of a debt due by him to it, and the check was sent by the last-named bank to the first-named bank on which it was drawn, but was not credited to the payee bank until an hour or so after a petition in bankruptcy had been filed against the maker. In an action involving the amount of the check, the question arose as to whether the payee bank was chargeable with knowledge of its president's insolvency. Justice Lamar said: "If Plant [the president], within the scope of his office, had knowledge of a fact which it was his duty to declare, and not to his interest to conceal, then his knowledge is to be treated as that of the bank. For he is then presumed to have done what he ought to have done, and to have actually given the information to his principal. But if the fact of his own insolvency and of his personal indebtedness to the Nashville bank were matters which it was to his interest to conceal, the law does not by a fiction charge the Macon bank, of which he was president, with notice of facts which the agent not only did not disclose, but which he was interested in concealing. * * * It was to his personal interest to conceal any fact which would prevent the Macon bank from receiving paper in satisfaction of a debt which had been unlawfully contracted by reason of his official position."⁷⁶

Notice to the active manager of a company is not notice to the company of the existence of the agency from conduct of the corporation or arising out of estoppel, since "his interests in this respect were adverse to the company, for they would amount to an appointment of himself as agent without the knowledge of his associates."⁷⁷

The adverse interest must have existed at the time knowledge was acquired or notice given and not have accrued subsequently.⁷⁸

⁷⁵ *Ballard v. Audubon Nat. Bank*, Co., 78 N. J. L. 637, 30 L. R. A. (N. S.) 347, 138 Am. St. Rep. 627, 78 Atl. 222 Fed. 57.

⁷⁶ *American Nat. Bank v. Miller*, 1024.
229 U. S. 517, 521, 57 L. Ed. 1310, ⁷⁸ *First Nat. Bank of Louisville v. Chowning Elec. Co.*, 142 Ky. 624, 134 aff'g 185 Fed. 338.

⁷⁷ *Schlessinger v. Forest Products* S. W. 1156.

§ 2246. — Joint interest as distinguished from adverse interest. However, knowledge of the manager of a corporation, although he was personally interested in the transaction in which it was acquired, is to be imputed to the corporation where he was the sole manager and the sole stockholder but one, and where in the particular transaction he acted both for himself and for his company with the agent of another company.⁷⁹

§ 2247. — Illustrations and applications of exception. As well said by an eminent author, in many of the cases this rule as to adverse interest "seems to have been applied quite arbitrarily and without much consideration of the reasons involved."⁸⁰ It is often applied to officers of banks.⁸¹ This rule preventing knowledge of or notice to a corporate officer or agent being imputed to the corporation where the officer or agent and the corporation are adversely interested in the particular transaction involved, is most frequently illustrated in case of banking operations, especially the discounting or purchase of negotiable paper in which the officer or agent is interested. It has repeatedly been held that the knowledge of the officer of a banking institution, obtained in a capacity other than as its representative, of the infirmity or invalidity of paper acquired by such banking institution, through an instrumentality in which such officer is interested adversely to the interest of the bank, will not be imputed to the bank.⁸² In other words, where an officer of a bank or other corporation sells and transfers a note to it, or procures the discount of

⁷⁹ "In short, he as an individual and as manager co-operated in doing an act for their joint interest. As to this particular act or transaction they became as one person, and the knowledge of the one must be imputed to the other." *Lea v. Iron Belt Mercantile Co.*, 147 Ala. 421, 8 L. B. A. (N. S.) 279, 119 Am. St. Rep. 93, 42 So. 415.

⁸⁰ 2 Mechem, Agency (2nd Ed.), § 1815.

⁸¹ *Bank of Hartford v. McDonald*, 107 Ark. 232, 154 S. W. 512.

⁸² *Levy & Cohn Mule Co. v. Kauffman*, 114 Fed. 170; *Davis v. Boone County Deposit Bank*, 25 Ky. L. Rep. 2078, 80 S. W. 161; *Coreoran v. Snow Cattle Co.*, 151 Mass. 74, 23 N. E. 727;

Rusmissett v. White Oak Stave Co., — W. Va. —, 92 S. E. 672.

"But there is an exception to this rule in respect to an officer or member of a board of directors of a corporation who has acquired knowledge outside of his official duties, which it is to his personal interest to conceal from his corporation. When such is the case, his knowledge will not be ascribed to the corporation of which he is an officer. This exception is especially applicable in the case of an officer of a bank who has a personal interest to be served in having paper discounted by it." *City Bank of Wheeling v. Bryan*, 72 W. Va. 29, 78 S. E. 400.

Rule applies to discount of notes by

a note by it for his own benefit, having notice of a defect in the title, or of illegality in the consideration of the note, or other defenses, notice is not imputed to the corporation, where such officer acts not for the corporation but for himself.⁸³ Thus, knowledge of the president of a bank who presented notes of another to the bank for discount, that the proceeds were to be used to speculate in stocks on mar-

cashier, especially where he has been guilty of fraud in procuring the execution of the note. *First Nat. Bank of Willimantic v. Bevin*, 72 Conn. 666, 45 Atl. 954.

⁸³ *United States. Holm v. Atlas Nat. Bank*, 84 Fed. 119.

Connecticut. First Nat. Bank of Willimantic v. Bevin, 72 Conn. 666, 45 Atl. 954.

Georgia. English-American Loan & Trust Co. v. Hiers, 112 Ga. 823, 38 S. E. 103.

Iowa. Hummel v. Bank of Monroe, 75 Iowa 689, 37 N. W. 954; *First Nat. Bank of Davenport v. Gifford*, 47 Iowa 575.

Louisiana. Louisiana State Bank v. Senecal, 13 La. 525.

Massachusetts. West Boston Sav. Bank v. Thompson, 124 Mass. 506; *Frost v. Inhabitants of Belmont*, 6 Allen 152; *Commercial Bank v. Cunningham*, 24 Pick. 270, 35 Am. Dec. 322; *Washington Bank v. Lewis*, 22 Pick. 24.

Missouri. Merchants' Nat. Bank of Kansas City v. Loyitt, 114 Mo. 519, 35 Am. St. Rep. 770, 21 S. W. 825.

New Jersey. Graham v. Orange County Nat. Bank, 59 N. J. L. 225, 35 Atl. 1053; *First Nat. Bank of Hightstown v. Christopher*, 40 N. J. L. 435.

New York. Casco Nat. Bank of Portland v. Clark, 139 N. Y. 307, 36 Am. St. Rep. 705, 34 N. E. 908; *Seneca County Bank v. Neass*, 5 Den. 329.

Ohio. Loomis v. Eagle Bank, 1 Disney 285.

Virginia. Martin v. South Salem Land Co., 94 Va. 28, 26 S. E. 591.

West Virginia. Rusmisse v. White Oak Stave Co., 92 S. E. 672.

England. In re European Bank, 5 Ch. App. 358.

"They were negotiating with the bank at arms' length in a transaction in which they were vendors and the bank a vendee. A rule of law which would impute notice to the bank in such a case would make it unsafe for any bank at any time to discount paper for, or purchase it from, one of its directors." *Lilly v. Hamilton Bank of New York*, 178 Fed. 53, 58, 29 L. R. A. (N. S.) 558.

Where the cashier of a bank procures the execution of a note by fraud, and transfers it to the bank as security for a loan, the bank is not chargeable with knowledge of the fraud, so as to preclude it from recovering on the note. *First Nat. Bank of Willimantic v. Bevin*, 72 Conn. 666, 45 Atl. 954.

A bank, when making a loan, is not chargeable with knowledge of a fact possessed by two of its directors, where they act for the borrower in the transaction, and are indorsers on the notes given by him. *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591.

In selling a note his interests are antagonistic and furthermore a bank officer who offers to his bank a note for discount is to be regarded in that transaction as a stranger, and the bank is not chargeable with the officer's knowledge of fraud or want of consideration for the note. *Dominion Trust Co. v. Hildner*, 243 Pa. 253, 90 Atl. 69.

gin with a firm in which the president was a member, is not imputable to the bank.⁸⁴ So where a corporate officer transfers a note owned by him to the corporation to pay a debt he owed the company, his knowledge as to a partial failure of consideration is not imputable to the company.⁸⁵ And knowledge of the president of a bank that a note given to the bank was accommodation paper for his own debt to the bank is not imputable to the bank.⁸⁶ Where the cashier pledged notes with his bank as collateral for his indebtedness, the bank is not chargeable with his knowledge of want of consideration for the notes, since in making the pledge "he was not acting in its [the bank's] behalf but was dealing at arm's length * * * and acting solely in his own interest."⁸⁷ Where the principal stockholder and president of a corporation directed a bank to apply the deposit of the corporation to his individual debt, his knowledge thereof was not imputed to the corporation.⁸⁸ Knowledge of the president and cashier of a bank as to the insolvent condition of a corporation in which they were stockholders, and which they had permitted to overdraw its account, will not be imputed to the corporation.⁸⁹

So far as the particular officer or agent whose interest is adverse, is concerned, little need be said except that the rule applies to all officers and to all agents, including directors,⁹⁰ the president of the

⁸⁴ First Nat. Bank of Birmingham v. Fidelity Title & Trust Co., 251 Pa. 529, 97 Atl. 75.

⁸⁵ Arlington Brewing Co. v. Blumenthal & Bickart, 36 App. Cas. (D. C.) 209, Ann. Cas. 1912 C 294.

⁸⁶ Hawkins v. First Nat. Bank, — Tex. Civ. App. —, 175 S. W. 163.

⁸⁷ Melton v. Pensacola Bank & Trust Co., 190 Fed. 126, 137.

⁸⁸ Buena Vista Veneer Co. v. Hodges, 116 Ark. 253, 172 S. W. 868.

⁸⁹ German-American State Bank v. Soap Lake Salts Remedy Co., 77 Wash. 332, 137 Pac. 461.

⁹⁰ English-American Loan & Trust Co. v. Hiers, 112 Ga. 823, 38 S. E. 103; Billings v. Shaw, 209 N. Y. 265, 103 N. E. 142, aff'g 151 N. Y. App. Div. 888, 135 N. Y. Supp. 1100.

Notice to an individual director as to a matter which it was to his interest to conceal from the corporation

is not imputed to the corporation. First Nat. Bank of New Martinsville v. Lowther-Kaufman Oil & Coal Co., 66 W. Va. 505, 28 L. R. A. (N. S.) 511, 66 S. E. 713. And see *infra*, this section.

If some directors convey land to their corporation, the corporation is not chargeable with their knowledge of bad faith in the transaction where the other directors were ignorant of the facts. Schneider v. Sellers, 98 Tex. 380, 84 S. W. 417.

Likewise, if a director has notice, but takes no part as director in the sale by him to the corporation of shares of stock which he individually held, his knowledge is not imputable to the corporation. Merchantville Building & Loan Ass'n v. Zane (N. J. Ch.), 38 Atl. 420.

By the weight of authority, if a director is acting for himself and adversely to the interests of the cor-

corporation, including the president of a bank, the president and cashier of a bank, vice president and cashier of a bank.⁹¹ Thus, the rule has been applied to the knowledge of the president of the corporation where he sells property to the corporation,⁹² where he discounts negotiable paper with his own bank;⁹³ where he misappropriates funds in personal transactions;⁹⁴ and where he deposits money to his personal account but which does not belong to him.⁹⁵ So the doctrine applies, for example, where any officer of a corporation sells and conveys or mortgages land to the corporation, having at the time knowledge of a prior unrecorded deed, lease or mortgage, or of other defects in the title, or equities in favor of third persons;⁹⁶ where a consignee of a cargo for sale as agent, having an absolute bill of lading in his own name, indorses the bill of lading and pledges the cargo to a bank in which he is a director, for a loan to himself, the loan

poration, in a particular transaction, as in a case in which he procures a note to be discounted by the corporation, or sells or pledges property to it, his knowledge of facts is not imputable to the corporation; and it is immaterial that he was present at a meeting of the directors at which the transaction was considered and authorized. In such a case, he does not act as the agent of the corporation. Where a person shipped a cargo to another, with authority to sell it for him upon an absolute bill of lading in the other's name, and the latter pledged the cargo to a bank, of which he was a director, as security for a loan, it was held that his knowledge was not imputable to the bank, so as to render it liable for conversion, although he was present at the directors' meeting at which the loan was approved. *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710, 1 N. E. 282; and see § 2252.

⁹¹ Cashier, see *Melton v. Pensacola Bank & Trust Co.*, 190 Fed. 126; *Hilliard v. Lyons*, 180 Fed. 685; *Overton Bank v. Thomson*, 118 Fed. 998; *Brady v. Mt. Morris Bank*, 65 N. Y. App. Div. 212, 73 N. Y. Supp. 532, and see *supra*, this section.

Where a cashier of a bank, acting

in his individual capacity, receives in trust property or money as the agent of a third person, his act in transferring the credit on the books of the bank to himself does not affect the bank with his knowledge. *School Dist. City of Sedalia, Missouri v. De Weese*, 100 Fed. 705.

⁹² *Barnes v. Trenton Gas Light Co.*, 27 N. J. Eq. 33; *Lee v. R. H. Elliott & Co.*, 113 Va. 618, 75 S. E. 146.

⁹³ *Corcoran v. Snow Cattle Co.*, 151 Mass. 74, 23 N. E. 727, and see *supra*, this section.

⁹⁴ *Lamson v. Beard*, 94 Fed. 30, 45 L. R. A. 822.

⁹⁵ *In re Plankinton Bank*, 87 Wis. 378, 58 N. W. 784.

⁹⁶ *Alabama*. *Frenkel v. Hudson*, 82 Ala. 158, 60 Am. Rep. 736, 2 So. 758.

Illinois. *Higgins v. Lansingh*, 154 Ill. 301, 40 N. E. 362.

Kansas. *Wickersham v. Chicago Zinc Co.*, 18 Kan. 481, 26 Am. Rep. 784.

Kentucky. *Lyne v. Bank of Kentucky*, 5 J. J. Marsh 545.

Missouri. *Johnston v. Shortridge*, 93 Mo. 227, 6 S. W. 64.

New Jersey. *Barnes v. Trenton Gas Light Co.*, 27 N. J. Eq. 33.

New York. *La Farge Fire Ins. Co. v. Bell*, 22 Barb. 54.

being approved at a meeting of the directors at which he is present;⁹⁷ where an officer pledges a certificate of stock to the bank, acting for himself, or as agent for his wife, and having knowledge of a prior unregistered transfer of the stock by himself and his wife;⁹⁸ or where an officer draws funds from the corporation with fraudulent intent to misappropriate the same.⁹⁹

Where an officer of a corporation, after having sold his stock, and before the transferee has the transfer registered, sells and transfers it to another person, who has his transfer registered, and procures a new certificate from the corporation, his knowledge of the unregistered prior transfer is not notice thereof to the corporation, so as to render it liable to the transferee.¹

§ 2248. — **Where same person is agent both of corporation and of other party to transaction: Interlocking officers.** "Where the same person acts with their consent, as agent of two or more principals," says Professor Mechem, "all interested in the same subject-matter, and concerning which he owes a duty of communication to each, notice to this agent must doubtless be deemed notice to all his principals in accordance with the ordinary rules."² The rule that if one is agent of both parties to a transaction and this is known and consented to, notice to him is notice to both of them if it would be notice if the agent represented such one alone, is applied to agents of corporations.³ And under this rule that a principal who knows that his agent is also acting as agent for the party adversely interested in a transaction with him, and yet consents that he may act as his agent, is estopped from denying the notice and knowledge which the agent has during the transaction,⁴ it is held that a bank which loans money to a mercantile company, on assignments of accounts receivable as security, and which appoints the president of the borrower as its agent to collect the accounts and deposit the proceeds, is bound by the knowledge of such agent that the company was insolvent.⁵

⁹⁷ *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710, 1 N. E. 282.

⁹⁸ *Platt v. Birmingham Axle Co.*, 41 Conn. 255.

⁹⁹ *Knobelock v. Germania Sav. Bank*, 50 S. C. 259, 27 S. E. 962.

Knowledge of the president of a bank of his misappropriation of its funds in personal transactions is not notice to the bank. *Lamson v. Beard*, 94 Fed. 30, 45 L. R. A. 822.

¹ *Dickinson v. Central Nat. Bank*, 129 Mass. 279, 37 Am. Rep. 351.

² Mechem, *Agency* (2nd Ed.), § 1837.

³ *First State Bank of Keota v. Bridges*, 39 Okla. 355, 135 Pac. 378.

⁴ *Pine Mountain Iron & Coal Co. v. Bailey*, 94 Fed. 258, 260.

⁵ *In re Cotton Manufacturers' Sales Co.*, 209 Fed. 629.

On the other hand, where the same person "happens to be an agent of two principals not thus interested, notice to him will not necessarily be notice to both principals. To make it so there must be some duty imposed upon him to communicate it to the principal sought to be affected. Where an agent stands in such a relation to two principals (who have not knowingly consented to his double employment) that his present duty to one conflicts with his present duty to the other, it is said that notice which he has with reference to the business of one principal will not be imputed to the other."⁶ This rule applies equally well where a corporate officer or agent is also agent of an individual, firm or other corporation.⁷ It follows that when a corporation deals with another corporation, of which its officer is also an officer or agent, or with a natural person, of whom he is also an agent, it is not chargeable with knowledge of facts possessed by him, if it does not relate to matters within his authority as officer of the first-named corporation or if he is not acting as its agent in the matter.⁸ The rule has been stated as follows: "If a person is

⁶ 2 Mechem, Agency (2nd Ed.), §§ 1837, 1838.

⁷ Partnership, see *infra*, next section.

⁸ *Kentucky*. *Randolph v. Ballard County Bank*, 142 Ky. 145, 150, 134 S. W. 165.

Minnesota. *First Nat. Bank of Rock Island v. Loyhed*, 28 Minn. 396, 10 N. W. 421.

Missouri. *Vandagriff v. Grand Commandery of Knights Templar*, 176 Mo. App. 441, 158 S. W. 461.

South Carolina. *Wardlaw v. Troy Oil Mill*, 74 S. C. 368, 114 Am. St. Rep. 1004, 54 S. E. 658.

England. *In re Marseilles Extension Ry. Co.*, 7 Ch. App. 161; *In re Contract Corporation*, L. R. 8 Eq. 14.

When one is an officer of two corporations and they have business transactions with each other, the knowledge of the common officer cannot be attributed to either corporation in a matter in which he did not represent it. *Benton v. German-American Nat. Bank*, 122 Mo. 332, 26 S. W. 975; *Penfield Inv. Co. v. Bruce*, 132 Mo. App. 257, 111 S. W. 888.

If the officer is not acting for his corporation in a particular transaction but is acting entirely for another company, his knowledge acquired therein is not imputable to the first company. *Union State Bank of Shawnee, Oklahoma v. First Nat. Bank of Huntsville, Arkansas*, 122 Ark. 612, 184 S. W. 411.

Rule applied to lease of property, by corporation of which the officer having knowledge was president, to corporation of which he was director and member of executive committee. *Brooklyn Distilling Co. v. Standard Distilling & Distributing Co.*, 193 N. Y. 551, 86 N. E. 564, *aff'g* 120 N. Y. App. Div. 237, 105 N. Y. Supp. 264, where the court said: "It is plain from the findings that what Mr. Matthiessen [the officer involved] had at heart were the interests of the lessee in opposition to those of the lessor. His information, therefore, to the effect that the lessee's purpose was an unlawful one, assuming it to have been such, did not charge the lessor with knowledge of the fact."

an officer of two corporations, and these corporations enter into dealings with each other, the knowledge of the common officer cannot be attributed to either corporation in a transaction in which he did not represent it."⁹ And even when the officer is acting for the corporation in the matter, as well as for the other corporation or person, his knowledge is not imputable to the corporation, where the facts are such that the other corporation or person is not under any duty to communicate them, or where it is not to his or its interest to communicate them. In such a case there is a conflict of interest and duty on the part of the officer, and there is no presumption either way as to his communication of knowledge. Thus, if one corporation borrows money from another, or enters into any other contract, through the intervention of a common officer, the latter corporation is not chargeable with the officer's knowledge that the money is borrowed or the contract made for an illegal or ultra vires purpose.¹⁰ Further illustrations of the rule—a few among many—are as follows:¹¹ Where the same person is president of the corporation which transferred notes to a bank and of the bank, his knowledge as officer of the transferrer is not ordinarily imputable to the bank;¹² knowledge of

⁹ *Benton v. German-American Nat. Bank*, 122 Mo. 332, 340, 26 S. W. 975, followed in *Central Nat. Bank v. Pipkin*, 66 Mo. App. 592, 598.

¹⁰ *In re Marseilles Extension Ry. Co.*, 7 Ch. App. 161; *In re Contract Corporation*, L. R. 8 Eq. 14. See also *Central Nat. Bank of Springfield v. Pitkin*, 66 Mo. App. 592; *Lyndon Mill Co. v. Lyndon Literary & Biblical Institution*, 63 Vt. 581, 25 Am. St. Rep. 783, 22 Atl. 575; *In re Hampshire Land Co.*, [1896] 2 Ch. 743. Compare, however, *Golden Reward Min. Co. v. Buxton Min. Co.*, 79 Fed. 868.

¹¹ Knowledge of the cashier and two directors of a bank that the cashier has, without authority, pledged the credit of the bank on the note of a corporation in which he and such directors are interested, is not notice to the bank. *Ft. Dearborn Nat. Bank v. Seymour*, 71 Minn. 81, 73 N. W. 724.

Where the same person, acting as vice president of a bank, and as treasurer of a corporation doing business

with the bank, obtained a draft from the bank, through himself, as vice president, on a check of the other corporation, drawn by himself as treasurer, and appropriated the proceeds to his own use, it was held that the fraud was committed by him as treasurer of the other corporation, that the bank was not chargeable with notice of it, and that the other corporation, and not the bank, must stand the loss. *Gunster v. Scranton Illuminating, Heat & Power Co.*, 181 Pa. St. 327, 59 Am. St. Rep. 650, 37 Atl. 550.

A cashier of a bank who is also a director of a manufacturing company, and who, as such, assists in promulgating false statements as to its financial condition for the purpose of defrauding its creditors, including the bank, is not the agent of the bank in such matter, so as to affect the validity of its claims against the company. *Hadden v. Dooley*, 92 Fed. 274, rev'g 84 Fed. 80.

¹² *Shaw v. Standard Piano Co.*, 86 N. J. Eq. 137, 97 Atl. 281.

the president of a corporation of a lien on land purchased by it is not imputed to a bank of which he is a director and a member of the loan committee, where the bank loans money to the corporation but he acts in behalf of the borrower;¹³ knowledge of an attorney of a corporation of a lien on property purchased by it is not notice to a bank of which he is president and which makes a loan to the corporation;¹⁴ and the fact that the president of a safe deposit company who was also treasurer of a railway company had knowledge, as president, of the insolvency of the safe deposit company, does not make that knowledge imputable to the railway company, where he did not deposit the moneys of the latter with the safe deposit company nor have power to do so.¹⁵ On the other hand, where the circumstances are such that it is the duty of the officer to impart to the other corporation the information of which he has become possessed, it will be deemed affected thereby.¹⁶ So communication of the knowledge to the corporation is to be presumed where it is to the interest of the other corporation or person that it should be communicated. Thus, where a creditor instructed his attorney to procure insurance on his debtor's life, and the attorney procured the insurance in a company of which he was agent, with authority to receive notice of assignments of policies, it was held that the company was chargeable with notice of the creditor's claim on the insurance, and that the latter was entitled to the benefit of it as against the debtor's assignee in bankruptcy.¹⁷ So where a number of the members of the board of directors of an insurance company were also directors of a bank, it was held that the bank, discounting a note executed by a third per-

Following the local law in New Jersey, a federal court has held that knowledge of the president of a bank as to fraud practiced on the maker of a note discounted by the bank is not to be imputed to the bank, such knowledge being obtained as president of another company, where he did not participate in the discount or purchase of the note. *McCalmont v. Lanning*, 154 Fed. 353, following *Willard v. Denise*, 50 N. J. Eq. 482, 35 Am. St. Rep. 788, 26 Atl. 29.

¹³ "Neel, the president of the oil mill company, when procuring a loan for it from the bank, was not acting as a director of the bank, or a member of the loan committee, but on the

contrary his relation and interests were those of a borrower from the bank, and there is no presumption that he informed the bank of the mortgage." *Wardlaw v. Troy Oil Mill*, 74 S. C. 368, 114 Am. St. Rep. 1004, 54 S. E. 658.

¹⁴ *Wardlaw v. Troy Oil Mill*, 74 S. C. 368, 114 Am. St. Rep. 1004, 54 S. E. 658.

¹⁵ *Utah Const. Co. v. Western Pac. R. Co.*, — Cal. —, 162 Pac. 631.

¹⁶ *Sullivan County R. Co. v. Connecticut River Lumber Co.*, 76 Conn. 464, 57 Atl. 287; *Berry v. Rood*, 168 Mo. 316, 67 S. W. 644.

¹⁷ *Gale v. Lewis*, 9 Q. B. 730.

son to the insurance company, was chargeable with notice that the note was procured by the insurance company by false representations as to its financial conditions, the representations having been made in statements published and filed by the company as required by statute.¹⁸ Moreover, it is held that knowledge acquired as a stockholder and director of one company is imputable to another company of which the person is president, where he was the prominent actor in the transaction and he could not have ceased to have it in mind while he was acting for the latter corporation.¹⁹ And it has been held in South Dakota that knowledge of the president of the indorser of a note, at the time of its execution, that it was executed in violation of a statute, is notice to the bank discounting the note where he is also president of the bank.²⁰

It has been held in Texas that knowledge of corporate affairs of a corporation will not be imputed to another corporation because of common directors possessed of such knowledge, on the theory that the duty of directors in such a case is not to disclose corporate affairs.²¹

If the interests of the two corporations are adverse, and the interests of the officer as a representative of one corporation is adverse to the interests of the corporation to which notice is sought to be imputed, but the officer acts as the sole representative of both corporations, then the knowledge is imputable to both corporations, under a principle hereinafter stated.²²

§ 2249. — Dealings between corporation and partnership of which officer is a member. This rule refusing to impute notice to a corporation where its officer or agent deals with it and his interests in the transaction are adverse to those of the corporation, applies equally well where the officer or agent is a member of a partnership dealing with the corporation.²³ For instance, the knowledge of the cashier

¹⁸ *City Bank of Columbus v. Phillips*, 22 Mo. 85, 64 Am. Dec. 254.

¹⁹ *Cook v. American Tubing & Webbing Co.*, 28 R. I. 41, 73, 9 L. R. A. (N. S.) 193, 65 Atl. 641.

²⁰ *Citizens' State Bank of Newton, Iowa v. Rowe*, 36 S. D. 151, 153 N. W. 939, rev'd on rehearing in 36 S. D. 349, 154 N. W. 816, on ground of erroneous assumption that president of bank was president of indorser of note at the time of its execution.

²¹ *Interstate Finance Co. v. Hosch*, — Tex. Civ. App. —, 163 S. W. 600. This is also held in England, *In re Marseilles Extension Ry. Co.*, L. R. 7 Ch. 161.

²² See § 2251, *infra*.

²³ *Alabama. Morris v. First Nat. Bank of Samson*, 162 Ala. 301, 50 So. 137.

Florida. Roess Lumber Co. v. State Exch. Bank, 68 Fla. 324, Ann. Cas. 1916 B 327, 67 So. 188.

and bookkeeper of a bank of the dissolution of a partnership of which they were members is not imputed to the bank in connection with a loan from the bank to the firm.²⁴ So knowledge acquired by the president of a bank, not in the course of his duties but as a member of a firm, is not imputable to the bank.²⁵ And knowledge of the president of a corporation of the insolvency of a firm of which he is a member is not notice thereof to the corporation, so as to invalidate a transfer of property by the president to it as security for pre-existing debts of the firm, the transfer being made to enable the firm to obtain further loans from the corporation.²⁶ So where a note bearing an unauthorized indorsement is transferred to a firm, which, in turn, transfers it to a corporation, one of the members of the firm being also a director in the corporation, his knowledge is not imputable to the corporation.²⁷ Likewise, where the executor of an estate and the president and cashier of a trust company entered into a partnership, and the executor mortgaged property of the estate to the trust company, the proceeds being used, not for purposes of the estate but in the partnership business, the trust company was not chargeable with the knowledge of the president and cashier of the fraudulent uses to which the proceeds had been put.²⁸ A fortiori, notice to a partner of the failure or other infirmity of a note discounted by a bank of which his copartner was president is not notice

Illinois. *Seaverns v. Presbyterian Hospital*, 173 Ill. 414, 64 Am. St. Rep. 125, 50 N. E. 1079.

Iowa. *First Nat. Bank of Davenport v. Gifford*, 47 Iowa 575.

Louisiana. *Seixas v. Citizens' Bank*, 38 La. Ann. 424.

New Jersey. *First Nat. Bank v. Christopher*, 40 N. J. L. 435, 29 Am. Rep. 262.

New York. *Atlantic State Bank v. Savery*, 82 N. Y. 291.

South Dakota. *National Bank of Commerce of Pierre v. Feeney*, 9 S. D. 550, 46 L. R. A. 732, 70 N. W. 874.

Where a loan was negotiated with a corporation, it was held that the fact that its president was also a member of a partnership through which the loan was negotiated for a third person did not charge the corporation with constructive notice of an arrangement between the borrower

and the firm that the firm should pay off prior mortgages out of the money loaned. *Seaverns v. Presbyterian Hospital*, 173 Ill. 414, 64 Am. St. Rep. 125, 50 N. E. 1079.

Rule applied where member of firm presenting notes for discount was president of bank. *First Nat. Bank of Birmingham v. Fidelity Title & Trust Co.*, 251 Pa. 529, 97 Atl. 75.

²⁴ *Citizens' Trust Co. v. Tindle*, — Mo. App. —, 194 S. W. 1066. See also *Morris v. First Nat. Bank of Samson*, 162 Ala. 301, 50 So. 137.

²⁵ *Amarillo Nat. Bank v. Harrell*, — Tex. Civ. App. —, 159 S. W. 858.

²⁶ *Seixas v. Citizens' Bank*, 38 La. Ann. 424.

²⁷ *Atlantic State Bank v. Savery*, 82 N. Y. 291.

²⁸ *Camden Safe Deposit & Trust Co. v. Lord*, 67 N. J. Eq. 489, 58 Atl. 607.

to the bank—the president having only constructive notice.²⁹ So notice which the law imputes to a cashier as a partner in a firm from which he obtained a note is not imputable to him as an officer of the bank.³⁰

§ 2250. — **Application of exception to independent frauds against the corporation.** There is a well-established exception to the rule that a corporation is charged with knowledge of its officers and agents, where the latter are engaged in committing an independent fraudulent act upon their own account and the facts to be imputed relate to such fraudulent act. Fraud of officers or agents of a corporation, practiced against the corporation, although of course known to them, is not imputable to the corporation, where the corporation has not accepted the benefits or otherwise ratified the fraud. The rule is that if an officer or agent, while acting for the corporation, is himself engaged in perpetrating a fraud upon the corporation, his knowledge is not constructive notice to the corporation.³¹ As said by Vice Chancellor Fleet, "I understand the law to be that where an agent representing two principals concocts a scheme to defraud one of them for the benefit of the other it will be presumed that he did not disclose, to the principal he intended to cheat, the means by which he intended to effect his purpose."³² Stated in another way, knowledge is not imputed where knowledge of the facts by the corporation would defeat the consummation of the fraud which the agent is engaged in perpetrating.³³ In a leading case decided by the Supreme Court of the United States, it is held that where a corporate agent does an act to defraud his company for his personal benefit, "the law will not presume that he communicated to the bank what he had done in order to promote the scheme devised by him in hostility to its

²⁹ *Baskins v. Valdosta Bank & Trust Co.*, 5 Ga. App. 600, 63 S. E. 648; *Taylor v. Felder*, 3 Ga. App. 287, 59 S. E. 844. See also § 2247, *supra*.

³⁰ *Scott v. Choctaw Bank*, 4 Ala. App. 648, 59 So. 184.

³¹ *Wyeth v. Renz-Bowles Co.*, 23 Ky. L. Rep. 2337, 66 S. W. 825; *Produce Exch. Trust Co. v. Bieberbach*, 176 Mass. 577, 58 N. E. 162; *Sproul v. Standard Plate Glass Co.*, 201 Pa. 103, 50 Atl. 1003.

"It is the circumstance that the

agent, while acting for his principal, is at the same time committing an independent fraudulent act upon his own account that makes the case an exception to the general rule." *Indian Head Nat. Bank v. Clark*, 166 Mass. 27, 31, 43 N. E. 912.

³² *De Kay v. Hackensack Water Co.*, 38 N. J. Eq. 158.

³³ *American Surety Co. v. Pauly*, 170 U. S. 133, 42 L. Ed. 977; *Hilliard v. Lyons*, 180 Fed. 685; *Lilly v. Hamilton Bank of New York*, 178 Fed. 53.

interests.”³⁴ For instance, where the cashier of a bank acquires knowledge when he is not acting for the bank nor in the course of his employment, but while engaged in committing an independent fraudulent act upon his own account, knowledge of facts relating to that act which, if communicated, would have prevented the consummation of the fraud, are not imputable to the bank.³⁵ One reason for this exception, if it may be so called, is that “where an agent, though ostensibly acting in the business of the principal, is really committing a fraud, for his own benefit, he is acting outside of the scope of his agency, and it would therefore be most unjust to charge the principal with knowledge of it.”³⁶ Whatever the reason may be, the exception is well established.³⁷ And in Massachusetts, it is held that this rule as to fraud applies although the corporate officer or agent was the only officer acting for his corporation, where he was engaged in perpetrating a fraud on the corporation for his own benefit.³⁸

This rule has been applied to misapplication by the treasurer of a company of guardianship funds.³⁹ On the same theory, the knowledge of the cashier of a bank of the forgery by him of part of the collateral attached to a note discounted by his bank is not imputed to the bank, where it was to his interest to conceal such knowledge in order to carry out his fraudulent scheme.⁴⁰ So, under the rule that a corporation is not chargeable with notice of fraudulent acts by an officer which he naturally would not disclose to it, it is held that a bank is not chargeable with knowledge of fraud of its president in pledging retired bonds of another with the bank for his own personal account.⁴¹ And knowledge of the president of a corporation of his own fraud is not imputable to the corporation where it was to his interest to conceal such knowledge from the corporation.⁴²

³⁴ American Surety Co. v. Pauly, 170 U. S. 133, 159, 42 L. Ed. 977.

³⁵ Smith v. Wallace Nat Bank, 27 Idaho 441, 150 Pac. 21.

³⁶ Thomson-Houston Elec. Co. v. Capitol Elec. Co., 65 Fed. 341, 343.

This reasoning is approved in Bank of Overton v. Thompson, 118 Fed. 798.

³⁷ Allen v. South Boston R. Co., 150 Mass. 200, 5 L. R. A. 716, 15 Am. St. Rep. 185, 22 N. E. 917.

³⁸ Indian Head Nat. Bank v. Clark, 166 Mass. 27, 43 N. E. 912.

³⁹ Brookhouse v. Union Pub. Co., 73 N. H. 368, 2 L. R. A. (N. S.) 993, 111 Am. St. Rep. 623, 6 Ann. Cas. 675, 62 Atl. 219.

⁴⁰ Harriman Nat. Bank v. Seldomridge, 240 Fed. 111.

⁴¹ Real Estate Trust Co. of Philadelphia v. Washington, A. & Mt. V. Ry. Co., 191 Fed. 566.

⁴² American Nat. Bank v. Miller, 229 U. S. 517, 521, 57 L. Ed. 1310; In re United States Hair Co., 239 Fed. 703.

However, in Ohio, the Supreme Court has attempted to differentiate a single fraudulent act of a corporate officer or agent from a series of fraudulent acts running over a long period of time, and has held that where the cashier, who was also general manager and practically ran the business without any control by the directors, and the vice president, by their fraudulent acts, made the bank insolvent, and they knew it was insolvent, their knowledge is attributable to the bank where the condition had existed for a long time.⁴³

In this connection, it is necessary to keep in mind that knowledge is imputed where the corporation takes the benefit of the fraud and ratifies the act,⁴⁴ and that the rule does not apply where the fraud is perpetrated upon third persons for his own benefit although acting in an official capacity.⁴⁵

§ 2251. — Qualification of exception where interested officer or agent is sole representative of corporation to whom notice is sought to be imputed. The exception does not apply when the transaction on behalf of the corporation, to which notice is sought to be imputed, is intrusted "solely" to the officer or agent having the knowledge.⁴⁶ The authorities recognize a marked distinction, says Presiding Jus-

⁴³ Orme v. Baker, 74 Ohio St. 337, 113 Am. St. Rep. 968, 78 N. E. 439.

⁴⁴ See § 2254, *infra*.

⁴⁵ See § 2253, *infra*.

⁴⁶ United States. Niblack v. Cosler, 80 Fed. 596.

California. Witter v. McCarthy, 111 Cal. XVII, 43 Pac. 969.

Iowa. Anderson v. Kinley, 90 Iowa 554, 58 N. W. 909.

Massachusetts. Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 268, 9 Am. St. Rep. 698, 17 N. E. 496. See Innerarity v. Merchants' Nat. Bank, 139 Mass. 332, 52 Am. Rep. 710, 1 N. E. 282. But see Indian Head Nat. Bank v. Clark, 166 Mass. 27, 43 N. E. 912, where knowledge of cashier's fraud on his bank for his own benefit was imputed to the corporation although in a transaction where he was the only one representing the bank.

Missouri. Berry v. Rood, 168 Mo. 316, 67 S. W. 644; Withers v. Lafayette County Bank, 67 Mo. App. 115,

125; Steam Stone-Cutter Co. v. Myers, 64 Mo. App. 527.

Oregon. Saratoga Inv. Co. v. Kern, 76 Ore. 243, 148 Pac. 1125.

Rhode Island. Cook v. American Tubing & Webbing Co., 28 R. I. 41, 75, 9 L. R. A. (N. S.) 193, 65 Atl. 641.

Tennessee. Smith v. Mercantile Bank, 132 Tenn. 147, 177 S. W. 72.

Texas. Smith v. Boatman Sav. Bank, 1 Tex. Civ. App. 115, 20 S. W. 1119.

Virginia. Barksdale v. Finney, 14 Gratt. 338.

This qualification to the rule of the effect of adverse interest does not apply where the officer whose knowledge is sought to be imputed to the corporation did not act for the corporation in the transaction. "By all well-considered authority the rule is now applied only to cases where the officer, whose knowledge is sought to be imputed to the corporation, acts for the corporation in the particular transaction; in other words, where the

tice Corson of South Dakota, "between cases where a cashier not only acts for himself, but also as such cashier, and cases where the person, though cashier, acts for himself only, or for a firm of which he is a member, and the corporation is represented in the transaction by other officers. In the latter cases the knowledge of the cashier is not imputed to the bank."⁴⁷ The reason for this qualification was stated in a federal decision as follows: "If Cornish was the sole representative of the bank in the transaction with himself, there was no one from whom information could have been concealed, or to whom it could have been communicated. If he was the sole representative of each party, each must have had equal knowledge. As the representative of the bank, his knowledge was not affected by his private interests, however much his conduct may have been. He necessarily knew as much in one capacity as he did in the other."⁴⁸ It will not be presumed, however, that the officer occupying a dual relation dealt with himself alone in making a contract between himself, or a firm or company which he represents, and the corporation.⁴⁹ Moreover, the fact that the officer dealing with his own corporation was one of the officials authorized to issue the stock which constituted the main consideration does not affect his relation to the transaction itself.⁵⁰

This qualification of the exception has been criticised or rejected, however, in some jurisdictions;⁵¹ and in many of the decisions cor-

officer of the corporation conducts both sides of the particular transaction [citing cases]. The rule does not apply where the officer does not act for the corporation, and is connected with the transaction only in an adversary capacity, or as the agent for the party dealing with the corporation." *First Nat. Bank of Gilbert v. Bailey*, 127 Minn. 296, 149 N. W. 469.

Where one person is president of both a borrowing and a lending corporation, and the president represents both corporations in the making of a loan from the one corporation to the other, the knowledge of the president of the fact that the capital stock of the borrowing corporation has been paid up by the acceptance of property at an exaggerated value will be deemed to affect the lending corporation. *Berry v. Rood*, 168 Mo. 316, 67 S. W. 644.

⁴⁷ *National Bank of Commerce of Pierre v. Feeney*, 9 S. D. 550, 46 L. R. A. 732, 70 N. W. 874.

⁴⁸ *First Nat. Bank of Blaine v. Blake*, 60 Fed. 78.

But Professor Mechem says: "The real ground upon which this situation rests is believed to be that already stated, namely, that where the agent is the sole representative of the corporation, the corporation cannot claim anything except through him and that therefore if it claims through him, after notice of the facts, it must accept his agency with its attendant notice." 2 Mechem, *Agency* (2nd Ed.), § 1825.

⁴⁹ *Taylor v. Felder*, 3 Ga. App. 287, 59 S. E. 844.

⁵⁰ *Roberts v. W. H. Hughes Co.*, 86 Vt. 76, 83 Atl. 807.

⁵¹ *First Nat. Bank of Nephi v. Foote*, 12 Utah 157, 168, 169, 42 Pac.

porations have been held chargeable with the knowledge of interested officers although they were the only representatives of the corporation, without any reference to this qualification of the exception.⁵² In West Virginia, where the president of a bank discounted notes of a corporation of which he was also president, it was held that his knowledge that the indorser sued thereon by the bank was an accommodation indorser and signed conditionally, was not imputable to the bank, notwithstanding the president of the bank alone passed on the discount. In that case the court said: "It is submitted that the evidence shows that the board of directors did not pass the discount of the notes, but that the same was done by Fowler alone. That cannot alter the case. They could have overthrown his act. Though Fowler took the paper from himself into the bank, it must be presumed that the other officials who were disinterested and qualified to act on that paper acquiesced in his action only because they had no notice of the infirmity in the notes. It is not reasonable to think that these disinterested officials would have silently approved his action if they had known what he knew about the paper. * * *

To hold that Fowler as president acted alone for the bank and that he had absolute power to bind it for his own private interests or those of a company in which he was privately interested, notwithstanding there were other officials of the bank who naturally would have intervened in its behalf if the knowledge which he possessed had been known to them, would mean no regard for the interests of depositors and stockholders. In the transaction of the discount of the notes, Fowler was acting really not for the bank but for other interests—those of the fuel company. The directors who permitted the paper to remain as the property of the bank acted for it. Fowler's interest was so adverse to the bank that he was disqualified from representing it."⁵³ In Louisiana, the rule is laid down that the knowledge even of the president of a bank will not be imputed to the corporation in a case where the matter involved is business transacted by the president in his official capacity, on the one side, and as an individual

205. See also *Bank of Overton v. Thompson*, 118 Fed. 798; *Gunster v. Seranton Illuminating, Heat & Power Co.*, 181 Pa. St. 327, 59 Am. St. Rep. 650, 37 Atl. 550.

This exception where the discount is made by the officer himself acting for the bank has been rejected, it seems, in New Jersey. *Vulcan Detinning Co. v. American Can Co.*, 72 N.

J. Eq. 387, 12 L. R. A. (N. S.) 102, 67 Atl. 339. See also *Lanning v. Johnson*, 75 N. J. L. 259, 69 Atl. 490; *Sooey v. State*, 41 N. J. L. 394.

⁵² See, for instance, *Findley v. Cowles*, 93 Iowa 389, 61 N. W. 998.

⁵³ *American Nat. Bank of Bluefield v. Ritz*, 70 W. Va. 409, 40 L. R. A. (N. S.) 156, 74 S. E. 679.

on the other, and where he transacted it with reference to his own interest and without regard to the interest of the bank.⁵⁴ In Kansas, it was recently held that knowledge of the cashier of a bank making a loan to a company of which he was the president, that the stock of the borrower was issued at a discount, is not imputable to the bank, although he acted in his official capacity in making the loan, so as to preclude a recovery by the bank against the stockholders to the extent of their unpaid subscriptions; and in so holding the court distinguished cases where a corporation deals with one of its own officers who acts for himself and not for it and said: "It can make no difference in principle whether the officer of a corporation in dealing with it acts solely for himself or as the agent for another company in which he holds stock. In either case his own interests are to some extent opposed to those of the corporation, which he is under a greater or less temptation to sacrifice. The rule of law cannot be made to depend upon the extent of the officer's personal interest, so that it is substantial. In the present case, if the cashier had asked the directors to make the loan, and they had done so on their own judgment, his interest in the oil company was sufficient so that the presumption would be that he did not tell them the stock had been issued at a discount, and his knowledge of the fact would not be imputed to the bank. But the cashier acted for the bank in this very transaction, either alone or in connection with other officers, so that in a sense the bank—that is, its active agent in the transaction—had actual knowledge of the situation, and this phase of the matter involves a different question. * * * Even if in this case the other officers of the bank took no part in lending the money, it does not follow that their ignorance of the corporation's affairs had no effect upon the transaction. If they had known its condition, they might have interfered and prevented the loan. The interest of the cashier as a stockholder of the oil company, desiring the loan to be made, lay in not disclosing to them any fact tending to impair its credit. The findings affirmatively show that none of them was in fact informed of the stock having been issued at a discount. The failure of the cashier to consult with the officers who should have passed upon the matter would create a situation much the same as though he had submitted it to their decision and withheld this information from them. We think his knowledge cannot be

⁵⁴ *Seixas v. Citizens' Bank*, 38 La. of Baton Rouge, 131 La. 30, Ann. Cas. Ann. 424, followed in *Leurey v. Bank* 1913 E 1168, 58 So. 1022.

considered as that of the bank.”⁵⁵ Probably the true explanation of the rule, which will reconcile much of the apparent conflict, is the one stated by Mr. Freeman, in a valuable note in the *American Decisions*, as follows: “Where the agent or officer of a corporation is also agent of another corporation or person, and there are mutual dealings between the principals through the intervention of such agent, the question as to whether either principal is to be affected with notice of what is known to the officer or agent by virtue of his relation to the other principal, will depend upon circumstances. If the knowledge is such as the principal himself, if present, would not be bound to communicate, there would seem to be no reason why the agent should be presumed to have communicated it. Thus, if one of two corporations having a common officer borrows money of the other, through the intervention of such officer, for a purpose which is illegal, or enters into a contract which is ultra vires, the other corporation ought not to be charged with notice of the facts.”⁵⁶ Continuing, he said: “The two corporations are dealing in such a case as strangers, and the fact that they have a common officer or other agent, ought to make no difference in the transaction. There is in reality in such a case a conflict of duty on the part of the agent. He has knowledge of certain facts which it is his duty to one principal to conceal, and to the other to communicate. There can, therefore, be no presumption either way, and the question of notice depends upon whether he did in fact communicate the information. But where it is the interest of the principal from whom he received the information to communicate it to the other, it ought to be presumed that he did so. Therefore notice should be inferred against the principal with whom the transaction was had.”⁵⁷

This qualification, as generally stated, has been applied where the interested officer was president,⁵⁸ or president and cashier,⁵⁹ or presi-

⁵⁵ Per Justice Mason in *First Nat. Bank v. Northrup*, 82 Kan. 638, 643, 646, 136 Am. St. Rep. 119, 109 Pac. 672, explaining *Berry v. Rood*, 168 Mo. 316, 67 S. W. 644, as merely dicta and distinguishing *Lea v. Iron Belt Mercantile Co.*, 147 Ala. 421, 8 L. B. A. (N. S.) 279, 119 Am. St. Rep. 93, 42 So. 415, as decided mainly upon the ground that the corporate officer making the loan owned nearly all of its stock and the transaction from its

standpoint was in fact for his own benefit.

⁵⁶ Note in 36 Am. Dec. 188, 193, citing *In re Marseilles Extension Ry. Co.*, 7 Ch. App. 161; *In re Contract Corporation*, L. R. 8 Eq. 14.

⁵⁷ *Id.*

⁵⁸ *McCalmont v. Lanning*, 154 Fed. 353; *Brobston v. Penniman*, 97 Ga. 527, 25 S. E. 350; *Holden v. New York & E. Bank*, 72 N. Y. 286.

⁵⁹ *Hardy v. First Nat. Bank*, 56 Kan. 493, 43 Pac. 1125.

dent and general manager,⁶⁰ or cashier⁶¹ or teller⁶² of a bank, or a treasurer.⁶³

This qualification of the adverse interest rule is most often applied where the president or cashier or director of a bank himself discounts a note in which he is interested, in which case it is held that the bank takes the paper subject to the knowledge of such officer, where he has full authority and control as to such discounts.⁶⁴ Thus where the president was the sole and only representative of the bank in discounting notes, his knowledge acquired in connection therewith that the person sought to be held liable on the note signed merely as an accommodation indorser, and that his liability and rights in the matter were those of a surety and not those of a principal debtor, was imputable to the bank notwithstanding the notes were given in a transaction which was a part of a conspiracy between the payee and the president under which the latter was paying the president personally for accommodations from the bank, where the accommodation

⁶⁰ *First Nat. Bank of Blaine v. Blake*, 60 Fed. 78.

⁶¹ *Connecticut. Lowndes v. City Nat. Bank of South Norwalk*, 82 Conn. 8, 22 L. R. A. (N. S.) 408, 72 Atl. 150.

Georgia. Morris v. Georgia Loan, Savings & Banking Co., 109 Ga. 12, 46 L. R. A. 506, 34 S. E. 378.

Kentucky. Citizens' Sav. Bank v. Walden, 21 Ky. L. Rep. 739, 52 S. W. 953.

Massachusetts. Loring v. Brodie, 134 Mass. 453.

Michigan. Tilden v. Barnard, 43 Mich. 376, 38 Am. Rep. 197, 5 N. W. 420.

New York. Fishkill Sav. Institution v. National Bank, 80 N. Y. 162, 36 Am. Rep. 595.

North Dakota. Emerado Farmers' Elevator Co. v. Farmers' Bank of Emerado, 20 N. D. 270, 29 L. R. A. (N. S.) 567, 127 N. W. 522.

South Dakota. National Bank of Commerce of Pierre v. Feeney, 9 S. D. 550, 46 L. R. A. 732, 70 N. W. 874; *Black Hills Nat. Bank of Rapid City v. Kellogg*, 4 S. D. 312, 56 N. W. 1071.

⁶² *Skinner v. Merchants' Bank*, 4 Allen (Mass.) 290; *Atlantic Bank v.*

Merchants' Bank, 10 Gray (Mass.) 532; *City Nat. Bank of Ft. Worth v. Martin*, 70 Tex. 643, 8 Am. St. Rep. 632, 8 S. W. 507.

⁶³ *Oak Grove & S. V. Cattle Co. v. Foster*, 7 N. M. 650, 41 Pac. 522.

⁶⁴ *United States. First Nat. Bank of Blaine v. Blake*, 60 Fed. 78.

Connecticut. First Nat. Bank v. New Milford, 36 Conn. 93.

Georgia. Morris v. Georgia Loan, Savings & Banking Co., 109 Ga. 12, 46 L. R. A. 506, 34 S. E. 378. See also *Fouche v. Merchants' Nat. Bank of Rome*, 110 Ga. 827, 36 S. E. 256; *Brobston v. Penniman*, 97 Ga. 527, 25 S. E. 350.

Kentucky. Citizens' Sav. Bank v. Walden, 21 Ky. L. Rep. 739, 52 S. W. 953.

Maryland. Peninsula Trust Co. v. Johnson, 128 Md. 535, 97 Atl. 925.

New York. See Bank of United States v. Davis, 2 Hill 451.

Rhode Island. Cook v. American Tubing & Webbing Co., 28 R. I. 41, 9 L. R. A. (N. S.) 193, 65 Atl. 641.

Washington. Gates v. Gregory, 91 Wash. 151, 157 Pac. 470.

indorser sought to be held liable had no notice of the conspiracy, on the theory that where the officer who has knowledge of the extrinsic fact "is the sole person or agency by which the corporation is represented in the matter, this notice to or knowledge of such agent or officer must of necessity be notice to or knowledge of the corporation, or it cannot have such notice or knowledge, or even be chargeable therewith."⁶⁵ In a recent case in Ohio, Justice Wanamaker, in the syllabi prepared by the court, states the rule as follows: "Where the officer is acting both for himself as an individual and as manager of a banking corporation in the purchase of a note from himself by the bank and his action in that behalf is adopted and ratified by the bank, the manager's knowledge as a man is equally his knowledge as manager of the bank. He cannot unknow as manager what he knows as man. To hold otherwise would be to promote fraud rather than prevent it."⁶⁶

In Ohio, the supreme court recently distinguished cases involving torts and said: "Manifestly, in a case sounding in tort there would be no presumption in law that the wrongful act of the agent was the act of the principal unless actual authority to do the act was proven or a subsequent ratification after all the facts and circumstances of the act were known. No man is presumed to do wrong. There is in fact, in law, and in good morals a reason for the distinction that there may not be that legal identity between principal and agent in a case of tort that there is in a case of contract."⁶⁷

§ 2252. — Same: Sale or discount of negotiable paper by director.

In addition to what has already been stated in the preceding section, it is important to consider how far the acts of an individual director come within this rule. For this purpose, four situations which may occur are stated as follows:

1. Where a director sells negotiable paper to his corporation which acts entirely through its cashier or other officer, and the seller has nothing to do with the purchase or discount. In such a case there is no question but that the knowledge of the director is not imputable to the corporation.⁶⁸ 2. Where a director obtains, on behalf of him-

⁶⁵ *Tatum v. Commercial Bank & Trust Co.*, 193 Ala. 120, L. R. A. 1916 C 767, 69 So. 508.

⁶⁶ *First Nat. Bank of New Bremen v. Burns*, 88 Ohio St. 434, 49 L. R. A. (N. S.) 764, 103 N. E. 93.

⁶⁷ *First Nat. Bank of New Bremen*

v. Burns, 88 Ohio St. 434, 49 L. R. A. (N. S.) 764, 103 N. E. 93.

⁶⁸ *English-American Loan & Trust Co. v. Hiers*, 112 Ga. 823, 38 S. E. 103, and see cases cited in preceding notes.

self or third persons, a discount of negotiable paper by his bank or like corporation, but he does not act with the board of directors or discount committee of which he is a member. In such a case, his knowledge of defects in or defenses to the paper discounted is not imputable to the corporation.⁶⁹ This rule applies also to the cashier of a bank. If the discount committee pass upon the question, it seems that the knowledge of the cashier or other officer adversely interested is not imputable to the bank,⁷⁰ even though the cashier is a member of the discount committee.⁷¹ Where the president of a bank, who was also a member of its discount committee, sold to the bank a negotiable note executed pursuant to a personal contract between the maker and the president whereby the proceeds were to be used in purchasing land and the profits equally divided between the two, it was held that the president in negotiating the note was acting for the maker and himself jointly and the bank was not charged with knowledge of facts known only to the president.⁷² In a New Jersey case action was brought on a note discounted by plaintiff bank, and executed by defendant and made payable to one who was also president of the bank and who, with the cashier, constituted the discount committee. The defense was that the note was given to raise funds for an illegal purpose and that the president's knowledge thereof was imputable to the bank. The court held that the president "did not act at all for the bank. His conduct was actuated wholly by personal reasons; and, if he knew that he was taking part in an unlawful transaction, the bank cannot be charged by his guilty participation."⁷³ 3. Where the director or other officer is a member of the board which is required to pass on the transaction, and is present at the meeting, but it does not appear what part he took thereat, or it appears that he did not participate in the vote. In such a case it seems that notice is not imputable to the corporation.⁷⁴ It has been held, however, that if the officer claimed to be adversely interested is a member of the

⁶⁹ *Lilly v. Hamilton Bank of New York*, 178 Fed. 53, 29 L. R. A. (N. S.) 558.

⁷⁰ *State Sav. Bank of Ionia v. Montgomery*, 126 Mich. 327, 85 N. W. 879.

⁷¹ See *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710, 1 N. E. 282; *People's Sav. Bank of West Bay City v. Hine*, 131 Mich. 181, 91 N. W. 130, in which case the cashier, when the note was offered for discount, consulted two of the direc-

tors, and after consulting them took the paper.

⁷² *First Nat. Bank of West Minneapolis v. Persall*, 110 Minn. 333, 136 Am. St. Rep. 499, 125 N. W. 506, 675, in which case the president mailed the note to his bank and took no part in the discount on behalf of the bank.

⁷³ *Graham v. Orange County Nat. Bank*, 59 N. J. L. 225, 35 Atl. 1053.

⁷⁴ *Innerarity v. Merchants' Nat.*

board which passes upon the discount, and it is a part of his duties as a member of the board, together with the other members, to pass upon discounts, his knowledge in regard to paper discounted is imputable to the bank.⁷⁵ 4. Where the director or other officer is not only a member of the board or committee which is required to and does pass on the transaction, but is present and votes in regard thereto as a member of the board or committee. In such a case the decisions are conflicting. It has been held in New York that knowledge of the illegality of a note by a bank director, acting with the board or committee of the bank at the time of the purchase or discount of the note by the bank, is imputable to the bank, while such knowledge by a director who is not present and does not act with the board or committee when the note is purchased or discounted is not imputable to the bank.⁷⁶ The trend of the decisions, however, is to the contrary.⁷⁷ As said in an early Alabama case where a director of a bank was handed a blank note to renew another of the maker's notes held by the bank and he filled it up for more than the sum necessary for renewal and had it discounted for his own use while acting as a member of the board of directors, the director was acting for his own interests and for the time being "his powers as a director were suspended; he was contracting with the bank through his associates in the directory; he was borrowing, not lending, its money. Though a member of the board, and present too, it cannot be supposed that he co-operated with them in purchasing paper of which he was the avowed proprietor; and whether he did or not, it cannot be presumed that he made any disclosure which would prejudice his application for a loan."⁷⁸ So in a comparatively recent decision of the Federal Circuit Court of Appeals, Justice Lanning said that "there are cases which hold that knowledge of the illegality of a note by a bank director, acting with the board or committee of the bank at the time of the purchase or discount of the note by the bank, is imputable to the bank, while such knowledge by a director who is not

Bank, 139 Mass. 332, 52 Am. Rep. 710, 1 N. E. 282.

⁷⁵ Bank of United States v. Davis, 2 Hill (N. Y.) 451; Union Bank v. Wando Min. & Mfg. Co., 17 S. C. 339.

⁷⁶ North River Bank v. Aymar, 3 Hill (N. Y.) 262; Bank of United States v. Davis, 2 Hill (N. Y.) 451; National Bank v. Norton, 1 Hill (N. Y.) 572. See also Westfield Bank v. Cornen, 37 N. Y. 320, 93 Am. Dec.

573, and other New York cases cited therein.

⁷⁷ Terrell v. Branch Bank, 12 Ala. 502, 507; Innerarity v. Merchants' Nat. Bank, 139 Mass. 332, 52 Am. Rep. 710, 1 N. E. 282. See also Bang v. Brett, 62 Minn. 4, 63 N. W. 1067; Custer v. Tompkins County Bank, 9 Pa. St. 27.

⁷⁸ Terrell v. Branch Bank, 12 Ala. 502.

present and does not act with the board or committee when the note is purchased or discounted is not imputable to the bank [citing New York cases]. We think, however, that, if the distinction is sound at all, it has no application where the director is transacting business with his bank for himself, and in its transaction fraudulently conceals facts which if made known to the bank would defeat his purpose."⁷⁹ A leading case on this phase of the subject was decided in Massachusetts in 1885 wherein the court said: "In some of these cases, weight appears to be given to the fact that the director was not actually present at the meeting when the transaction was concluded; but this cannot be of importance. If it were shown that Burgess urged the loan upon the board of directors and actually voted in favor of it, his associates not seeing fit to intervene or object to this conduct, he would still have acted on his own behalf, and of those whose interests and efforts were of necessity adverse to those of the corporation. To assume that, under such circumstances, the facts he knew were communicated to the directors, and that he laid before them the fraud he was committing in wrongfully pledging property, would be a presumption too violent for belief, and would do great injustice to the remaining directors and the interests they represented."⁸⁰ Of course the rule would be otherwise if the interested directors constituted a majority or, perhaps, if their votes were necessary to conclude the deal.

In Massachusetts, where a note was discounted, according to custom, by the cashier and one director acting together, it was held that knowledge of the director was imputable to the bank.⁸¹ In North Carolina, where the president of a bank discounted a note payable to him, it being the custom for himself and the cashier to constitute the discount committee, and he actually participated as a member of such committee in the discounting of the note, his knowledge of defenses to the note was held imputable to the bank.⁸²

§ 2253. — Qualification of exception in case of fraud perpetrated by officer upon third person for his own benefit but acting in official capacity. When the act of an officer of a corporation constitutes a fraud upon a third person, or upon another corporation of which he

⁷⁹ *Lilly v. Hamilton Bank of New York*, 178 Fed. 53, 58, 29 L. R. A. (N. S.) 558, approving *Terrell v. Branch Bank*, 12 Ala. 502.

⁸⁰ *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 335, 52 Am. Rep.

710, 1 N. E. 282. *Contra*, *Union Bank v. Campbell*, 4 Humph. (Tenn.) 394.

⁸¹ *National Security Bank v. Cushman*, 121 Mass. 490.

⁸² *Le Due v. Moore*, 111 N. C. 516, 15 S. E. 888.

is also an officer, the first-mentioned corporation is chargeable with notice of the nature of the transaction, although the fraud is perpetrated for his own benefit, where he also represents the corporation in the transaction.⁸³

In a Massachusetts case, where the treasurer of a corporation paid his deficit to it by drawing checks upon another corporation, of which he was also treasurer, no other officer of either corporation having knowledge of the true nature of the transaction when it occurred, it was held that the knowledge of the treasurer was imputable to the corporation receiving the checks, as he represented it in the transaction; and the receipt of the checks was therefore treated as wrongful, and as imposing a liability on the corporation to repay the amount

⁸³ **California.** *Taft v. Presidio & F. R. Co.*, 84 Cal. 131, 11 L. R. A. 125, 18 Am. St. Rep. 166, 24 Pac. 436.

Connecticut. *First Nat. Bank of New Milford v. Town of New Milford*, 36 Conn. 93.

Kentucky. *Mutual Life Ins. Co. of Kentucky v. Chosen Friend Lodge No. 2, I. O. O. F.*, 29 Ky. L. Rep. 394, 93 S. W. 1044.

Massachusetts. *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 9 Am. St. Rep. 698, 17 N. E. 496; *Atlantic Bank v. Merchants' Bank*, 10 Gray 532.

Michigan. *Detroit Motor Co. v. Third Nat. Bank*, 111 Mich. 407.

Missouri. *Leonard v. Latimer*, 67 Mo. App. 138; *Withers v. Lafayette County Bank*, 67 Mo. App. 115; *Steam Stone-Cutter Co. v. Myers*, 64 Mo. App. 527; *St. Louis Union Society v. Mitchell*, 26 Mo. App. 206.

New York. *Holden v. New York & E. Bank*, 72 N. Y. 286; *Fishkill Sav. Institute v. Bostwick*, 19 Hun 354; *Van Leuvan v. First Nat. Bank of Kingston*, 6 Lans. 373.

Pennsylvania. *In re Millward-Cliff Cracker Co.'s Estate*, 161 Pa. St. 157, 28 Atl. 1072.

Texas. *Smith v. Boatman Sav. Bank*, 1 Tex. Civ. App. 115, 20 S. W. 1119.

Virginia. *Barksdale v. Finney*, 14 Gratt. 338.

"Where an officer or agent of a corporation takes advantage of his official position to perpetrate a fraud upon a third person, acting at the time in his official character upon a matter within the sphere of his duty, the corporation must be presumed to have notice of all facts within his knowledge affecting the validity of his act: 6 Southern Law Review, 821. Although in cases where there is no fiduciary relation, it will not be presumed that a person will disclose his own fraud, no such presumption can be indulged here against the counter presumptions that an agent has communicated to his principal all material facts known to him affecting a transaction in which he is acting as such agent in the line of his duty. For the protection of third persons it must rather be presumed that the principal has authorized the agent's act, with notice of the fraud." Note by Mr. A. C. Freeman in 36 Am. Dec. 188, 194.

The knowledge of the general manager of a bank and his fraud is imputable to the bank although he took some personal benefit from the fraud. *Williams v. Hasshagen*, 166 Cal. 386, 393, 137 Pac. 9.

"The fact that those agents committed a fraud cannot alter the legal effect of their acts or of their knowl-

to the other corporation.⁸⁴ So where a general manager attempts to relocate a claim for his company, which is a fraud on another company, his knowledge of the fraud is imputed to the first-named corporation.⁸⁵ This rule has also been applied in an Oklahoma case to a reissue of the majority of the stock of a corporation by the president without the surrender of the original certificates, although the president in reissuing the stock was acting in his individual capacity, where the stock could not be reissued without his own official act, and he reissued it with knowledge that it was fraudulent as to the rights of bona fide holders of the stock.⁸⁶ Other illustrations are given in the note below.⁸⁷ On the other hand, fraud of a corporate

edge with respect to the company in regard to third parties who had no connection whatever with them in relation to the perpetration of the fraud, and no knowledge that any such fraud had been perpetrated." *Armstrong v. Ashley*, 204 U. S. 272, 283, 51 L. Ed. 482.

⁸⁴ *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 9 Am. St. Rep. 698, 17 N. E. 496.

⁸⁵ *Argentine Min. Co. v. Benedict*, 18 Utah 183, 55 Pac. 559.

⁸⁶ *First Nat. Bank of Sulphur Springs v. Stribling*, 16 Okla. 41, 86 Pac. 512.

⁸⁷ A bank is chargeable with notice of facts invalidating the title to securities obtained by the collusion of its teller with an officer of another bank, by certifying the check of an irresponsible person, which is taken up by the other bank. *Atlantic Bank v. Merchants' Bank*, 10 Gray (Mass.) 532.

Where a town treasurer gave his note, as treasurer, to raise money for his own use, and discounted the same as cashier of a bank, it was held that the bank was chargeable with notice of the fraud. *First Nat. Bank of New Milford v. Town of New Milford*, 36 Conn. 93.

The same is true where the treasurer of a corporation fraudulently pledges securities of the corporation to a bank of which he is cashier, to

obtain a loan to himself. *Fishkill Sav. Institute v. Bostwick*, 19 Hun (N. Y.) 354. See also *In re Millward-Cliff Cracker Co.'s Estate*, 161 Pa. St. 157, 28 Atl. 1072. Compare *Gunster v. Scranton Illuminating, Heat & Power Co.*, 181 Pa. St. 327, 59 Am. St. Rep. 650, 37 Atl. 550.

Where a person who was alone able to represent a corporation, of which he was president and sole manager, purchased for the company property which he had previously purchased as an individual, it was held that his knowledge that there was a balance due on the original purchase was imputable to the corporation. *Steam Stone-Cutter Co. v. Myers*, 64 Mo. App. 527.

Knowledge by a member of a firm of the true consideration of a certificate of deposit, which the firm discounted at a bank in payment of individual notes of one of its members, and which had been negligently altered in making out a duplicate certificate, was held to be imputable to the bank, where the other member of the firm was its president, and acted as its sole representative in accepting the certificate. *Niblack v. Cosler*, 80 Fed. 596, aff'g 74 Fed. 1000.

And where the president and cashier of a bank, being also members of a partnership composed of themselves and another person, to the capital of which they had, under the partner-

agent, practiced on a third person, is not imputed to the corporation where he was acting adversely as an individual or as the agent of the other party, as distinguished from acting for his corporation.⁸⁸

§ 2254. Rule where act is ratified by corporation. If a corporate officer or agent acquires knowledge or is given notice, and the corporation adopts or ratifies the act in connection with which the knowledge was obtained or the notice given, notice is imputed to the corporation, although the circumstances are such that otherwise the corporation would not be chargeable therewith. If a corporation ratifies an unauthorized contract or other transaction by an officer, it is chargeable with his knowledge of fraud, illegality or other facts in the transaction.⁸⁹ This rule is often applied in case of fraud upon the part of the corporate officer or agent.⁹⁰ Thus, the New Hampshire court recently said, in distinguishing certain decisions claimed to be contrary to the general rule, that "in both cases the principals were seeking to hold an advantage acquired through the fraudulent acts of their agents, and were chargeable with the fraud by virtue of the

ship articles, agreed to contribute a certain sum, executed and delivered to the bank, without the knowledge of the other partner, a note in the name of the partnership, for the purpose of raising the money they had agreed to contribute to the partnership, it was held that the bank was affected with notice that the transaction was for their private benefit, and that it could not hold the other partner liable on the note. *Brobston v. Penniman*, 97 Ga. 527, 25 S. E. 350.

⁸⁸ *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710, 1 N. E. 282.

⁸⁹ *Singleton v. Bank of Monticello*, 113 Ga. 527, 38 S. E. 947.

The knowledge of the president of a bank that certain stock is not fully paid up is imputable to the bank, where he, acting for it, accepts a transfer of the stock, and it retains the same. *Fouche v. Merchants' Nat. Bank of Rome*, 110 Ga. 827, 36 S. E. 256.

A bank, by bringing an action upon a contract of loan made by an officer

without authority, ratifies the contract, and is chargeable with knowledge possessed by the officer that the loan was in furtherance of an illegal purpose. *Singleton v. Bank of Monticello*, 113 Ga. 527, 38 S. E. 947.

⁹⁰ *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 9 Am. St. Rep. 698, 17 N. E. 496; *Brookhouse v. Union Pub. Co.*, 73 N. H. 368, 2 L. R. A. (N. S.) 993, 111 Am. St. Rep. 623, 6 Ann. Cas. 675, 62 Atl. 219, explaining *First Nat. Bank v. New Milford*, 36 Conn. 93, and *Holden v. New York & E. Bank*, 72 N. Y. 286, on this ground.

Where the cashier of a bank, having a stockholder's certificates of stock to sell or pledge for him, and pay over to him the proceeds, deposits the proceeds in the bank, and the bank appropriates the same to an indebtedness of the stockholder, it is chargeable with notice of the cashier's fraud, and cannot make the appropriation. *Winslow v. Harriman Iron Co.* (Tenn. Ch. App.), 42 S. W. 698.

familiar principle that a person cannot ratify acts and disaffirm the fraud that is a constituent part of them."⁹¹ Moreover, in such a case, it seems, it is immaterial, so far as notice being imputed is concerned, whether the officer having knowledge acquired it in transactions where he was acting in good faith for the corporation or in transactions where he was acting in bad faith.⁹² If a corporate agent really acts for himself with intent to defraud a third person, his knowledge is that of the corporation, to the extent at least of requiring the corporation to restore what has come into its hands through the fraud.⁹³

§ 2255. Stipulation against communication of knowledge. There is no presumption of notice to a corporation of facts communicated to an officer, where it is expressly stipulated or understood that the facts shall not be communicated. Where the cashier of a bank, by direction of the president, made a loan to a person known by them to be insolvent, but with the understanding that this fact should not be communicated to the bank, it was held that the bank was not chargeable with notice.⁹⁴

§ 2256. Knowledge as imputed to officer—Notice to one officer or agent as notice to other officers or agents. It has been held that "where a corporation has two agents of equal power and authority, notice to one is constructive notice to the other, and, therefore, notice to the corporation."⁹⁵ As to this, of course, there is no question.

§ 2257. — Knowledge as officer as imputed to himself as individual. Whatever knowledge a director or other officer has or ought to have officially, he has or will be conclusively presumed to have as a private individual.⁹⁶

§ 2258. — Knowledge of officer as imputed to another officer as an individual. While it seems to have been held in North Dakota that knowledge of one officer of a corporation which is imputed to the

⁹¹ *Brookhouse v. Union Pub. Co.*, 73 N. H. 368, 2 L. R. A. (N. S.) 993, 111 Am. St. Rep. 623, 6 Ann. Cas. 675, 62 Atl. 219.

⁹² *Farmers' Bank v. Saling*, 33 Ore. 394, 54 Pac. 190.

⁹³ *White Plains Coal Co. v. Teague*, 163 Ky. 110, 173 S. W. 360.

⁹⁴ *First Nat. Bank of Sturgis v. Reed*, 36 Mich. 263.

⁹⁵ *Perry v. Simpson Waterproof Mfg. Co.*, 37 Conn. 520, 538.

⁹⁶ *McCarty v. Keprata*, 24 N. D. 395, 48 L. R. A. (N. S.) 65, Ann. Cas. 1915 A 834, 139 N. W. 992.

corporation is also to be imputed to one of the directors who was the president so as to affect him as an individual,⁹⁷ the better rule seems to be that the knowledge of a corporation derived by virtue of the relationship between itself and an officer or agent thereof is not imputed to another officer or agent as an individual.⁹⁸

§ 2259. Want of notice to particular officer as sufficient to show want of notice to corporation. Looking at the question under consideration from another viewpoint, it is held that proof of want of knowledge of or notice to the officer or agent of the corporation to whom notice would regularly be given, is sufficient to show that the corporation had no notice, at least where there is no evidence that there was notice to or knowledge of other officers or agents. Thus, want of notice to the president of a bank of infirmity of a note purchased by it, he being the officer to whom such notice should and would probably be given because he was the officer authorized to represent the bank in the purchase of the note, has been held sufficient to show that the bank had no notice.⁹⁹

§ 2260. Question as one of law or of fact. Whether the corporate officer or agent was possessed of actual knowledge of facts is ordinarily one of fact for the jury. Whether the knowledge of, or notice to, an officer or agent of a corporation is to be imputed to the corporation is a question of law for the court.¹

⁹⁷ *McCarty v. Kepreta*, 24 N. D. 395, 48 L. R. A. (N. S.) 65, Ann. Cas. 1915 A 834, 139 N. W. 992, applying rule to purchase of note by president of bank from the bank, where cashier had knowledge of defects in the paper. In a note in 48 L. R. A. (N. S.) 65, it is stated that this case, so far as a sale of bank paper to its president is concerned, "may be regarded as the pioneer case upon that question." See also note in Ann. Cas. 1915 A 855. It is necessary to keep in mind that the question as to what a director is bound to know, from his office, in regard to the corporate property or business, in purchasing property from the corporation, is governed by entirely different principles, i. e., his duties as a fiduciary to keep him-

self informed as to the corporate business.

⁹⁸ *Washburn v. Inter-Mountain Min. Co.*, 56 Ore. 578, 586, Ann. Cas. 1912 C 357, 109 Pac. 382, explaining statement in *Holly Mfg. Co. v. New Chester Water Co.*, 48 Fed. 879, 889, that actual knowledge of some of the directors was to be imputed to all the directors as meaning "all as constituting the corporation and is not authority for holding that, in an individual matter, a director is charged with notice because the corporation is presumed to have notice on account of notice to another director."

⁹⁹ *Citizens' Bank v. Stewart*, 22 Cal. App. 91, 133 Pac. 337.

¹ *Mutual Inv. Co. v. Wildman*, 182 Ill. App. 137.

XXIV. OFFICERS CONSIDERED AS TRUSTEES OR FIDUCIARIES

A. General Rules

§ 2261. **Directors and other officers as trustees or agents—General rule.** In order to determine the rights, duties and liabilities of corporate directors, the courts often predicate their holding upon the statement that the directors or other officers are agents or are trustees, or both.² Sometimes directors or other officers are stated to be, or are considered as, agents.³ On the other hand, it is sometimes said that the directors, trustees and other officers of a corporation are trustees for the corporation, or for the stockholders collectively, and in a certain sense this is true.⁴ They are not "trustees," however, in

² Whether directors are trustees or agents, see also articles by Charles Kerr in 47 Am. L. Rev. 561 and by W. P. Rogers in 47 Chicago Leg. News 382.

³ **United States.** Briggs v. Spaulding, 141 U. S. 132, 35 L. Ed. 662.

Alabama. O'Conner Min. & Mfg. Co. v. Coosa Furnace Co., 95 Ala. 614, 56 Am. St. Rep. 251, 18 So. 290.

Connecticut. New Haven Trust Co. v. Doherty, 75 Conn. 555, 96 Am. St. Rep. 239, 54 Atl. 209.

Indiana. Wayne Pike Co. v. Hammons, 129 Ind. 368, 27 N. E. 487.

Michigan. Ten Eyck v. Pontiac, O. & P. A. R. Co., 74 Mich. 226, 3 L. R. A. 378, 16 Am. St. Rep. 633, 41 N. W. 905.

New York. Hun v. Cary, 82 N. Y. 65, 37 Am. Rep. 546.

Oregon. Davis v. Hofer, 38 Ore. 150, 63 Pac. 56.

⁴ **United States.** Koehler v. Black River Falls Iron Co., 2 Black 715, 721, 17 L. Ed. 339; McCourt v. Singers-Bigger, 145 Fed. 103, 7 Ann. Cas. 287.

Alabama. Montgomery Light Co. v. Lahey, 121 Ala. 131, 25 So. 1006.

Arizona. Steinfield v. Nielsen, 15 Ariz. 424, 139 Pac. 879. See also Zeckendorf v. Steinfield, 12 Ariz. 245, 100 Pac. 784.

California. Poor v. Yarnell, 28 Cal. App. 714, 153 Pac. 976.

Georgia. Oliver v. Oliver, 118 Ga. 362, 45 S. E. 232.

Idaho. Riley v. Callahan Min. Co., 28 Idaho 525, 155 Pac. 665.

Illinois. Voorhees v. Mason, 245 Ill. 256, 91 N. E. 1056, rev'g on other grounds 148 Ill. App. 647; Ellis v. Ward, 137 Ill. 509, 25 N. E. 530; Kelly v. Fahrney, 145 Ill. App. 80, aff'd 242 Ill. 240, 89 N. E. 984.

Iowa. Dawson v. National Life Ins. Co. of America, 176 Iowa 362, L. R. A. 1916 E 878, 157 N. W. 929; Hinkley v. Sac Oil & Pipe Line Co., 132 Iowa 396, 119 Am. St. Rep. 564, 107 N. W. 629.

Kansas. Stewart v. Harris, 69 Kan. 498, 504, 66 L. R. A. 261, 105 Am. St. Rep. 178, 2 Ann. Cas. 873, 77 Pac. 277.

Michigan. Pikes Peak Co. v. Pfuntner, 158 Mich. 412, 123 N. W. 19, 16 Det. L. N. 689.

Minnesota. Shearer v. Barnes, 118 Minn. 179, 136 N. W. 861.

Nebraska. Jacquith v. Mason, 99 Neb. 509, 156 N. W. 1041; Nebraska Power Co. v. Koenig, 93 Neb. 68, 139 N. W. 839; Barber v. Martin, 67 Neb. 445, 93 N. W. 722.

New Hampshire. Pearson v. Concord R. Corporation, 62 N. H. 537, 13 Am. St. Rep. 590.

New Jersey. Williams v. McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775.

the strict sense of the term.⁵ Directors, said Justice Lurton when a member of the Supreme Court of Tennessee, "are not express trustees. The language of Special Judge Ingersoll in *Shea v. Mabry*, 1 Lea, 319, that 'directors are trustees,' etc., is rhetorically sound, but technically inexact. It is a statement often found in opinions, but is true only to a limited extent. They are mandataries. They are agents. They are trustees in the sense that every agent is a trustee

New York. *Bosworth v. Allen*, 168 N. Y. 157, 55 L. R. A. 751, 85 Am. St. Rep. 667, 61 N. E. 163; *Bloom v. National United Ben. Savings & Loan Co.*, 152 N. Y. 114, 46 N. E. 166; *In re Watertown Gaslight Co.*, 127 App. Div. 462, 111 N. Y. Supp. 486; *Continental Securities Co. v. Belmont*, 83 Misc. 340, 144 N. Y. Supp. 801; *Robinson v. Smith*, 3 Paige 222, 24 Am. Dec. 212, where it was said: "The directors are the trustees or managing partners, and the stockholders are the cestui que trusts, and have a joint interest in all the property and effects of the corporation."

Ohio. *Larwill v. Burke*, 19 Ohio Cir. Ct. 449, 513, 10 Ohio Cir. Dec. 605.

Pennsylvania. *Bird Coal & Iron Co. v. Humes*, 157 Pa. St. 278, 37 Am. St. Rep. 727, 27 Atl. 750.

Tennessee. *Shea v. Mabry*, 1 Lea 319.

West Virginia. *Elliott v. Farmers' Bank of Philippi*, 61 W. Va. 641, 57 S. E. 242.

Wisconsin. *North Hudson Mut. Building & Loan Ass'n v. Childs*, 82 Wis. 460, 33 Am. St. Rep. 57, 52 N. W. 600.

"There are doubtless many cases in which directors are spoken of as trustees, and in a general sense they are trustees; but they are to be more accurately described as agents without compensation." *Winston v. Gordon*, 115 Va. 899, 912, 80 S. E. 756.

"A director's duties are trust duties, or, more accurately speaking, are so nearly of the nature of the duties

of a trustee to his cestui que trust that a fiduciary relationship with its attendant responsibilities is appropriately said to exist between the director and the corporation." *Stephany v. Marsden*, 75 N. J. Eq. 90, 71 Atl. 598.

"Directors of a corporation are 'trustees' and subject to the requirements and obligations of persons occupying that relation as defined in the Civ. Code, § 2230 et seq." *Highland Park Inv. Co. v. List*, 27 Cal. App. 761, 151 Pac. 162.

In Wisconsin, the Supreme Court, on rehearing, reversed itself by holding that directors are not trustees of an "express" trust. *Boyd v. Mutual Fire Ass'n of Eau Claire*, 116 Wis. 155, 61 L. R. A. 918, 96 Am. St. Rep. 948, 94 N. W. 171, 90 N. W. 1086.

A director acting as a member of an investment committee is just as much a trustee as when acting as a director. *Toledo Sav. Bank v. Johnston*, 94 Iowa 212, 217, 62 N. W. 748.

⁵ **Colorado.** *Mackey v. Burns*, 16 Colo. App. 6, 64 Pac. 485.

Connecticut. *Allen v. Curtis*, 26 Conn. 456.

Indiana. *Board Com'rs of Tippecanoe County v. Reynolds*, 44 Ind. 509, 15 Am. Rep. 245.

Kansas. *Ryan v. Leavenworth, A. & N. Ry. Co.*, 21 Kan. 365.

New Jersey. *Marr v. Marr*, 72 N. J. Eq. 797, 66 Atl. 182.

New York. *Bosworth v. Allen*, 168 N. Y. 157, 55 L. R. A. 751, 85 Am. St. Rep. 667, 61 N. E. 163.

Wisconsin. *Boyd v. Mutual Fire*

tee for his principal, and bound to exercise diligence and good faith. They do not hold the legal title, and more often than otherwise are not the officers of the corporation having possession of the corporate property. They are equally interested with those they represent. They more nearly represent the managing partners in a business firm than a technical trustee. At most, they are implied trustees, in whose favor the statutes of limitation do run."⁶

Still other decisions refer to directors as agents "and" trustees. In other cases, instead of being considered either trustees or agents, they have been regarded merely as mandatories, i. e., persons who have gratuitously undertaken to perform certain duties.⁷ An officer receiving no compensation is sometimes considered as a mere gratuitous bailee, so far as liability for loss of funds in his hands are concerned.⁸

But whether or not directors and other corporate officers are strictly trustees, there can be no doubt that their character is that of a fiduciary so far as the corporation and the stockholders as a body

Ass'n of Eau Claire, 116 Wis. 155, 61 L. R. A. 918, 96 Am. St. Rep. 948, 94 N. W. 171, 90 N. W. 1086.

England. *Ferguson v. Wilson*, 2 Ch. App. 771; *Sheffield & S. Y. Permanent Bldg. Society v. Aizlewood*, L. R. 44 Ch. Div. 412; *Overend & Gurney Co. v. Gibb*, L. R. 5 H. L. 480; *Grimwade v. Mutual Society*, 52 L. T. (N. S.) 409; *Re Railway & General Light Improvement Co.*, 42 L. T. (N. S.) 206.

"While not technically trustees, for the title of the corporate property was in the corporation itself, they were charged with the duties and subject to the liabilities of trustees." *Bosworth v. Allen*, 168 N. Y. 157, 55 L. R. A. 751, 85 Am. St. Rep. 667, 61 N. E. 163.

In *In re Sperling's Appeal*, 71 Pa. St. 11, 10 Am. Rep. 684, it was said by Judge Sharswood: "It is by no means a well-settled point what is the precise relation which directors sustain to stockholders. They are, undoubtedly, said in many authorities to be trustees, but that, as I apprehend, is only in a general sense, as

we term an agent or any bailee intrusted with the care and management of the property of another. It is certain that they are not technically trustees."

And in a case in the Supreme Court of the United States it was said: "Bank directors are often styled trustees, but not in any technical sense. The relation between the corporation and them is rather that of principal and agent." *Briggs v. Spaulding*, 141 U. S. 132, 35 L. Ed. 662.

"The relation of directors to stockholders is not technically that of trustees. Nevertheless, * * *, it is undoubtedly a relation of trust and confidence." *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897.

⁶ *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448.

⁷ *In re Sperling's Appeal*, 71 Pa. St. 11, 20, 10 Am. Rep. 684.

⁸ *Hibernia Bldg. Ass'n v. McGrath*, 154 Pa. St. 296, 35 Am. St. Rep. 828, 26 Atl. 377.

are concerned.⁹ In other words, it is unquestionably true that, as agents intrusted with the management of the corporation, for the benefit of the stockholders collectively, they occupy a fiduciary relation, and in this sense the relation is one of trust.¹⁰

It has been stated that the relation of directors to the stockholders is essentially that of trustee and cestui que trust;¹¹ but what is meant by this statement is merely that such is the relation to the stockholders collectively which is only another way of stating that they are trustees for the corporation.

Sometimes, managing officers are expressly called trustees instead of directors by the statute or incorporation papers, which, however, of course, does not affect their relation to the corporation.

§ 2262. — Difference between directors and agents. Directors differ from agents of a mere individual in that the powers of directors are, in an important sense, original and undelegated in that the stockholders do not confer and cannot revoke the powers, and that they are derivative only in the sense of being received from the state in the act of incorporation, while in the strict relation of principal and agent all the authority of the latter is derived by delegation from the former.¹² So directors, in so far as they receive no salary, differ from agents who receive compensation.

§ 2263. — Statutes governing trustees in general as applicable. In some of the Western states, especially in those states where the law relating to trusts has been codified, as in California and other states

⁹ **Colorado.** *Morgan v. King*, 27 Colo. 539, 63 Pac. 416.

Florida. *Jacksonville Cigar Co. v. Dozier*, 43 So. 523.

Illinois. *Cratty v. Peoria Law Library Ass'n*, 219 Ill. 516, 76 N. E. 707, rev'g 120 Ill. App. 596.

Montana. *Coombs v. Barker*, 31 Mont. 526, 79 Pac. 1.

New York. *Hoyle v. Plattsburgh & M. R. Co.*, 54 N. Y. 314, 13 Am. Rep. 595; *Hinds v. Fishkill & M. Equitable Gas Co.*, 96 App. Div. 14, 88 N. Y. Supp. 954.

When it is said that a director occupies a fiduciary relation, this refers principally to his duties rather than his powers.

¹⁰ *Koehler v. Black River Falls Iron Co.*, 2 Black (U. S.) 715, 17 L. Ed. 339; *Pearson v. Concord R. Corporation*, 62 N. H. 537, 13 Am. St. Rep. 590; *Duncomb v. New York, H. & N. R. Co.*, 84 N. Y. 190; *Hoyle v. Plattsburgh & M. R. Co.*, 54 N. Y. 314, 13 Am. Rep. 595; *Imperial Mercantile Credit Ass'n v. Coleman*, L. R. 6 H. L. 189.

¹¹ *People v. Powell*, 201 N. Y. 194, 94 N. E. 634, aff'g 140 N. Y. App. Div. 912, 125 N. Y. Supp. 1139.

¹² *Hoyt v. Thompson's Ex'r*, 19 N. Y. 207, writ of error dismissed 1 Black (U. S.) 518, 17 L. Ed. 65, and see §§ 1961-1963, *supra*.

following its lead, it is common for the courts to apply to directors the statutory rules governing trustees in general.¹³

§ 2264. — Double character of agent and trustee. The rule, as stated by Mr. Pomeroy, is that "directors are clothed at the same time with a double character—that of quasi trustees and that of agents."¹⁴ It has been held that as to third persons, directors are the agents of the corporation, but as to the corporation itself, equity holds them liable as trustees.¹⁵ In referring to the early English case of *Charitable Corporation v. Sutton*,¹⁶ a magazine writer has called attention to the fact that that case referred to the director as an agent and also as a trustee, and that "courts have continued to do the same thing down to the present day and have never been able to say whether a director's duty should be judged by that of an agent or by that of a trustee. This is not the fault of the courts but is due in large measure to the fact that a director in some situations stands in the relation of agent to principal and in others in the relation of trustee to cestui. He has characteristics common to both but often stands in a position differing from either. Agents usually receive a direct consideration or compensation for their services while directors usually do not. Trustees have no interest in the subject-matter of the

¹³ *Pacific Vinegar & Pickle Works v. Smith*, 145 Cal. 352, 104 Am. St. Rep. 42, 78 Pac. 550; *Schnittger v. Old Home Consol. Min. Co.*, 144 Cal. 603, 78 Pac. 9; *Fowler v. Iowa Land Co.*, 18 S. D. 131, 99 N. W. 1095, applying Civ. Code S. D. § 1641, providing that trustee cannot enforce any claim against the trust property which he may acquire after his appointment as trustee.

¹⁴ 3 Pomeroy's Equity Juris. (3rd Ed.), § 1089.

¹⁵ *Continental Securities Co. v. Belmont*, 206 N. Y. 7, 16, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914 A 777, 99 N. E. 138; *Bosworth v. Allen*, 168 N. Y. 157, 55 L. R. A. 751, 85 Am. St. Rep. 667, 61 N. E. 163.

"Directors are the agents of the corporation in its dealings with third persons, but they are trustees in relation to the corporation for they hold its property and are charged with the

duty of using, managing, and expending it in its business and for its benefit." *Gray v. Heinze*, 82 N. Y. Misc. 618, 144 N. Y. Supp. 1045.

The liability of directors and other officers to the corporation for mismanagement is determined by substantially the same principles which determine the liability of any other agent to his principal for failure to perform the duties which he has undertaken. "The liability of officers to the corporation for damages caused by negligent or unauthorized acts rests upon the common-law rule which renders every agent liable who violates his authority or neglects his duty to the damage of his principal." Pinney J., in *North Hudson Mut. Building & Loan Ass'n v. Childs*, 82 Wis. 460, 33 Am. St. Rep. 57, 52 N. W. 600.

¹⁶ 2 Atk. 400, 405, 26 Eng. Rep. 642.

trust while directors usually have a very substantial interest as stockholders in the property of the corporation. For this reason the problem cannot be solved by relying entirely upon analogies as the courts seem inclined to do but must be worked out upon a somewhat independent basis."¹⁷

§ 2265. — As dependent on whether court one of law or equity. It has been said that "while courts of law generally treat the directors as agents, courts of equity treat them as trustees, and hold them to a strict account for any breach of the trust relation. For all practical purposes they are trustees when called upon in equity to account for their official conduct."¹⁸ In other words, when directors or other corporate officers are sought to be held liable in a suit by the corporation, the remedy is generally in equity on the theory that the officers are at least quasi trustees and so liable in equity for a breach of trust.¹⁹ On the other hand, if officers are sought to be held liable by creditors of the corporation or persons dealing with the corporation, rather than by the corporation itself, the action is generally at law instead of in equity,²⁰ and the liability is generally determined according to the rules of agency, i. e., the liability of an agent to third persons.²¹

§ 2266. — Classification as agent or as trustee not exclusive. It was said in an English decision that when directors are spoken of by the courts as "agents, trustees, or managing partners of the company, it is essential to recollect that such expressions are not used as exhaustive of the powers or responsibilities of those persons, but only as indicating useful points of view from which they may for the moment and for the particular purpose be considered—points of view at which they seem for the moment to be either cutting the circle or falling within the category of the suggested kind. It is not meant that they belong to the category but that it is useful for the purpose of the moment to observe that they fall pro tanto within the principles which govern that particular class. * * * Directors are not exactly agents nor exactly servants—perhaps not servants at all—nor exactly trustees, nor exactly managing partners, if by that is meant that they are nothing more and nothing else."²²

¹⁷ Article by M. C. Lynch in 3 Cal. Law Rev. 21, 22.

¹⁸ Bosworth v. Allen, 168 N. Y. 157, 55 L. R. A. 751, 85 Am. St. Rep. 667, 61 N. E. 163.

¹⁹ See § 2671, *infra*.

²⁰ See § 2673, *infra*.

²¹ See also § 2264, *supra*.

²² Imperial Hydropathic Hotel Co. v. Hampson, 23 Ch. Div. 1, 12.

§ 2267. — Importance of determining whether officer a trustee or an agent. However, as has been said, it is doubtlessly true, at least under most circumstances, that it is immaterial whether directors be treated as trustees in the full sense of that term or as agents.²³ In a recent case in Georgia, Justice Lumpkin ably sums up the situation as follows: "Directors of a private corporation occupy a somewhat peculiar position. They have been variously classified as agents, mandataries, bailees and trustees; and it has been sought to define their duties and liabilities to the corporation and its stockholders on the basis of such relations. A great deal of learning has been expended, and perhaps some of it wasted, in efforts to rigidly apply one or another of these analogies to facts to which it has not always been fully applicable. Directors are agents, but they are also agents clothed with a fiduciary character; and, while they are not express or technical trustees, they are selected to manage the affairs and property of the corporation for its benefit, and they bear to it and to its stockholders a relation which in many respects may be called a trust relation; and thus by numerous courts they have been called trustees." ²⁴

§ 2268. — Rule as different where officer is one other than a director. Although directors may be considered to be trustees, other officers of the corporation, especially those appointed by the board of directors and who devote all or a large portion of their time to the corporate affairs and who are paid a salary, are more properly considered as agents of the corporation.

§ 2269. — Review of situation. A few cases have considered at some length whether a director occupied the position of trustee or of agent, but the most of the decisions, especially the later ones, merely state in so many words that he is a trustee, or is an agent, or that he is both a trustee and agent, without further consideration of the subject and merely as dicta. It is unfortunate, to say the least, that the courts should ever have attempted to classify directors either as trustees or as agents or both. It would have been much better to have worked out the rules governing their duties and liabilities according to the nature of the particular office and the nature of the particular duty or liability involved, without regard to the rules either of trust or agency, except by analogy. The true rule is believed to be this. A director, strictly speaking, is neither a trustee nor an

²³ *Coombs v. Barker*, 31 Mont. 526,
79 Pac. 1.

²⁴ *McEwen v. Kelly*, 140 Ga. 720,
79 S. E. 777.

agent: He resembles both. In some respects the rules relating to trustees are applicable to him and in some respects they are not applicable to him. In some respects the rules applicable to agents are applicable to him, and in some respects such rules are not applicable to him. Whether, in a given case, the rule applicable to trustees or the rule applicable to agents, or neither of such rules, is applicable, is determinable by no fixed rule, but depends almost entirely upon the nature of the particular act or contract which is the subject of the controversy. The following statement of a prominent textbook writer is quoted with approval: "The position of directors has been variously designated and described. Thus, they have been called agents; and they certainly are for some purposes agents of the corporation. They have also been called 'managing partners'; but as they are obviously not partners at all, the phrase is helpful only by analogy. Again, they have been called 'trustees.' But as a trustee is one who holds the title to property for the benefit of another, and as directors are not invested with the title to the corporate property, the inaccuracy of the appellation is apparent. The truth is that the status of director and corporation is a distinct legal relationship. It resembles in some respects those of agent and principal, of managing and dormant partners, of trustee and cestui que trust; but it is different from each."²⁵

§ 2270. Relation to individual stockholders. Sometimes it is said that a director or other managing officer is a trustee in so far as the corporation and its stockholders are concerned, and sometimes it is said that he is a trustee only as to the corporation itself. However, the better rule seems to be that he is a trustee for an individual stockholder, as well as the corporation, at least in a limited sense.²⁶ Thus,

²⁵ 2 Machen, Corporations, § 1399.

²⁶ Jackson v. Ludeling, 21 Wall. (U. S.) 616, 22 L. Ed. 492; Stewart v. Harris, 69 Kan. 498, 66 L. R. A. 261, 105 Am. St. Rep. 178, 2 Ann. Cas. 873, 77 Pac. 277; Sargent v. Kansas Midland R. Co., 48 Kan. 672, 688, 29 Pac. 1063; Black v. Simpson, 94 S. C. 312, 46 L. R. A. (N. S.) 137, 77 S. E. 1023.

"The board of directors, therefore, occupies a dual relation in reference to the stockholder. It is both agent and adversary. It represents and it antagonizes. It protects and it as-

sails. In the conduct of the corporate enterprise, in choosing methods, in fixing policies, and administering affairs, the board must be held to act on behalf of the stockholder. It represents him. The determination of the extent to which the capital stock shall be embarked falls naturally within the province of those who are charged with the prosecution and success of the undertaking; and in exercising the power vested in it by law, or by contract, to fix the time and amount of stock calls, the board in a just and proper sense represents the

Justice Lamar, in a Georgia decision, said that the fact that a director is a trustee for all the stockholders "is not to be perverted into holding that he is under no obligation to each. The fact that he must serve the company does not warrant him in becoming the active and successful opponent of an individual stockholder with reference to the latter's undivided interest in the very property committed to the director's care. That he is primarily trustee for the corporation is not intended to make the artificial entity a fetich to be worshipped in the sacrifice of those who, in the last analysis, are the real parties at interest. No process of reasoning and no amount of argument can destroy the fact that the director is, in a most important and legitimate sense, trustee for the stockholder. * * * Not a strict trustee, for he does not hold title to the shares, not even a strict trustee who is practically prohibited from dealing with his *cestui que trust*; but a quasi trustee as to the shareholder's interest in the shares."²⁷ This view is the one enunciated by Mr. Pomeroy who, however, excludes from such trust the corporate property itself.²⁸ In many jurisdictions, however, it is held that directors are not trustees as to shares of stock held by individual stockholders.²⁹ Thus, in Illinois, it is said that "the officers of a corporation are trustees for the stockholders as a body with respect to the business and property of the corporation, which is under their control and management for the benefit of stockholders generally; but an officer has no control over the shares of the individual stockholder and is not a trustee for such stockholder with respect to his stock."³⁰

This question usually arises in connection with purchases of stock by a director or the like, from a shareholder, all of which is considered hereafter.³¹

stockholder, as it does in other matters involving judgment and discretion." *West v. Topeka Sav. Bank*, 66 Kan. 524, 528, 63 L. R. A. 137, 97 Am. St. Rep. 385, 72 Pac. 252.

²⁷ *Oliver v. Oliver*, 118 Ga. 362, 367, 45 S. E. 232.

²⁸ "So far as the trust embraces or is concerned with the corporate property, the directors and managing officers occupy the position of quasi trustees towards the corporation only; there is no relation of beneficiary and trustee, having the corporate property for its subject-matter, between the

stockholders and the directors." 3 Pomeroy's *Equity Jurisprudence* (3rd Ed.), § 1090.

²⁹ *Board Com'rs of Tippecanoe County v. Reynolds*, 44 Ind. 509, 15 Am. Rep. 245; *Smith v. Hurd*, 12 Metc. (Mass.) 371, 46 Am. Dec. 690; *Crowell v. Jackson*, 53 N. J. L. 656, 23 Atl. 426; *Haarstick v. Fox*, 9 Utah 110, 33 Pac. 251.

³⁰ *Bawden v. Taylor*, 254 Ill. 464, 98 N. E. 941, following *Hooker v. Midland Steel Co.*, 215 Ill. 444, 106 Am. St. Rep. 170, 74 N. E. 445.

³¹ See § 2564, *infra*.

§ 2271. **Relation to creditors.** Directors are not wholly without duties to creditors,³² but the decisions are in conflict as to whether a director is a trustee for creditors of the corporation, even where it is conceded that he is a trustee for the corporation itself. In a few states it has been held that directors are trustees for creditors,³³ at least in case of directors of a bank in favor of depositors.³⁴ In other states the contrary is held.³⁵ In a leading case in Minnesota, Justice Mitchell stated what he considered the rule to be, as follows: "Again, the directors of a corporation are not in any contractual relation with its creditors. They are strangers to each other. The creditors have no cause of complaint on account of any unlawful act of corporate officers, provided sufficient assets remain to pay their claims. Of course, as in case of any other persons, strangers to each other, directors would be liable at common law or equity to make just compensation for any wrong done to the legal rights of creditors. For example, if they misappropriate any part of the capital stock (which, in America, is held to be a trust fund for creditors), they might be held liable as trustees to the extent necessary to pay the debts; and, as in the case of liability to the corporation, the limit of the liability would be the amount of resultant damage."³⁶

It is a general rule, however, that when the corporation becomes insolvent, the directors are thereafter considered as trustees for the

³² *McEwen v. Kelly*, 140 Ga. 720, 79 S. E. 777.

³³ *Savings Bank of Louisville's Assignee v. Caperton*, 87 Ky. 306, 12 Am. St. Rep. 488, 8 S. W. 885; *Banning v. Loving*, 82 Ky. 370; *Conant, Ellis & Co. v. Seneca County Bank*, 1 Ohio St. 298; *Seale v. Baker*, 70 Tex. 283, 291, 8 Am. St. Rep. 592, 7 S. W. 742; *Marshall v. Farmers' & Merchants' Sav. Bank of Alexander*, 85 Va. 676, 2 L. R. A. 534, 17 Am. St. Rep. 84, 8 S. E. 586.

³⁴ *Delano v. Case*, 121 Ill. 247, 2 Am. St. Rep. 81, 12 N. E. 676, aff'g 17 Ill. App. 531; *Wolfe v. Simmons*, 75 Miss. 539, 23 So. 586; *Williams v. McKay*, 40 N. J. Eq. 189, 196, 53 Am. Rep. 775.

Directors of banks "are not only trustees for the corporation, but also, though perhaps in a modified sense, for the creditors of the corporation, who become such by depositing their

money with the bank in the ordinary course of such business." Per Vice Chancellor Pitney in *Campbell v. Watson*, 62 N. J. Eq. 396, 50 Atl. 120.

³⁵ *O'Conner Min. & Mfg. Co. v. Coosa Furnace Co.*, 95 Ala. 614, 618, 36 Am. St. Rep. 251, 10 So. 290; *Stone v. Rottman*, 183 Mo. 552, 82 S. W. 76; *Union Nat. Bank v. Hill*, 148 Mo. 380, 71 Am. St. Rep. 615, 49 S. W. 1012; *Hart v. Hanson*, 14 N. D. 570, 3 L. R. A. (N. S.) 438, 105 N. W. 942; *Deaderick v. Bank of Commerce*, 100 Tenn. 457, 45 S. W. 786.

In Wisconsin, "the directors of a corporation are trustees for it and bear no other relation to its creditors than the agent of an individual to his creditors" *Killen v. Barnes*, 106 Wis. 546, 564, 82 N. W. 536.

³⁶ *Patterson v. Stewart*, 41 Minn. 84, 90, 4 L. R. A. 745, 16 Am. St. Rep. 671, 42 N. W. 926.

corporate creditors.³⁷ In Alabama, however, it is held that directors or other corporate officers are not trustees for creditors of the corporation even when the corporation is insolvent.³⁸

This question usually arises in connection with the right of creditors to hold directors liable for negligent management of the corporation resulting in loss primarily to the corporation and secondarily to the corporate creditors,³⁹ and in connection with the right of officers to prefer themselves as creditors.⁴⁰

§ 2272. Duties and responsibilities arising from nature of office. Inasmuch as corporate directors and officers occupy a fiduciary capacity, the following rules are so well settled as to be beyond dispute:

1. Directors and other officers must exercise the utmost good faith in all transactions touching their duties to the corporation and its property.⁴¹ For instance, if a director is also employed by the corporation to make purchases for it, he must act in the utmost good faith and buy for the corporation and not for himself.⁴² So the general manager of a company, in suing it for salary, money advanced, and the like, must act openly and above board, and a judgment in his favor will be set aside where he was guilty of fraud in keeping knowledge of the suit and the execution sale from the other directors.⁴³

2. All their acts must be for the benefit of the corporation and not for their own benefit, except as hereinafter stated.⁴⁴

³⁷ *City Nat. Bank v. Goshen Woolen Mills Co.*, 35 Ind. App. 562, 69 N. E. 206; *Olney v. Conanicut Land Co.*, 16 R. I. 597, 5 L. R. A. 361, 27 Am. St. Rep. 767, 18 Atl. 181. See also *McKellar v. Stanton*, 104 S. C. 248, 88 S. E. 527.

In New Jersey, the courts clearly draw the distinction between directors as trustees for creditors when the corporation is insolvent, and directors as not trustees for creditors when the corporation is solvent. This duty to creditors, upon insolvency, however, said Vice Chancellor Reed, "may arise before actual steps, either voluntary or involuntary, have been taken to wind up a corporate business. I think that when such a condition of corporate affairs confronts the directors that it is obvious that the com-

pany is insolvent, * * * then the duty of the directors to the creditors begins." *Bird v. Magowan* (N. J. Ch.), 43 Atl. 278.

³⁸ *Force v. Age-Herald Co.*, 136 Ala. 271, 278, 33 So. 866.

³⁹ See §§ 2574-2578, *infra*.

⁴⁰ See § 2327, *infra*, and *infra*, chapter on Insolvency.

⁴¹ *Schneider v. Johnson*, 161 Mo. App. 375, 143 S. W. 78; *Billings v. Shaw*, 209 N. Y. 265, 103 N. E. 142, *aff'g* 151 N. Y. App. Div. 888, 135 N. Y. Supp. 1100.

⁴² *Loewer v. Lonoke Rice Milling Co.*, 111 Ark. 62, 161 S. W. 1042, and see § 2283 *et seq.*, *infra*.

⁴³ *Sprague v. Stratton-Massachusetts Gold Mines Co.*, 53 Colo. 315, 125 Pac. 490.

⁴⁴ See § 2281 *et seq.*, *infra*.

3. They are not permitted to profit as individuals by virtue of their position.⁴⁵

4. Any profits received by them from the company's property or business belongs to the company and they hold the same as trustees for the benefit of the corporation and its stockholders.⁴⁶

However, the fiduciary relationship does not make an officer liable as an insurer.⁴⁷ A director is not an insurer and therefore he is not liable for a loss of corporate assets unless he was negligent and, if negligent, the negligence was the cause of the loss.⁴⁸

§ 2273. Right to urge fiduciary relation where corporation and officer in effect the same. Where the corporation is a mere shadow organized and maintained by a person as a cloak or alias under which to conduct his own business, he cannot insist that he, as president, bears towards the corporation a fiduciary relation so as to prevent him from lawfully authorizing a bank to apply a deposit in the corporate name to discharge his personal debt.⁴⁹

§ 2274. Fiduciary relationship as extending to subsidiary corporation. Where one corporation obtains control of another corporation, the directors of the former corporation, in so far as their acts affect the rights of stockholders in the subsidiary corporation, occupy a fiduciary relation towards the latter.⁵⁰

§ 2275. Title to and possession of corporate property—In general. Directors, before dissolution of the corporation, do not, by virtue of their office, hold or possess any title to or interest in the property of the corporation.⁵¹ This is one of the reasons usually advanced for holding that a director or other corporate officer is not, strictly speaking, a trustee. However, under some circumstances, a corporate officer may hold corporate property under an express or implied trust, for the benefit of the corporation, as where he used corporate funds to purchase it in his own name, or the like.⁵² If an officer holds

⁴⁵ See §§ 2303-2324, *infra*.

⁴⁶ See §§ 2303-2324, *infra*.

⁴⁷ *Mowbray v. Antrin*, 123 Ind. 24, 23 N. E. 858, holding treasurer of private corporation not liable to corporation for loss of corporate funds and papers, where not negligent.

⁴⁸ *Wallach v. Billings*, 277 Ill. 218, 115 N. E. 382.

⁴⁹ *Hanson Sheep Co. v. Farmers' &*

Traders' State Bank, 53 Mont. 324, 163 Pac. 1151.

⁵⁰ *Cannon v. Brush Elec. Co.*, 96 Md. 446, 94 Am. St. Rep. 584, 54 Atl. 121.

⁵¹ *Rossi v. Caire*, 174 Cal. 74, 161 Pac. 1161.

⁵² Corporate officers who use corporate funds, either directly or indirectly, in purchasing its stock from third persons, hold it as trustee for

stock as trustee for the corporation, then of course he must account to it for the dividends received on such stock.⁵³ However, a corporate officer is not chargeable with interest on corporate funds which he holds merely as custodian thereof,⁵⁴ but he is chargeable with interest on funds misappropriated by him.⁵⁵

§ 2276. — **Estoppel to dispute title or set up adverse title.** Inasmuch as corporate officers hold corporate property for the corporation and not otherwise, they are estopped to dispute the corporation's title to or custody of the property.⁵⁶ Moreover, one in possession of corporate property as its manager, cannot, while still sustaining that relation, take possession of the premises in his own right.⁵⁷

§ 2277. **Engaging in rival business.** There are only a few decisions relating to the right of corporate officers to engage in a rival business, and the most of these are more or less confined to the facts of the particular case so that the rights of officers in this respect is not clearly defined by the courts. In a New York case, it was said: "But I know of no rule which prohibits a director of a corporation engaging in a business similar to that carried on by the corporation, either in his own behalf or for another corporation of which he is likewise a director. True, he owes to his stockholders the most scrupulous good faith. He may not deal with the trust property for his own advantage. He may not deal in his own behalf in respect to any matter involving his rights and duties as a director. He may not seek his own profit at the expense of the company or its stockholders. But, so long as he violates no legal or moral duty which he owes to the corporation or its stockholders, he is entirely free to engage in an independent competitive business."⁵⁸ Likewise it was held in Missouri that where the president of a packet company tried to secure contracts to carry mail from the government for the company but was unsuccessful, he had the right to make a contract in his own behalf for carrying the mails.⁵⁹ So it has been held that corporate directors

the company. *Barker v. Montana Gold, Silver, Platinum & Tellurium Min. Co.*, 35 Mont. 351, 89 Pac. 66.

⁵³ *Zeckendorf v. Steinfeld*, 225 U. S. 445, 56 L. Ed. 1156, modifying 12 Ariz. 245, 100 Pac. 784.

⁵⁴ *Red Bud Realty Co. v. South*, 96 Ark. 281, 131 S. W. 340.

⁵⁵ *Red Bud Realty Co. v. South*, 96 Ark. 281, 131 S. W. 340, and see § 2722, *infra*.

⁵⁶ *Burley Tobacco Co. v. Vest*, 165 Ky. 762, Ann. Cas. 1917 B 149, 178 S. W. 1102.

⁵⁷ *Buckhorn Plaster Co. v. Consolidated Plaster Co.*, 47 Colo. 516, 108 Pac. 27.

⁵⁸ *New York Automobile Co. v. Franklin*, 49 N. Y. Misc. 8, 97 N. Y. Supp. 781.

⁵⁹ In this case, the president in carrying out the contract made use of

and officers, "so long as they acted with good faith to their associates" in the company, are not debarred from engaging in the same business, "especially in a place where that company was not authorized by its charter to operate."⁶⁰ On the other hand, it is held in New Jersey that "it was not lawfully possible for the defendant, while a director and treasurer of complainant corporation, to enter into an opposition business in his own behalf of such a nature that it would cripple or injure the corporation that he represented."⁶¹

It would seem to be beyond doubt that after a corporation has become insolvent and has practically ceased to exist, its president may contract to do the business which the corporation previously did.⁶²

§ 2278. Protection of trade secrets. The rule that equity will restrain an employee from making disclosures or use of trade secrets communicated to him in the course of a confidential employment,⁶³ applies equally well, it seems, to officers of a corporation,⁶⁴ although there is nothing peculiar to corporations in so far as the law relating thereto is concerned.

§ 2279. Sale of influence in management of company. "It is clear," says Mr. Morawetz, "that a director has no right to sell his influence in the management of the company, or to enter into any agreement by which his official action would be influenced or controlled. Such an agreement would be dishonest and illegal; it would be an agreement to commit a breach of trust."⁶⁵ This question has already been considered in a preceding volume,⁶⁶ and is also treated of hereafter.⁶⁷

§ 2280. Termination of fiduciary relation. When a corporate officer ceases to act as such, either because of his resignation or removal

both his company and also of others' boats. The court said that "his relation to the packet company required that he should use all the facilities afforded by the packet company in performing the contract, and, * * * he will not be allowed to make profit out of such use, but will be held to account to the company for all that he received for the service performed by the company in such use." *Keokuk Northern Line Packet Co. v. Davidson*, 95 Mo. 467, 8 S. W. 545.

⁶⁰ *Barr v. Pittsburgh Plate Glass Co.*, 51 Fed. 33, 39.

⁶¹ *Hussong Dyeing Mach. Co. v. Morris* (N. J. Ch.), 89 Atl. 249.

⁶² *Murray v. Vanderbilt*, 39 Barb. (N. Y.) 140.

⁶³ See note in 44 L. R. A. (N. S.) 1160.

⁶⁴ *Pomeroy Ink Co. v. Pomeroy*, 77 N. J. Eq. 293, 78 Atl. 698.

⁶⁵ 1 Morawetz, Corporations, § 519.

⁶⁶ See §§ 1753, 1754, vol. 3.

⁶⁷ See § 2415, *infra*.

from office, or because of the insolvency of the corporation, the fiduciary relation ceases. If all the powers of a director cease upon the appointment of a receiver, then his fiduciary relation ceases at that time so far as subsequent dealings with the receiver or the corporate property is concerned.⁶⁸ A fortiori, fiduciary relations of corporate directors or other officers are terminated when a receiver is appointed and the officers are enjoined from any further acts relating to the management of the business.⁶⁹

B. Acquiring Adverse Title or Interests

§ 2281. General rule. The general rule is that a director or other corporate officer cannot acquire an interest adverse to that of the corporation, while acting for the corporation or when dealing individually with third persons.⁷⁰ It has been said that "in general the legal restrictions which rest upon such officers in their acquisitions

⁶⁸ *Holmsted v. Annable*, 18 Dom. L. R. (Can.) 3, holding sale by liquidator to director was valid.

⁶⁹ *In re Allen-Foster-Willett Co.*, — Mass. —, 116 N. E. 875.

⁷⁰ *Jackson v. Ludeling*, 21 Wall. (U. S.) 616, 22 L. Ed. 492; *Cook v. Sherman*, 20 Fed. 167; *Fricker v. Americus Manufacturing & Improvement Co.*, 124 Ga. 165, 52 S. E. 65; *Center Creek Water & Irrigation Co. v. Lindsay*, 21 Utah 192, 60 Pac. 559.

One who joins with directors in an unlawful redemption of corporate property sold under judicial sale will be deemed to have knowledge that under the law the directors cannot redeem in their own name. Where such party had full knowledge of the facts and the law, he will stand in no better position than the directors. *Coombs v. Barker*, 31 Mont. 526, 79 Pac. 1.

But where a corporation has forfeited its interests in property held by it under a mere conditional sale, it is not fraudulent for an officer to purchase the property from the vendor who has retaken it, there having been no wrongdoing on the part of the officer in connection with the forfeiture of the company's interest.

Kidder v. Wittler-Corbin Machinery Co., 38 Wash. 179, 80 Pac. 301.

In a late case involving the stock of the Du Pont Powder Company, the president and largest stockholder, before going away on a trip, offered to sell to the company a block of stock at a certain price for the purpose of distributing it among the more important employees at the price paid by the company. The finance committee rejected the offer solely because they thought the price was too high and instructed the acting president to so inform the absent president. The stock rapidly advanced in price because of the European War, and the acting president, by concealing important facts from the absent president and from the company, purchased it for himself and associates at a considerably higher price than that at which it was originally offered, by using the credit and funds of the company as an aid in financing their purchase. It was held that the company had the right to take over the stock at the price paid and to require an accounting as to dividends paid. *Du Pont v. Du Pont*, 242 Fed. 98.

are generally limited to property wherein the corporation has an interest already existing, or in which it has an expectancy growing out of an existing right, or to cases where the officers' interference will in some degree balk the corporation in effecting the purposes of its creation."⁷¹ Where the superintendent of the manufacturing department of a corporation was also a director, he "was legally bound not to act in antagonism to the interests of" the corporation, said the Supreme Judicial Court of Massachusetts, in considering the rights under an assignment of a patent to such superintendent from a third person; and Justice Sheldon clearly states the governing rule as follows: "If there was property which was necessary for the business of the plaintiff [corporation], and which he knew that the plaintiff desired to acquire and intended and was able to purchase and pay for, in order to protect and develop its business interests, it would be a violation of his duty for him secretly to purchase that property, either for the purpose of afterward selling it to the plaintiff at an advanced price and thus taking advantage of its necessities, or of using such property otherwise to the injury of the plaintiff; and the plaintiff could by proper proceedings in equity secure to itself the benefit of his purchase."⁷²

If it is the duty of officers in a particular case to enter into a contract, or to purchase or take a transfer of property, on behalf of the corporation, and, in violation of this duty, they enter into the contract or acquire the property personally, they will not be permitted to retain the benefit, but will be held as trustees for the corporation.⁷³

⁷¹ *Lagarde v. Anniston Lime & Stone Co.*, 126 Ala. 496, 28 So. 199.

⁷² *American Circular Loom Co. v. Wilson*, 198 Mass. 182, 206, 126 Am. St. Rep. 409, 84 N. E. 133.

⁷³ *Higgins v. Lansingh*, 154 Ill. 301, 40 N. E. 262; *Trenton Banking Co. v. McKelway*, 8 N. J. Eq. 84; *McClure v. Law*, 161 N. Y. 78, 76 Am. St. Rep. 262, 55 N. E. 388; *Blake v. Buffalo Creek R. Co.*, 56 N. Y. 485; *Averell v. Barber*, 53 Hun (N. Y.) 636, 6 N. Y. Supp. 255. See *Earle v. Burland*, 27 Ont. App. (Can.) 540.

Where the president of a corporation buys land and has it conveyed to himself, he will be held in equity as trustee for the corporation, where he had previously been selected by

the corporation to negotiate with the vendor to procure the land for the corporation. *Trenton Banking Co. v. McKelway*, 8 N. J. Eq. 84.

Where two directors of a corporation assumed to acquire title to certain patents in their own name, instead of in the name of the corporation, as they should have done, and transferred them to another corporation, which had no knowledge of the equity of the first company therein, and the second corporation transferred the patents to one of such directors as trustee, it was held proper to decree that such director should assign all the interest which he held individually and as trustee to a receiver, and that both directors should account for

Directors "must remember that they are not at liberty to sacrifice the interests which they are bound to protect, and, while ostensibly acting for the company, divert in their own favour business which should properly belong to the company they represent."⁷⁴

If a person should make an offer to a corporation, through one of its officers intrusted with its management, to transfer property to the corporation on certain terms, and the officer, in violation of his duty to the corporation, should make a counter proposition to take the property and enter into the contract personally, and the proposition should be accepted and property transferred to him, it would undoubtedly be decreed by a court of equity, at the suit of the corporation, or at the suit of a stockholder in a proper case, that he held the property in trust for the corporation. Such a case falls, no doubt, within the rule prohibiting an officer from making any secret profit or acquiring any secret personal advantage in his dealings on behalf of the corporation.⁷⁵ However this may be, he is clearly liable on the ground of fraud and breach of trust.

"Whether in any case an officer of a corporation is in duty bound to purchase property for the corporation, or to refrain from purchasing property for himself, depends upon whether the corporation has an interest, actual or in expectancy, in the property, or whether the purchase of the property by the officer or director may hinder or defeat the plans and purposes of the corporation in the carrying on or development of the legitimate business for which it was created."⁷⁶

§ 2282. Limitations of and exceptions to rule. There is a vast field for individual activity lying outside the duty of a director, yet well within the general scope of the corporation's business.⁷⁷ The test seems to be whether there was a specific duty, on the part of the officer sought to be held liable, to act or contract in regard to the particular matter as the representative of the corporation—all of which is largely a question of fact.⁷⁸ If there is no such duty,

all profits made by them out of the patents. *Averell v. Barber*, 53 Hun (N. Y.) 636, 6 N. Y. Supp. 255.

⁷⁴ *Cook v. Deeks*, 27 Dom. L. R. (Can.) 1, 8, rev'g 21 Dom. L. R. 497.

⁷⁵ *McClure v. Law*, 161 N. Y. 78, 76 Am. St. Rep. 262, 55 N. E. 388, rev'g 20 N. Y. App. Div. 459, 47 N. Y. Supp. 84.

⁷⁶ *Zeckendorf v. Steinfeld*, 12 Ariz. 245, 100 Pac. 784, citing *Trice v. Com-*

stock, 121 Fed. 620, 61 L. R. A. 176, in which latter case Judge Sanborn reviews the question at some length so far as agents generally are concerned.

⁷⁷ See note in 13 *Columbia L. Rev.* 431.

⁷⁸ *Mackey v. Burns*, 16 Colo. App. 6, 64 Pac. 485; *New York Automobile Co. v. Franklin*, 49 N. Y. Misc. 8, 97 N. Y. Supp. 781.

then the director or other corporate officer may acquire outside interests, although the corporation may be more or less interested. Thus a director or other officer may acquire what would otherwise be adverse interests where the other party to the transaction refuses to deal with the corporation,⁷⁹ or where the corporation is financially unable to undertake the transaction,⁸⁰ or where the transaction is beyond the powers of the corporation.⁸¹

§ 2283. Illustrations of rules—In general. The rule against acquiring adverse interests is illustrated by a purchase by directors of certain patent rights to work under which was the purpose for which the corporation was formed,⁸² and by purchases by railroad directors of rights of way along the projected route of the railroad.⁸³ If the president of a company takes "in his own name the title to property conveniently designed for the use of the business of the corporation and occupied by it, the law will deem such an act, *prima facie*, at least, potentially fraudulent as against the corporation, and the officer will at the instance of the corporation be held to hold the title as trustee for its use."⁸⁴ Where it was the duty of one as a director of a power company to take part in procuring water rights essential to the operation of the power plant, he cannot acquire adverse rights to waters of the same stream, and if he does so equity will restore to the corporation the benefits of his hostile acts.⁸⁵ So the president of a corporation cannot obtain title to property of another company, at a trustee's sale thereof, where the sale was merely a scheme to clear the title of the first-named corporation and no money was in fact paid.⁸⁶ It has been held that property transferred to the president of a street railway company, in consideration of extending the line to the grantor's property, will be deemed to be held by him as trustee, where no contract between the company and the president is shown.⁸⁷

On the other hand, it has been held that if a corporate officer purchases property with his own money, the mere fact of his relationship

⁷⁹ See § 2285, n. 4, *infra*.

⁸⁰ See § 2285, *infra*.

⁸¹ See *Barr v. Pittsburg Plate Glass Co.*, 51 Fed. 33. Compare § 2309, *infra*.

⁸² *Averell v. Barber*, 53 Hun (N. Y.) 636, 6 N. Y. Supp. 255.

⁸³ *Blake v. Buffalo Creek R. Co.*, 56 N. Y. 489.

⁸⁴ *Leader Pub. Co. v. Grant Trust & Savings Co.*, 182 Ind. 651, 108 N. E. 121.

⁸⁵ *Nebraska Power Co. v. Koenig*, 93 Neb. 68, 139 N. W. 839.

⁸⁶ *Scott v. Farmers' & Merchants' Nat. Bank*, 97 Tex. 31, 104 Am. St. Rep. 835, 75 S. W. 7, rev'g (Tex. Civ. App.), 67 S. W. 343, 66 S. W. 485.

⁸⁷ *Scott v. Farmers' & Merchants' Nat. Bank*, 97 Tex. 31, 104 Am. St. Rep. 835, 75 S. W. 7, rev'g (Tex. Civ. App.), 67 S. W. 343, 66 S. W. 485.

and of his intent to afterwards sell it to the company does not create any enforceable trust in the property for the benefit of the corporation.⁸⁸ So it has been held that the mere fact that a corporation has been negotiating for and trying to purchase land not necessary to the continuance of the corporate business does not invalidate its purchase by a corporate officer for himself.⁸⁹ So it has been held that a mere statement to corporate officers by another officer that he intended to purchase certain property for the benefit of the company, does not make him a trustee where he afterwards purchases the property, where the corporation parted with nothing and was not deprived of anything of value by virtue of the promise;⁹⁰ but in the same case it was held that one who as managing partner of a firm dominates the affairs of a corporation through its board of directors, cannot, even though not himself a director, purchase property the value of which he had learned from his connection with the affairs of the company, but he will be held as trustee for the company.⁹¹ Where a mining engineer was employed by an exploration company under a contract providing that he should not accept or enter into any other business or employment whatsoever, it was held that he could, nevertheless, where sent to examine and report upon certain mining properties, take an option on other nearby properties where he believed the claims would be valuable to the company in connection with the larger properties if the company decided to take the larger properties, and also that the claims might be profitably developed by himself if the company decided not to embark in the larger scheme.⁹²

§ 2284. — Obtaining assignment of corporate contract from other party thereto. When an officer of a corporation has made a contract on behalf of the corporation with a third person, he will not be allowed to afterwards take an assignment of the contract from the latter, or otherwise acquire an interest therein adverse to the corporation, without the consent of the corporation.⁹³

⁸⁸ Camden Land Co. v. Lewis, 101 Me. 78, 63 Atl. 523.

⁸⁹ Lagarde v. Anniston Lime & Stone Co., 126 Ala. 496, 28 So. 199.

⁹⁰ Zeckendorf v. Steinfeld, 12 Ariz. 245, 100 Pac. 784.

⁹¹ Zeckendorf v. Steinfeld, 12 Ariz. 245, 100 Pac. 784.

⁹² Beatty v. Guggenheim Exploration Co., 167 N. Y. App. Div. 864, 153 N. Y. Supp. 757.

⁹³ Gilman, C. & S. R. Co. v. Kelly, 77 Ill. 426; Flint & P. M. Ry. Co. v. Dewey, 14 Mich. 477; Western R. Co. v. Bayne, 11 Hun (N. Y.) 166; Cook v. Berlin Woolen Mill Co., 43 Wis. 433.

Where officers of a corporation execute a contract for the sale of corporate property to a stranger, a repurchase by them from him, while the contract is executory, is voidable at

§ 2285. — **Renewal of lease or purchase of leased property.** There is a reasonable expectancy attending a lease of land that the tenant holding possession under it will be able to renew the lease at its expiration, which expectancy is, under some circumstances, recognized as a valuable property right, although the tenant may have no way of enforcing the renewal.⁹⁴ This rule has been applied against the renewal of corporate leases by an officer of the corporation for himself, in a number of cases.⁹⁵ Thus, where a managing director obtains a renewal of the company's lease on premises used in the business, for himself, when he could have secured it for the company at the same rental, his failure to do so is a breach of duty giving a cause of action against him in favor of the corporation for the damages sustained.⁹⁶ So a director and officer of a corporation who procures a renewal of a lease in his own name—the lease being the principal property of the company—before the expiration of the lease held by the company, and then sells all his stock in the company, will be decreed to hold the lease as trustee for the corporation;⁹⁷ and it is no defense that the corporation was involved in financial difficulties and was adjudicated a bankrupt, since the expectancy “belonged not only to the tenant, but to those to whom the lease might be assigned.”⁹⁸ Moreover, a director cannot take a lease of property occupied by the corporation, and known by him to be of peculiar value to the corporation, although he takes it in the name of his wife.⁹⁹ On the same theory, the president and secretary of a company cannot purchase land for their own use where the company has a lease on it and a contract for its purchase.¹ So where the president had been for some time prospecting on mining land at the expense of the company, which paid him a salary, he cannot obtain one of the leases on the land in his own name, but in such case he holds it as trustee for the company.² The manager of a corporation who had no authority to subscribe in the name of the company for stock in another corporation cannot recoup loss suffered by him thereby, by canceling a valu-

the instance of the corporation. *Cook v. Berlin Woolen Mill Co.*, 43 Wis. 433.

⁹⁴ *Lagarde v. Anniston Lime & Stone Co.*, 126 Ala. 496, 28 So. 199.

⁹⁵ *McCourt v. Singers-Bigger*, 145 Fed. 103, 7 A. & E. Ann. Cas. 287.

⁹⁶ *Acker, Merrill & Condit Co. v. McGaw*, 106 Md. 536, 68 Atl. 17.

⁹⁷ *Pikes Peak Co. v. Pfuntner*, 158 Mich. 412, 123 N. W. 19.

⁹⁸ *Pikes Peak Co. v. Pfuntner*, 158 Mich. 412, 123 N. W. 19, 16 Det. L. N. 689.

⁹⁹ *H. C. Girard Co. v. Lamoureux*, — Mass. —, 116 N. E. 572.

¹ *Lagarde v. Anniston Lime & Stone Co.*, 126 Ala. 496, 28 So. 199.

² *De Bardeleben v. Bessemer Land & Improvement Co.*, 140 Ala. 621, 37 So. 511.

able lease held by the company of which he was manager, taking a new lease in his own name, and then profit by subleasing to his own and other companies.³

On the other hand, if the lessor expressly refuses to renew a corporate lease, a director or other officer who afterwards obtains a lease on the property, with a covenant against its assignment or a subletting, is entitled to possession.⁴ So directors may take an extension of a lease belonging to the company where the latter is in liquidation and has practically refused to accept the extension.⁵

§ 2286. — Redemption from judicial sale. The right of directors, as individuals, to redeem from a judicial sale of all the corporate property would seem to depend upon whether their acts were all fair and in good faith. In one case, such a redemption was decreed to be for the benefit of the corporation and the directors were ordered to reconvey the property to the corporation on the ground that it was not shown that the redemption was fair and in good faith, it appearing that the redemption was made under a judgment rendered in favor of one of the directors only two days before the redemption, and that the judgment was obtained by default based upon the acceptance of service of the summons by one of their number. No explanation was offered as to why the judgment was obtained only two days before the time for redemption expired, nor why the summons was not served in the usual way upon the corporation, nor why notice of the suit was not given to any one except the directors who took part in the redemption.⁶

§ 2287. Purchases by director from trustee selected to sell land. A difference is to be noted between purchases by a director from his co-directors as representing the corporation and purchases by him from a trustee chosen by creditors and stockholders to hold corporate property in trust to sell to pay debts. In such a case as the latter, it has been held that "when the director makes, and such a trustee accepts, an offer of purchase, the burden of showing that improper influence moved the trustee in making the contract is upon him who assails

³ *Holland Furniture Co. v. Knooihuizen*, — Mich. —, 163 N. W. 884.

⁴ *Crittenden & Cowles Co. v. Cowles*, 66 N. Y. App. Div. 95, 72 N. Y. Supp. 701. To same effect, *Jacksonville Cigar Co. v. Dozier*, 53 Fla. 1059, 43 So. 523.

⁵ *Boston Shoe Co., Ltd., v. Frank*, 48 Quebec L. R. 66.

⁶ "These facts render it too doubtful for this court to hold that the entire proceeding was open, aboveboard, fair, and equitable." *Coombs v. Barker*, 31 Mont. 526, 79 Pac. 1.

it. There is a burden resting upon the director-purchaser, not on the ground of any trust or confidence in the matter of the sale, but because he stands in fiduciary relations to the corporation, as to his dealings with its property, and he has therefore to show that, in his contract with the trustee, he did not avail himself of any information which was not equally possessed by the trustee. With this one exception, the director stands, as regards the presumption of influence over such trustee, as any other purchaser would stand on that issue."⁷

C. Purchase of Claims Against the Corporation and Enforcement Thereof

§ 2288. **In general.** Two questions arise in this connection. First, can a corporate officer purchase a claim against the corporation and afterwards enforce it for what he paid for it? This question is almost universally answered in the affirmative.⁸ Secondly, can corporate officers purchase claims against their corporation at a discount and then enforce them for their face value? As to this matter there is some conflict in the decisions.⁹

Unless the circumstances surrounding the transaction makes it inequitable for him to do so,¹⁰ or unless the enforcement of such claims purchased by corporate officers is forbidden by statute,¹¹ there is no question but that directors or other officers may advance money in payment of valid claims against the corporation, or buy up claims, and enforce the same against the corporation, or recover the money from it as paid to its use, to the extent of the money actually paid, with legal interest thereon.¹² At any event, the officer purchasing such claims is entitled to recover the amount actually expended in purchasing them.¹³ Thus, directors may purchase the bonds of the

⁷ *Kessler & Co. v. Ensley Co.*, 141 Fed. 130, 162, aff'd 148 Fed. 1019 (mem. dec.).

⁸ See *infra*, this section.

⁹ See § 2289, *infra*.

¹⁰ *Martin v. Chambers*, 214 Fed. 769.

¹¹ *Fowler v. Iowa Land Co.*, 18 S. D. 131, 99 N. W. 1095.

¹² *United States*. *Kroegher v. Calivada Colonization Co.*, 119 Fed. 641.

California. *Sullivan v. Triunfo Gold & Silver Min. Co.*, 39 Cal. 459, 466.

But see *Davis v. Rock Creek, etc.*, Co., 55 Cal. 359, 36 Am. Rep. 40.

Illinois. *Harts v. Brown*, 77 Ill.

226; *Merrick v. Peru Coal Co.*, 61 Ill. 472.

Kansas. *Harrison v. Mulvane*, 62 Kan. 454, 54 L. R. A. 405, 63 Pac. 749.

Missouri. *Attaway v. Third Nat. Bank*, 15 Mo. App. 578.

New York. *Duncomb v. New York, H. & N. R. Co.*, 84 N. Y. 190.

Pennsylvania. *Donner v. Donner*, 211 Pa. 409, 60 Atl. 1036.

Utah. *McIntyre v. Ajax Min. Co.*, 23 Utah 162, 77 Pac. 613.

¹³ "The effect of such purchase would not be, either in law or in morals, to discharge the debt and ab-

corporation or take them as security for their personal indorsement of the corporate paper.¹⁴ So where a corporation was a failure, and the president, to protect his interests, bought all the notes secured by two deeds of trust on the corporate property because the holder was threatening foreclosure, and then after some two years sold the property under the deeds of trust, his purchase of the property at such sale cannot be set aside, where he was acting fairly and in good faith throughout the whole transaction.¹⁵ So the president of a corporation, who is also a director, may purchase a mortgage on the corporate property from his own funds, and may enforce it where he acts in good faith.¹⁶ On the other hand, of course, if a director is appointed on a committee to compromise debts of the corporation and to buy in the claims against it at a discount, he cannot buy up outstanding claims for his own benefit.¹⁷

If the stockholders are all notified of attachments against the corporation and that the corporate property would be lost unless the stockholders all contributed a certain sum apiece, a stockholder who refused to pay anything whatever cannot attack a purchase of such claims by some of the directors, where in good faith.¹⁸

§ 2289. Right to enforce for face of the debt. Textbooks on the subject of Trusts state that a trustee cannot buy up a debt or incumbrance to which the trust estate is liable, for less than is actually due thereon, and make a profit to himself, but that such a purchase inures to the benefit of the trust estate.¹⁹ And some courts have applied this rule to purchases by corporate officers of claims against the corporation.²⁰ But the general rule is that directors or other corporate

solve the said company from its obligation to pay." *Kitchen v. St. Louis, K. C. & N. Ry. Co.*, 69 Mo. 224, 271.

¹⁴ *Medford v. Myrick*, — Tex. Civ. App. —, 147 S. W. 876, and see § 987, vol. 2.

¹⁵ *La Veine v. Tiffany Springs & Land Co.*, — Mo. —, 187 S. W. 1186.

¹⁶ *Vermeule v. Hover*, 113 Me. 74, 93 Atl. 37, criticising statement in *European & N. A. R. Co. v. Poor*, 59 Me. 277, as being too broad.

¹⁷ *Horner v. New South Oilmill*, — Ark. —, 197 S. W. 1163.

¹⁸ *Snediker v. Ayers*, 146 Cal. 407, 80 Pac. 511.

¹⁹ 1 *Perry, Trusts* (6th Ed.), § 428.

²⁰ *Martin v. Chambers*, 214 Fed. 769; *Davis v. Rock Creek Lumber, Flume & Mining Co.*, 55 Cal. 359, 364, 36 Am. Rep. 40; *Bramblett v. Commonwealth Land & Lumber Co.*, 27 Ky. L. Rep. 156, 84 S. W. 545, 26 Ky. L. Rep. 1176, 83 S. W. 599. To same effect, *McDonald v. Haughton*, 70 N. C. 393. See also *Brewster v. Stratman*, 4 Mo. App. 41; *Moulton v. Connell-Hall-McLester Co.*, 93 Tenn. 377, 384, 27 S. W. 672.

Rule applied to secret purchase by treasurer of claim against the corporation, followed by payment by himself to himself of the full amount of the claim although purchased at a dis-

officers may purchase, and enforce, claims against their corporation, at their face value, notwithstanding they were bought at a discount,²¹ provided, however, that (1) if such officer owed the duty to his company to purchase the claim for the company instead of for himself he cannot enforce his claim in excess of what he paid for it,²² and, according to what is apparently held in a few decisions, that (2) if the corporation is insolvent at the time of the purchase the officer cannot enforce his claim for more than he paid for it.²³

Here are three propositions. First, a corporate officer may purchase a claim against his corporation, where a solvent and going concern, and enforce it for its face value, although he bought it at a discount, when not an active breach of trust,²⁴ although there is some authority to the contrary, as stated above,²⁵ but whether certain of the apparently contra decisions intend to hold that officers cannot make a profit on claims against insolvent corporations or whether they intend to hold that they can make no profit in purchasing claims against either solvent or insolvent corporations is not altogether clear. In support of the rule that corporation officers cannot profit by purchasing claims against the corporations, the answer given by the Kentucky court to the argument that it is immaterial to the corporation who owns claims against it which it is under legal obligation to pay, is that one cannot serve two masters; that one cannot be both creditor and debtor and act impartially; that a corporation is entitled to the best judgment of its officers in protecting its interests, and that in the generality of cases the corporation will suffer where it is a choice by the officer between a sacrifice of his personal interests and those of the corporation.²⁶ On the other hand, in support of the rule that corporate officers may purchase claims against their corporation at a

count. *The Telegraph v. Lee*, 125 Iowa 17, 98 N. W. 364.

So where a third person purchases claims against the corporation by agreement with a corporate officer, his connection with such officer will bar his right to make profit on the transaction. *Bramblet v. Commonwealth Land & Lumber Co.*, 27 Ky. L. Rep. 156, 84 S. W. 545, 26 Ky. L. Rep. 1176, 83 S. W. 599.

²¹ See *infra*, this section.

Whether corporate officers may purchase outstanding obligations of the corporation for less than their face value, and then enforce them against

their company for the full face value, depends upon the circumstances. See *Young v. Columbia Land & Investment Co.*, 53 Ore. 438, 133 Am. St. Rep. 844, 101 Pac. 212, 99 Pac. 936.

²² See *infra*, this section.

²³ See *infra*, this section.

²⁴ *Inglehart v. Thousand Island Hotel Co.*, 32 Hun (N. Y.) 377, 383, and see cases cited *infra* this section.

Power of officers to purchase bonds at less than par, see §§ 985, 987, vol. 2.

²⁵ See *supra*, this section.

²⁶ *Bramblet v. Commonwealth Land & Lumber Co.*, 26 Ky. L. Rep. 1176, 83 S. W. 599.

discount and enforce them for their face value, it was said by Justice Finch in a case in the Court of Appeals of New York that if the contrary be sound doctrine, and "if directors cannot, in any case, invest in the bonds of their own companies except at the peril of a constructive fraud; if they cannot safely buy such bonds below par, because they deem them unduly depressed, if titles to corporate obligations, passing through their hands, become tainted by their touches—it is quite time that the courts should give (what they have not given) a very definite and distinct warning." Continuing it was said that the basis of the rule forbidding purchase of claims by trustees was the "collision between trust duty and personal interest, and the equitable prohibition has no application where there is no such possible inconsistency. There is no such conflict in the ordinary case of the purchase by a director in a going corporation of its outstanding obligations. There is no present duty resting upon him to extinguish them. The time for that has not come; the duty has not arisen, may never arise; the corporation is not prepared to pay, does not contemplate paying, but intends and expects to await the full maturity of the debt. Unless some special fund has been provided, or some special liquidation has been ordered, the director owes no duty to his company to discharge or buy in the outstanding bonds, and may purchase for himself, because no inconsistent trust duty has arisen."²⁷ So in Illinois, Justice Carter of the Supreme Court said, in 1895, that the right to purchase claims at a discount and enforce them in full had not been decided in Illinois but that "if he act fairly and for the interest of the corporation we think he may. He certainly would be doing the corporation no injury in case his management were in the interest of the corporation, and it were given a fair opportunity to itself become the purchaser, and could not or would not embrace such opportunity."²⁸ In Wisconsin, the purchase is held to be forbidden only where there is a collision between trust duty and personal interest. The court said: "Can it be said that any such conflict exists in the ordinary case of the purchase by a director in a going corporation of its outstanding obligations? * * * It is not claimed that any fund had been provided for the payment of these obligations. No special liquidation thereof had been ordered by the corporation. No fact or circumstance is alleged charging him with a present duty to act for the corporation which would make it inconsistent for him

²⁷ *Seymour v. Spring Forest Cemetery Ass'n*, 144 N. Y. 333, 344, 26 L. E. A. 859, 39 N. E. 365.

²⁸ *Higgins v. Lansingh*, 154 Ill. 301, 386, 40 N. E. 362.

to make a personal purchase of these notes, save that he was an officer and director. On the contrary, it is alleged that the company was embarrassed and without funds to pay pressing demands,—not that it was insolvent, but hard up. * * * It is not charged that he neglected any duty he owed to the corporation in not securing funds for their discharge, or that he diverted any of its moneys properly applicable thereto to other purposes. * * * It is only in cases where the conflict of duty mentioned arises that the rule is received in its fullest application.”²⁹ The rule laid down in Utah is that “a party may rightfully purchase a bona fide existing claim against a corporation of which he is a director, provided that, * * * the rights of other creditors are not involved, and he is under no present duty to act in the transaction for the corporation.”³⁰ In New Jersey, where a director bought corporate bonds of a creditor for less than their face value, but at a price not unconscionable in view of the fact that they were not readily marketable, it was held that “unless fraud be shown, or some unjust advantage taken of a situation, there is no reason why the officers of a company may not purchase its bonds at their market value” and recover their face value.³¹ However, the fact that the purchaser owns practically all the preferred stock of the corporation and most of the secured claims against the company, and practically controls it, and that he did not inform the other members of the board of the intended sale of securities, of which they were ignorant, has been held to preclude such officer from enforcing securities so bought at a discount for their face value.³²

Second, a director or other corporate officer cannot enforce for their face value claims which he bought at a discount, where to do so would involve a breach of trust. In other words, if a corporate director or other officer purchases a claim against the corporation when it was his express or implied duty, if he purchased at all, to purchase for the corporation, i. e., pay the claim with corporate funds, then the officer cannot profit by such a purchase.³³ Thus, if a director purchases claims against the corporation with his own funds, but pursuant to a resolution of the board of directors which guaranteed his

²⁹ Per Justice Bardeen in *Glenwood Mfg. Co. v. Syme*, 109 Wis. 355, 85 N. W. 432.

³⁰ *McIntyre v. Ajax Min. Co.*, 28 Utah 162, 77 Pac. 613.

³¹ *Camden Safe Deposit & Trust Co. v. Citizens' Ice & Cold Storage Co.*,

69 N. J. Eq. 718, 61 Atl. 529, *aff'd* 71 N. J. Eq. 221, 65 Atl. 980.

³² *Higgins v. Lansingh*, 154 Ill. 301, 40 N. E. 362.

³³ Of course corporate officers have no right to purchase claims against the corporation where they had already

repayment, he cannot enforce the claims for their face value where he bought them at a discount.³⁴ And if any officer is acting for the corporation in purchasing claims against it, he can hold the company liable only for the amounts actually paid by him.³⁵ Moreover, directors cannot purchase corporate notes at a discount and enforce them for their face value where there was a personal duty devolving upon them to take up the notes in the interest of the corporation.³⁶ It was held in Pennsylvania that the treasurer of a company could not buy up claims against the company for his own use and thereby make a profit.³⁷ And, of course, if the treasurer of a corporation has sufficient funds in his hands to pay off claims against the corporation, but instead he purchases them for himself at a discount, he cannot enforce such claims against the corporation for their face value.³⁸ On the other hand, if the treasurer of a corporation has no corporate moneys in his possession or under his control, and he is under no obligation to the company to purchase claims against it or to pay them at the time, it has been held that if he purchases promissory notes, at about the time of their maturity or after maturity, he may, in such a case, enforce them for their face value, although he buys them at a large discount.³⁹ In an early case in Missouri the president of a company, on its becoming insolvent and being sued, bought the claim sued on at about one-seventh its face value and then let judgment go against the company for the full amount. It was held that since the purchase was made at a time when he was acting for the company, and since the interests of the corporation and his interests were identical and could not be separated, he could be allowed only the amount paid.⁴⁰ Directors cannot purchase and enforce notes given by the corporation, where bought at a discount, where it was the fault of the other directors who connived at and consented to the purchase, that provision was not made by the corporation to take care of the notes, which it was well able to do.⁴¹ In Iowa it was held that a treas-

passed a resolution directing another of their number to purchase such claims for the benefit of the company. *Kimmell v. Geeting*, 2 Grant's Cas. (Pa.) 125.

³⁴ *Kroegher v. Calivada Colonization Co.*, 119 Fed. 641.

³⁵ *Atherton v. Emerson*, 199 Mass. 199, 85 N. E. 530.

³⁶ *Young v. Columbia Land & Investment Co.*, 53 Ore. 438, 133 Am. St. Rep. 844, 101 Pac. 212, 99 Pac. 936.

³⁷ *Hill v. Frazier*, 22 Pa. St. 320.

³⁸ *Thomas v. Sweet*, 37 Kan. 183, 14 Pac. 545.

³⁹ *St. Louis, Ft. S. & W. R. Co. v. Chenault*, 36 Kan. 51, 12 Pac. 303.

⁴⁰ *Lingle v. National Ins. Co.*, 45 Mo. 109.

⁴¹ The reason is that it was the duty of the purchasing directors to take up the notes in the interest of the corporation. *Young v. Columbia Land & Investment Co.*, 53 Ore. 438, 133 Am.

urer of a company cannot himself purchase a claim against the corporation at a discount, with his own funds, and then pay himself the full amount of the claim, although the board of directors ratify the payment of the claim, where they had no knowledge of the circumstances attending the payment.⁴³

Third, there is some authority seeming to hold that a corporate officer cannot, where he knows the corporation to be insolvent at the time he purchases claims against it, enforce the claim at its face value where he bought it at a discount⁴³—thus drawing a distinction according to whether the corporation was solvent or insolvent at the time of the purchase. Thus, in Kentucky it is held that “a president of an insolvent and failing corporation cannot traffic in its property to his advantage and to its disadvantage, or buy in debts against it at heavy discount and then assert them for full value;”⁴⁴ but the reason given by the court for refusing to allow the officer a profit would seem to be fully as applicable to cases of solvent corporations as to cases of insolvent ones.

§ 2290. After fiduciary relationship is terminated. In any event, an officer may purchase and enforce claims against the corporation after he has ceased to act as an officer,⁴⁵ or after the corporation has ceased to do business.⁴⁶ If directors are enjoined from further interference with the corporate business upon the appointment of a receiver, their fiduciary obligations are terminated and thereafter they commit no breach of trust by purchasing claims against the corporation, and they may enforce them at their face value although purchased at a discount.⁴⁷

D. Purchase at Judicial, Execution or Tax Sale

§ 2291. General considerations. There is a conflict of opinion as to whether a corporate director or other officer may purchase, at an

St. Rep. 844, 101 Pac. 212, aff'g 99 Pac. 936.

⁴³ *The Telegraph v. Lee*, 125 Iowa 17, 98 N. W. 364.

⁴³ *Bonney v. Tilley*, 109 Cal. 346, 42 Pac. 439, which may be construed as stating the rule broadly enough to also apply to solvent corporations.

⁴⁴ *Bramblett v. Commonwealth Land & Lumber Co.*, 27 Ky. L. Rep. 156, 84 S. W. 545, 26 Ky. L. Rep. 1176, 83 S. W. 599.

⁴⁵ *Hammond's Appeal*, 123 Pa. St. 503, 16 Atl. 419.

⁴⁶ *Stanton v. Gilpin*, 38 Wash. 191, 80 Pac. 290.

Rule applied where corporation had made an assignment for the benefit of creditors. In *re Craig's Appeal*, 92 Pa. St. 396.

⁴⁷ In *re Allen-Foster-Willett Co.*, — Mass. —, 116 N. E. 875.

execution or judicial sale, property of the corporation. In some states, upon the theory that the duty of such officers, at least in case of directors, is to protect the corporation, it is, or was at one time, held that they cannot purchase the property except for the benefit of the corporation.⁴⁸ In other jurisdictions, and by the great weight of the more recent decisions, the purchase is upheld,⁴⁹ at least if the price is a fair one and the officers have not been guilty of bad faith.⁵⁰

However, as to certain matters, the courts have practically agreed. Thus, firstly, the Supreme Court of the United States has expressly held that such a purchase is not void but merely voidable,⁵¹ and it is so held at the present day in nearly all, if not all, the different jurisdictions.⁵² Secondly, the sale is always voidable where the purchase by the officer is, because of the facts attending the particular purchase, a breach of his trust, or where the purchase is not in good faith or is unfair.⁵³ Thirdly, the court, when the sale is attacked, should carefully scrutinize all the acts connected therewith, and either set it aside or hold the officer as trustee, unless it is clearly shown to be fair and that the officer acted in good faith, i. e., the burden of clearly showing the fairness and good faith of the sale is on the purchasing officer and he must clearly show such fairness and good faith.

The real conflict of opinion, for the most part at least, is whether such a purchase by a corporate officer (1) may be set aside, or the officer held as a trustee for the corporation, merely because of his relationship to the corporation and without reference to his good or bad faith or the adequacy of the consideration, or whether the sale (2) must be upheld notwithstanding the relationship of the purchaser, where the purchase was made in good faith and the price paid was a fair one. The one line of cases apply the general principle of equity that if a trustee becomes the purchaser of the trust property,

⁴⁸ See § 2293, *infra*.

⁴⁹ *Vermeule v. Hover*, 113 Me. 74, 93 Atl. 37; *Lucas v. Friant*, 111 Mich. 426, 69 N. W. 735; *Coombs v. Barker*, 31 Mont. 526, 79 Pac. 1.

Under the California Code prohibiting trustees from taking part in any transaction adverse to the beneficiary, one who was the secretary and general manager of a company had no authority to secretly purchase its property in his own name at forced sales, especially since another code provision

requires all trustees acquiring any interest "adverse to the interest of his beneficiary in the subject of the trust," to "immediately inform the latter thereof." *San Francisco Water Co. v. Pattee*, 86 Cal. 623, 25 Pac. 135.

⁵⁰ See § 2294, *infra*.

⁵¹ *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328.

⁵² *Saltmarsh v. Spaulding*, 147 Mass. 224, 17 N. E. 316; *Ready v. Smith*, 170 Mo. 163, 70 S. W. 484.

⁵³ See § 2292, *infra*.

such act is voidable at the instance of the cestui que trust.⁵⁴ The weight of authority, however, as applied to purchases by corporate officers, is to the contrary, and the better rule, it is submitted, is that such sales should never be set aside or the officer held as a trustee where there are no grounds except the relationship of the officer, provided he has in no way acted as the representative of the corporation in bringing about or conducting the sale.⁵⁵ In fact, the principles relied on and governing this debated question are the same, for practical purposes, as those governing the same question as applied to dealings between a corporation and its officers in general, as hereafter stated.⁵⁶ At any event, it would seem that if the officer is also a creditor of the corporation, or in effect a creditor, as where he has guaranteed debts of the corporation, he may purchase to protect his own interests, provided, of course, he acts in good faith and the consideration is fair; and this includes the right to purchase at his own execution or judicial sale.⁵⁷

In short, in a particular state, it may be necessary, among other things, to consider one or more of the following matters: (1) who brought about the sale?; (2) was the officer guilty of any breach of trust causing the default resulting in the sale?; (3) did the officer have any control, and if so, how extensive, over the proceedings resulting in the sale or the sale itself?; (4) was the corporation in the hands of a receiver or the like at the time of the sale?; (5) what is the rule in the particular jurisdiction as to whether dealings between a corporation and its officers are voidable merely at the option of the corporation without other grounds than the relationship of the parties?; (6) was there any bad faith on the part of the purchasing officer?; (7) was the price paid a fair one?; and (8) did the officer purchase to protect himself as a creditor of the corporation or did he purchase merely as a speculation or for other reasons?

The effect as against creditors of an officer's purchase of corporate property at an execution, foreclosure or other judicial sale is considered in a subsequent chapter.⁵⁸

§ 2292. Always voidable where purchase a breach of trust or not in good faith. The directors and other managing officers of a corporation are under a duty to the corporation and the other stockholders to prevent the property of the corporation from being sold under execution, or for taxes, or on foreclosure, etc., or, if they cannot

⁵⁴ See textbooks on Trusts.

⁵⁵ See § 2294, *infra*.

⁵⁶ See §§ 2330-2403, *infra*.

⁵⁷ See § 2295, *infra*.

⁵⁸ *Infra*, chapter on Insolvency.

prevent the sale, to do what they can to have it sell at the highest possible price, and, if they bring about such a sale, not under any right acquired by contract with the corporation, but in violation of their trust, and purchase the property themselves, or if, although the sale is brought about by a creditor, they purchase the same otherwise than in the most perfect good faith, all of the courts undoubtedly agree that the corporation is entitled to have the sale set aside, or hold them as trustees, or to compel them to account for profits made, or pay the fair value of the property.⁵⁹ For instance, a corporate officer who is made an agent to procure a loan for the corporation to save its property from a sheriff's sale, but who procures a loan for himself and purchases for himself at such sale, cannot hold the property as against the corporation, regardless of whether he acted in good faith or whether actual gain resulted to him, provided the corporation acts within a reasonable time.⁶⁰ Furthermore, if a corporate officer purchases at his own execution or judicial sale, the court will look into the acts and conduct of the purchaser "with far greater scrutiny" than as if "he sustained no relation to the company other than that of creditor," and is justified in setting the sale aside on "much slighter ground."⁶¹

§ 2293. View that purchase voidable regardless of fairness or good faith. In some jurisdictions, at one time or another, the courts have gone to the extent of holding that the corporation has a right to have the sale set aside, even when there is no actual bad faith or unfairness, unless there are special circumstances which render the rule inapplicable.⁶² In some of the older cases it was held that where an

⁵⁹ *Illinois*. J. W. Butler Paper Co. v. Robbins, 151 Ill. 588, 38 N. E. 153; Hoffman v. Reichert, 147 Ill. 274, 37 Am. St. Rep. 219, 35 N. E. 527.

Kentucky. Covington & L. R. Co. v. Bowler's Heirs, 9 Bush 468.

New Jersey. Raleigh v. Fitzpatrick, 43 N. J. Eq. 501, 11 Atl. 1.

New York. Hoyle v. Plattsburgh & M. R. Co., 54 N. Y. 314, 13 Am. Rep. 595.

Canada. In re Iron Clay Brick Mfg. Co., 19 Ont. 113.

⁶⁰ *Fricker v. Americus Manufacturing & Improvement Co.*, 124 Ga. 165, 52 S. E. 65.

⁶¹ *Hallam v. Indianola Hotel Co.*, 56 Iowa 178, 180, 9 N. W. 111.

⁶² *Arkansas*. Jones v. Arkansas Mechanical & Agricultural Co., 38 Ark. 17.

Illinois. Hoffman v. Reichert, 147 Ill. 274, 37 Am. St. Rep. 219, 35 N. E. 527; Allen v. Jackson, 122 Ill. 567, 13 N. E. 840; Harts v. Brown, 77 Ill. 226.

Missouri. McAllen v. Woodcock, 60 Mo. 174.

New Jersey. Raleigh v. Fitzpatrick, 43 N. J. Eq. 501, 11 Atl. 1.

New York. Hoyle v. Plattsburgh & M. R. Co., 54 N. Y. 314, 13 Am. Rep. 595.

officer purchases corporate property at a forced sale, the purchase must be regarded as made for the benefit of the corporation.⁶³ In 1873, the Court of Appeals of New York, while refusing to decide the rights of a purchaser under his own execution sale, said generally that a director could not become the purchaser of corporate property at judicial or execution sale, except subject to the right of the corporation "to elect to disaffirm the sale and demand a resale." As director, the court said, "it was his duty to prevent a sale if possible; and if not, then to endeavor to have the property produce the highest price; and, in order to the attainment of these objects, to use the knowledge he had derived from the confidence reposed in him as director. As purchaser, on the other hand, it was his interest to pay as little as possible, and to use his special knowledge for his own advantage. Actual fraud or actual advantage do not need in such cases to be shown."⁶⁴ Furthermore, as an additional reason, the Arkansas court has said that the appearance of a corporate officer as a bidder may have the effect to prevent bidding.⁶⁵ In a Kentucky case, the court called attention to the fact, in holding a judicial sale of a railroad to a director to be voidable, that the purchaser and his co-directors might have prosecuted an appeal from the judgment under which the sale was made, and hence that the officer by his purchase placed

Canada. In re Iron Clay Brick Mfg. Co., 19 Ont. 113.

"The rule, as sustained by sound moral principles and the weight of authority, is that, where a director purchases at judicial sale the properties of the corporation, he does so subject to the right of the corporation or its stockholders to disaffirm the sale and to demand a resale without showing any actual fraud or any actual prejudice." *Fagan v. Stuttgart Normal Institute*, 91 Ark. 141, 120 S. W. 404.

A person is not within this rule merely because he was elected a director, where it was without his knowledge, and he has not acted as such. *Rozecrans Gold Min. Co. v. Morey*, 111 Cal. 114, 43 Pac. 585.

On the ground that a corporate officer sustains a fiduciary relation to the corporation, it has been held that

he will not be permitted to purchase corporate property at a sale thereof which he causes to be held, and that if he so purchases the sale may be set aside without a showing of fraud. *Fricker v. Americus Manufacturing & Improvement Co.*, 124 Ga. 165, 176, 52 S. E. 65.

Effect of California statutes relating to trustees in general, see *San Francisco Water Co. v. Pattee*, 86 Cal. 623, 25 Pac. 135.

That the corporation must offer to redeem, see *Harpending v. Munson*, 91 N. Y. 650.

⁶³ *McAllen v. Woodcock*, 60 Mo. 174, 180. See also *Brewster v. Stratman*, 4 Mo. App. 41.

⁶⁴ *Hoyle v. Plattsburgh & M. R. Co.*, 54 N. Y. 314, 13 Am. Rep. 595.

⁶⁵ *Fagan v. Stuttgart Normal Institute*, 91 Ark. 141, 120 S. W. 404.

himself in a position in which his personal interests were adverse to those of the corporation.⁶⁶

§ 2294. View that purchase not voidable where fair and in good faith. "The principle that a trustee may purchase the trust property at a judicial sale brought about by a third party, which he had taken no part in procuring, and over which he could not have had control," says the Supreme Court of the United States, "is upheld by numerous decisions of this court and of other courts of this country."⁶⁷ And by the weight of authority a purchase of corporate property by a director or other officer of the corporation at an execution or judicial sale is not voidable at the instance of the corporation or its stockholders, if he purchased fairly and openly, and if at the time he did not represent the corporation in the matter, and did not bring about the sale in violation of his duty to the corporation;⁶⁸ and this

⁶⁶ *Covington & L. R. Co. v. Bowler's Heirs*, 9 Bush (Ky.) 468, 486.

⁶⁷ *Allen v. Gillette*, 127 U. S. 589, 596, 32 L. Ed. 271.

⁶⁸ *United States. McKittrick v. Arkansas Cent. Ry. Co.*, 152 U. S. 473, 497, 38 L. Ed. 518; *Hayden v. Official Hotel Red-Book & Directory Co.*, 42 Fed. 875; *Credit Co. of London v. Arkansas Cent. R. Co.*, 15 Fed. 46.

Kentucky. Osborne's Adm'x v. Monks, 14 Ky. L. Rep. 606, 21 S. W. 101.

Massachusetts. Saltmarsh v. Spaulding, 147 Mass. 224, 17 N. E. 316.

Michigan. Lucas v. Friant, 111 Mich. 426, 69 N. W. 735.

Mississippi. Millsaps v. Chapman, 76 Miss. 942, 71 Am. St. Rep. 547, 26 So. 369.

Montana. Coombs v. Barker, 31 Mont. 526, 79 Pac. 1.

Nebraska. Horbach v. Marsh, 37 Neb. 22, 55 N. W. 286.

New Jersey. Marr v. Marr, 72 N. J. Eq. 797, 66 Atl. 182, rev'd on other grounds 73 N. J. Eq. 643, 133 Am. St. Rep. 742, 70 Atl. 375.

Oregon. Patterson v. Portland Smelting Works, 35 Ore. 96, 56 Pac. 407.

Pennsylvania. Watts' Appeal, 78 Pa. St. 370.

Tennessee. New Memphis Gaslight Co. Cases, 105 Tenn. 268, 80 Am. St. Rep. 880, 60 S. W. 206.

The decision most often cited in support of this rule is the leading case of *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328, but that case is really not an authority for so broad a rule, since all that is held therein is that a purchase by a creditor at a sale to enforce a debt owing to him by the corporation cannot be set aside if it is fair and made in good faith.

In paragraph one of the official syllabi to *Horbach v. Marsh*, 37 Neb. 22, 55 N. W. 286, it is said that a corporate officer who purchases at judicial sale "will be protected in such purchase, provided he shows affirmatively that he has, as indicated, paid the full value of the property of which he so became the purchaser."

The purchase is valid provided always that the acts of the purchasing officer are fair and honest and he does not obtain any dishonest advantage over the corporation or stockholders. *Coombs v. Barker*, 31 Mont. 526, 79 Pac. 1.

is particularly true where the purchase was necessary in order to protect interests previously acquired by him by a valid contract with the corporation.⁶⁹ It has even been held that where a purchase by directors at foreclosure sale is in all respects fair and open, the purchase will be sustained although as a matter of fact the secured loan was made to the corporation by the directors in order that they might have opportunity of buying in the property at foreclosure.⁷⁰

§ 2295. Purchase to protect debt or rights of officer. A corporate creditor, although also a director or other officer of the corporation, ordinarily may purchase at a forced sale of the corporate property, in order to protect his interests as a creditor or under a contract with the corporation.⁷¹

Where a deed of trust was given to secure a loan made by a director to the corporation, and the director purchased at the trustee's sale, the Supreme Court of the United States, in the leading case on this subject, in upholding the purchase, called attention to the facts that the director was not both seller and buyer, but that a trustee was interposed who made the sale, and that if it should be held that the director could not bid, then "he would have been deprived of the only means which his contract gave him of making his debt out of the security on which he had loaned his money."⁷²

For instance, when a corporation is indebted to a director or other officer, the latter, as against the corporation, has the same right as a stranger to attach or levy an execution on its property, and have the same sold to satisfy the debt;⁷³ and it necessarily follows that he can purchase at such a sale to protect his interests,⁷⁴ although whether

The value of the goods sold, less the amount paid, may be recovered. *Fishel v. Goddard*, 30 Colo. 147, 69 Pac. 607.

⁶⁹ See § 2295, *infra*.

⁷⁰ *Schnittger v. Old Home Consol. Min. Co.*, 144 Cal. 603, 78 Pac. 9.

⁷¹ *Buchler v. Black*, 226 Fed. 703, *aff'd* 213 Fed. 880; *Janney v. Minneapolis Industrial Exposition*, 79 Minn. 488, 50 L. R. A. 273, 82 N. W. 984.

"Having made themselves liable for the payment of the debt, it would be a harsh rule that would force them to remain passive and allow property to be sacrificed at judicial sale for less than the debt, and require them to pay the amount remaining due."

College Park Elec. Belt Line v. Ide, 15 Tex. Civ. App. 273, 40 S. W. 64.

⁷² *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 590, 23 L. Ed. 328.

⁷³ *Hoffman v. Reichert*, 147 Ill. 274, 37 Am. St. Rep. 219, 35 N. E. 527; *Rollins v. Shaver Wagon & Carriage Co.*, 80 Iowa 380, 20 Am. St. Rep. 427, 45 N. W. 1037.

⁷⁴ *Marr v. Marr*, 72 N. J. Eq. 797, 66 Atl. 182, *rev'd* on other grounds in 73 N. J. Eq. 643, 133 Am. St. Rep. 742, 70 Atl. 375; *Law v. Fuller*, 217 Pa. 439, 66 Atl. 754. See also *Rehender v. Riggs*, 20 Colo. App. 423, 79 Pac. 328.

he can thus obtain a preference over other creditors when the corporation is insolvent is a different question, and is considered hereafter.⁷⁵

"It violates no principle of law or equity," says the Supreme Court of California, "to permit the judgment-creditor, even though he be a director of the debtor corporation, to become the purchaser at the execution sale of the corporation property. Such a case is distinguishable from those cases where a director, with no personal interest in the action, becomes the purchaser under execution sale in a suit of a third party against the corporation."⁷⁶ In a New Jersey case, it was held that undue advantage was not shown by failure to give notice of the sale, other than the statutory notice, to all the stockholders;⁷⁷ but on appeal the circumstances were held to be such that the corporation or stockholders were entitled to the benefit of the purchase, where the property sold for only half of its value, and where no notice of the sale was given to stockholders (the board of directors having practically ceased to act in the affairs of the company), and the director who purchased had been in sole charge of the business for nearly two years.⁷⁸ In the last appeal, Chancellor Pitney said that "we deem it clear that the director, who is also a creditor, must, on taking legal proceedings for collection of his debt, relinquish his trust *pro hac vice*, not covertly, but openly, and with fair notice to his company. Whether such notice should be given to the stockholders or to the directors may depend upon circumstances. If the company is equipped with other officers and directors who are actively representing the interests of the stockholders, it may well be that notice to such officers or directors would be deemed sufficient. But it is, as we think, inconsistent with the duty of a director (at least under circumstances such as here presented) that he should assume an attitude antagonistic to his company, unless he sees to it that the interests of the stockholders, which he, by reason of his personal interest, is for the time disqualified from protecting, are in the charge of other officers and directors able and willing to protect them, and to whom his notice may be given, or else sees to it that fair notice of his contemplated action be given to the stockholders, so that they may take measures to protect themselves."⁷⁹ If fraud and collusion in purchasing at an execution sale

⁷⁵ *Infra*, chapter on Insolvency.

⁷⁶ *Snediker v. Ayers*, 146 Cal. 407, 80 Pac. 511.

⁷⁷ *Marr v. Marr*, 72 N. J. Eq. 797, 66 Atl. 182, *rev'd* on other grounds in 73 N. J. Eq. 643, 133 Am. St. Rep. 742, 70 Atl. 375.

⁷⁸ *Marr v. Marr*, 73 N. J. Eq. 643, 133 Am. St. Rep. 742, 70 Atl. 375, *rev'g* 72 N. J. Eq. 797, 66 Atl. 182.

⁷⁹ *Marr v. Marr*, 73 N. J. Eq. 643, 133 Am. St. Rep. 742, 70 Atl. 375, *rev'g* on other grounds 72 N. J. Eq. 797, 66 Atl. 182.

under one's own judgment is alleged, the burden is on the complainant to show such facts.⁸⁰

Likewise, when a director or other officer has a valid debt against the corporation, secured by a mortgage on its property, he is entitled to foreclose the mortgage, and may purchase at the sale.⁸¹ So when directors of a corporation are sureties on notes of the corporation secured by a mortgage on its property, and the mortgage is foreclosed, they may purchase at the sale for the purpose of protecting themselves.⁸² If directors hold bonds of their corporation as security, and it be conceded that directors may lend their credit in good faith to the corporation to enable it to carry on its legitimate business and take as indemnity its bonds to secure themselves from personal loss, it necessarily follows that they acquire the right, the same as any other mortgagee, to protect themselves even to the extent of becoming a purchaser at a foreclosure sale which has become inevitable through no fault of themselves.⁸³ Especially may a director or other officer pur-

⁸⁰ *Snediker v. Ayers*, 146 Cal. 407, 80 Pac. 511.

⁸¹ *United States. Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328.

Connecticut. Hopson v. Aetna Axle & Spring Co., 50 Conn. 597.

Iowa. Warfield v. Marshall County Canning Co., 72 Iowa 666, 2 Am. St. Rep. 263, 34 N. W. 467; *Hallam v. Indianola Hotel Co.*, 56 Iowa 178, 9 N. W. 111.

Kentucky. McMurtry v. Montgomery Masonic Temple Co., 86 Ky. 206, 5 S. W. 570.

Massachusetts. Saltmarsh v. Spaulding, 147 Mass. 224, 17 N. E. 316.

Michigan. Lucas v. Friant, 111 Mich. 426, 436, 69 N. W. 735.

Mississippi. Millsaps v. Chapman, 76 Miss. 942, 71 Am. St. Rep. 547, 26 So. 369.

Missouri. Foster v. Belcher's Sugar Refining Co., 118 Mo. 238, 24 S. W. 63.

Nebraska. Gorder v. Plattsmouth Canning Co., 36 Neb. 548, 54 N. W. 830.

New York. Inglehart v. Thousand Island Hotel Co., 109 N. Y. 454, 17 N. E. 358; *Harpending v. Munson*, 91

N. Y. 650; *Preston v. Loughran*, 58 Hun 210, 12 N. Y. Supp. 313.

Oregon. Jones v. Hale, 32 Ore. 465, 52 Pac. 311.

⁸² Where the directors of a corporation, being authorized by the stockholders to borrow money, signed the corporate note for a loan as sureties, and gave a deed of trust, which stipulated that it should inure to their benefit in case they should be compelled to pay the debt, it was held that, even if the stipulation was void, the directors had a right to bid in the property at the trustees' sale, to protect their interests. *College Park Elec. Belt Line v. Ide*, 15 Tex. Civ. App. 273, 40 S. W. 64.

Where corporate officers are personally liable as indorsers on notes of the corporation on which judgment had been rendered against the corporation, they may purchase the property at the execution sale for their own protection—this being an exception to the general rule. *Tiffany v. Smith*, 124 N. Y. Supp. 85.

⁸³ *Rawlings v. New Memphis Gas-light Co.*, 105 Tenn. 268, 80 Am. St. Rep. 880, 60 S. W. 206.

chase where he is not only a creditor of the corporation but, in addition, at the time of the sale, he exercised no control over the property of the corporation because it had been placed in the control of a court through a duly appointed receiver, and the corporate officer had done all that he could to prevent or delay the foreclosure suit.⁸⁴

In Canada, however, it has been held that even where a director who purchased at a foreclosure sale under a mortgage held a judgment against the corporation, he could not purchase for the amount of his claim nor avoid liability for the difference in price at which he bought and the price at which he sold some time later, by showing that the property when purchased at the foreclosure sale brought its then full market value.⁸⁵

However, in any event, unless ratified, a purchase at one's own execution sale will not be upheld where the sale was brought about by collusion and the price was inadequate.⁸⁶ And when a director who is a creditor purchases corporate property at a judicial, execution or other public sale, and the bona fides of the transaction is assailed in a direct proceeding in equity to set aside the sale, the burden is upon the purchasing director to show that the property produced at such sale its full value.⁸⁷

§ 2296. Rule as affected by insolvency of corporation. If the corporation is insolvent at the time of the forced sale, or is rendered insolvent by such sale, the right of a corporate officer to purchase the property is even more limited, it would seem, than if the corporation were solvent.⁸⁸ And if the officer acts contrary to his trust he then is liable even to creditors of the corporation, since upon a corporation becoming insolvent the directors become trustees for the creditors, it is generally held.⁸⁹

"The weight of authority," said the court in a Washington case,

⁸⁴ *Buchler v. Black*, 226 Fed. 703, aff'g 213 Fed. 880.

⁸⁵ *In re Iron Clay Brick Mfg. Co.*, 19 Ont. Rep. 113.

⁸⁶ *Hope v. Valley City Salt Co.*, 25 W. Va. 789. See *J. W. Butler Paper Co. v. Robbins*, 151 Ill. 588, 38 N. E. 152, where, although purchase was by wife of president pursuant to judgments entered by his connivance, the principle is applicable.

Sale will be closely scrutinized for fraud. *Hallam v. Indianola Hotel Co.*, 56 Iowa 178, 9 N. W. 111.

⁸⁷ *Patterson v. Portland Smelting Works*, 35 Ore. 96, 107, 56 Pac. 407.

⁸⁸ "The law will not permit a director of an insolvent corporation to purchase all of its assets, * * * at execution sale to which he is not a party, for a less consideration than the value of the property, without requiring him to account for the property or its value." *Tobin Canning Co. v. Fraser*, 81 Tex. 407, 17 S. W. 25.

⁸⁹ *Infra*, chapter on Insolvency.

"is in favor of the rule that a director of a corporation may not purchase the corporate property at a foreclosure or execution sale thereof, except subject to the right of the corporation (and, in some cases, of its creditors) to repudiate the sale and demand a resale. * * *

This principle results from the relation of a director to the corporation of which he is a member. The office of a director is fiduciary in its character, and ordinarily a director or officer of a corporation is a trustee, or at least a quasi trustee, of the company and the stockholders. But after a corporation becomes insolvent its assets constitute in equity a trust fund for the payment of its debts, and the directors or managing officers are held to be trustees for the company's creditors. * * *

And in the event of the insolvency of a corporation its directors are bound to manage its assets with scrupulous regard for the equitable rights of creditors; and a court of equity will not permit them to use or dispose of the property of the corporation for their own benefit, or to purchase and hold it for their private purposes, if objection thereto be made at the proper time by the corporation or its creditors. * * *

A sale of corporate property under judicial process to a director of the corporation will usually be set aside in equity as contrary to public policy, even though no actual fraud or actual advantage to the purchaser be shown."⁹⁰

§ 2297. Where property sold by assignee or receiver. As well stated by Chief Justice Start in a Minnesota decision, it is clear "upon principle that where the legal title and control of all the property of a corporation is vested in an assignee or receiver, in trust for the benefit of its creditors, and the court orders the property sold for the purposes of the trust, a director creditor, having interests to protect, may in good faith purchase the property at such sale, and acquire thereby the absolute title thereto. Especially is this so where there are other active directors, and the sale is made subject to confirmation by the court, and is approved by it. But in all such cases the director must act in the utmost good faith, for the transaction will be jealously scrutinized."⁹¹

§ 2298. Judicial sale of property of debtor of corporation. It has been held that where a corporate officer buys in property of a debtor of the corporation, at execution sale, for the amount of the debt, he is

⁹⁰ Potvin v. Denny Hotel Co., 26 Wash. 309, 66 Pac. 376. 273, 82 N. W. 984. See also Buchler v. Black, 226 Fed. 703, aff'g 213 Fed. 880.

⁹¹ Janney v. Minneapolis Industrial Exposition, 79 Minn. 488, 50 L. R. A.

deemed to have acted for the corporation, where he used the debt to pay his bid for nearly a year.⁹²

§ 2299. Application of rules to tax sales. These rules laid down above also govern tax sales, except when obviously not applicable. But a manager of a corporation, whose duty it was to pay the corporate taxes, cannot become a purchaser at a sale made because of the failure to pay the taxes, as against the corporation.⁹³

§ 2300. Ratification, laches and estoppel. Inasmuch as the purchase is voidable rather than void,⁹⁴ it may be ratified by the corporation.⁹⁵ Moreover, if the corporation or stockholders desire to attack the sale, application must be made within a reasonable time;⁹⁶ and delays of four years,⁹⁷ three years,⁹⁸ two and one-half years,⁹⁹ twenty months,¹ and seventeen months,² have been held fatal in particular cases. Moreover, the rule which requires prompt action is especially applicable to cases in which a sale of mining property is involved.³

The corporation or its stockholders may be estopped to attack a judicial sale to one of the officers of the corporation by their approval thereof which was relied on by the transferee of the property who thereupon erected substantial improvements on the property.⁴

On the other hand, the fact that the officer purchasing at a foreclosure sale, under a mortgage to a third person, had previously conveyed such property in behalf of the corporation by a warranty deed does not estop him from purchasing at the foreclosure sale where the deed contained no express personal warranty.⁵

§ 2301. Who may attack. A stranger cannot attack the sale because of the relationship of the purchaser;⁶ and this includes a mere

⁹² *Moses v. Ocoee Bank*, 1 Lea (Tenn.) 398, 412.

⁹³ *Collins v. Hoffman*, 62 Wash. 278, Ann. Cas. 1913 A 1, 113 Pac. 625. Same case, 74 Wash. 264, 133 Pac. 450, holding that the purchase inured to the benefit of the corporation.

⁹⁴ See § 2291, *supra*.

⁹⁵ *Ready v. Smith*, 170 Mo. 163, 70 S. W. 484.

⁹⁶ *Ready v. Smith*, 170 Mo. 163, 70 S. W. 484.

⁹⁷ *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328; *Horbach v. Marsh*, 37 Neb. 22, 55 N. W. 286.

⁹⁸ *Buchler v. Black*, 226 Fed. 703, 707, *aff'g* 213 Fed. 880.

⁹⁹ *Pittsburgh & L. I. Iron Co. v. Cleveland Iron Min. Co.*, 178 U. S. 270, 44 L. Ed. 1065.

¹ *Ready v. Smith*, 170 Mo. 163, 70 S. W. 484.

² *Rothchild v. Memphis & C. R. Co.*, 113 Fed. 476.

³ *Johnston v. Standard Min. Co.*, 148 U. S. 360, 370, 37 L. Ed. 480; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328; *Buchler v. Black*, 226 Fed. 703, 707.

⁴ *Fagan v. Stuttgart Normal Institute*, 91 Ark. 141, 120 S. W. 404.

⁵ *Vermeule v. Hover*, 113 Me. 74, 93 Atl. 37.

⁶ *Vermeule v. Hover*, 113 Me. 74,

creditor of the corporation.⁷ Such a purchase by a corporate officer is good at law, and is only voidable in equity at the suit of some party in interest, and with equitable rights.⁸ If creditors desire to sue, the form of the action would seem to be one against the directors or other officers to recover the amount of their claims upon the ground of conversion of corporate assets to the use of such officers in excess of such claims, in which action a recovery may be had for the value of the property purchased, at the time of the sale, less the sum paid.⁹

§ 2302. Relief granted where sale subject to attack. Ordinarily, if the sale is subject to attack, the relief granted may be either the setting aside of the sale or the affirmance of the sale and holding the purchaser as a trustee to the extent that he profited by the purchase.¹⁰

E. Profits Made by Officer

§ 2303. General considerations and rules. A principle often invoked by corporations or their stockholders is that a trustee, in dealing with trust property, cannot claim for himself, but must yield to the beneficiary any profit which he makes; and this principle is universally recognized.¹¹

This question arises in a variety of ways and is so closely interwoven with other rules hereafter noted as to the validity of dealings of a corporation with one of its officers or with a party in which an officer is interested,¹² and as to the rights of officers to acquire interests adverse to the corporation,¹³ that it is often difficult to say where the one rule leaves off and where the other begins. These profits or advantages may be entirely proper or they may be a gross violation of the duties of the officer. They may arise either (1) in connection with a contract between the corporation and one of its officers, or a third person or firm or company in which an officer is interested, in which

93 Atl. 37; *Saltmarsh v. Spaulding*, 147 Mass. 224, 17 N. E. 316; *Inglehart v. Thousand Island Hotel Co.*, 109 N. Y. 454, 17 N. E. 358; *Caraher v. Royal Ins. Co.*, 63 Hun (N. Y.) 82, 17 N. Y. Supp. 858.

⁷ *Ready v. Smith*, 170 Mo. 163, 70 S. W. 484.

But creditor may attack sale where made when corporation was insolvent. *Potvin v. Denny Hotel Co.*, 26 Wash. 309, 66 Pac. 376, and see *infra*, chapter on Insolvency.

⁸ *Fagan v. Stuttgart Normal Institute*, 91 Ark. 141, 120 S. W. 404.

⁹ See *Fishel v. Goddard*, 30 Colo. 147, 69 Pac. 607.

¹⁰ *Marr v. Marr*, 73 N. J. Eq. 643, 133 Am. St. Rep. 742, 70 Atl. 375, *rev'g* on other grounds 72 N. J. Eq. 797, 66 Atl. 182.

¹¹ *Tenison v. Patton*, 95 Tex. 284, 67 S. W. 92.

¹² See § 2330 et seq., *infra*.

¹³ See §§ 2281-2302, *supra*.

case, of course, the question depends altogether upon the validity of the contract,¹⁴ or (2) in connection with a contract between the corporation and a third person in which the officer receiving the profit takes no part, or (3) in connection with a personal transaction between a corporate officer and a third person, or (4) in various other ways, included in which are transactions involving no contract whatever, or merely the implied contract of the corporate officer to act in good faith and for the interests of the corporation.

Furthermore, this question of profits may be looked at from the viewpoint of the remedy. Thus, the question may arise merely (1) as to the validity or enforceability of the contract, or the right to set it aside, because of such profits,¹⁵ or (2) as to the right of the corporation to recover from the officer the profits so made by him in violation of his duty.

To state a rule broad enough to cover all the phases of the question is difficult. Oftentimes the rule, as stated, is confined to secret profits, but it is clear that it embraces more than secret profits.¹⁶ In any event, a director must account to the corporation or the stockholders for profits made by him out of corporate transactions, where he either concealed or did not disclose the extent to which he was making a profit out of the transactions.¹⁷ Stated in its most general form, the rule is that directors or other officers of a corporation cannot make a personal profit out of their office.

Since the directors and other officers of a corporation, whatever their relation may be technically, occupy a fiduciary or quasi trust relation towards the corporation and the stockholders collectively, it is thoroughly well settled that they cannot, either directly or indirectly, in their dealings on behalf of the corporation with others, or in any other transaction in which they are under a duty to guard the interests of the corporation, make any profit, or acquire any other personal benefit or advantage, not also enjoyed by the other stockholders, and, if they do so, they may be compelled to account therefor to the corporation in an appropriate action.¹⁸

¹⁴ See § 2330 et seq., *infra*.

¹⁵ See § 2310, *infra*.

¹⁶ See § 2306, *infra*.

¹⁷ *Goodbody v. Delaney*, 82 N. J. Eq. 140, 91 Atl. 724.

Where the general manager acting as agent for all the stockholders makes a sale of their stock, it is not proper for him to make a secret profit

on the sale at their expense. *Barber v. Martin*, 67 Neb. 445, 93 N. W. 722, and see § 2319, *infra*.

¹⁸ *United States. Jackson v. Ludeling*, 21 Wall. 616, 22 L. Ed. 492; *Koehler v. Black River Falls Iron Co.*, 2 Black 715, 17 L. Ed. 339; *Pepper v. Addicks*, 153 Fed. 383; *Krohn v. Williamson*, 62 Fed. 869; *Cook v. Sher-*

"A director," said Judge Dean in a Pennsylvania case, "is a trustee for the entire body of stockholders, and both good morals and good law imperatively demand he shall manage all the business affairs of the company with a view to promote, not his own interests, but the common interests, and he cannot directly or indirectly derive any personal profit or advantage by reason of his position, distinct from his co-shareholders: * * * And by assuming the office, he undertakes to give his best judgment in the interests of the corporation in

man, 20 Fed. 167; *Wardell v. Union Pac. R. Co.*, 4 Dill. 330, Fed. Cas. No. 17,164, 103 U. S. 651, 26 L. Ed. 509.

Alabama. *Perry v. Tuskaloosa Cotton-Seed Oil-Mill Co.*, 93 Ala. 364, 9 So. 217; *Memphis & C. R. Co. v. Woods*, 88 Ala. 630, 7 L. R. A. 605, 16 Am. St. Rep. 81, 7 So. 108.

California. *Western States Life Ins. Co. v. Lockwood*, 166 Cal. 185, 135 Pac. 496; *Smith v. Los Angeles Immigration & Land Co-operative Ass'n*, 78 Cal. 289, 12 Am. St. Rep. 53, 20 Pac. 677; *Davis v. Rock Creek Lumber, Flume & Mining Co.*, 55 Cal. 359, 36 Am. Rep. 40; *Farmers' & Merchants' Bank of Los Angeles v. Downey*, 53 Cal. 466, 31 Am. Rep. 62.

Connecticut. *Yale Gas Stove Co. v. Wilcox*, 64 Conn. 101, 25 L. R. A. 90, 42 Am. St. Rep. 159, 29 Atl. 303.

Illinois. *Estate of Smythe v. Evans*, 209 Ill. 376, 70 N. E. 906, rev'g 108 Ill. App. 145; *Higgins v. Lansingh*, 154 Ill. 301, 40 N. E. 362; *Hoffman v. Reichert*, 147 Ill. 274, 37 Am. St. Rep. 219, 35 N. E. 527; *Chicago Hansom Cab Co. v. Yerkes*, 141 Ill. 320, 33 Am. St. Rep. 315, 30 N. E. 667; *Gilman, C. & S. E. Co. v. Kelly*, 77 Ill. 426; *Linder v. Carpenter*, 62 Ill. 309; *Bestor v. Wathen*, 60 Ill. 138; *Kelly v. Fahrney*, 145 Ill. App. 80, aff'd 242 Ill. 240, 89 N. E. 984; *Moore v. United States One Stave Barrel Co.*, 141 Ill. App. 104, aff'd 238 Ill. 544, 128 Am. St. Rep. 153, 87 N. E. 536; *Robertson v. H. E. Bucklen & Co.*, 107 Ill. App. 369.

Indiana. *Tevis v. Hammersmith*,

170 Ind. 286, 84 N. E. 337; *Port v. Russell*, 36 Ind. 60, 10 Am. Rep. 5; *Paine v. Lake Erie & L. R. Co.*, 31 Ind. 283; *Tevis v. Hammersmith* (Ind. App.), 81 N. E. 614. See also *Ward v. Yarnelle*, 173 Ind. 535, 91 N. E. 7.

Iowa. *The Telegraph v. Loetscher*, 127 Iowa 383, 4 Ann. Cas. 667, 101 N. W. 773; *Blair Town Lot & Land Co. v. Walker*, 50 Iowa 376.

Kansas. *Sargent v. Kansas Midland R. Co.*, 48 Kan. 672, 29 Pac. 1063; *Arkansas Valley Agr. Society v. Eichholtz*, 45 Kan. 164, 25 Pac. 613; *Ryan v. Leavenworth, A. & N. W. Ry. Co.*, 21 Kan. 365.

Kentucky. *Patterson v. Woolridge*, 170 Ky. 748, 186 S. W. 639; *Jasper v. Appalachian Gas Co.*, 152 Ky. 68, Ann. Cas. 1915 B 192, 153 S. W. 50; *Covington & L. R. Co. v. Bowler's Heirs*, 9 Bush 468; *Paducah Land, Coal & Iron Co. v. Hayes*, 15 Ky. L. Rep. 517, 24 S. W. 237.

Maine. *European & N. A. Ry. Co. v. Poor*, 59 Me. 277.

Maryland. *Cumberland Coal & Iron Co. v. Parish*, 42 Md. 598; *Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456, 77 Am. Dec. 311.

Massachusetts. *Parker v. Nickerson*, 112 Mass. 195.

Michigan. *Flint & P. M. Ry. Co. v. Dewey*, 14 Mich. 477.

Minnesota. *Goodhue Farmers' Warehouse Co. v. Davis*, 81 Minn. 210, 83 N. W. 531.

Missouri. *Mt. Vernon Bank v. Porter*, 148 Mo. 176, 49 S. W. 982, rev'g 65

all matters in which he acts for it, untrammelled by any hostile interest in himself or others. There is an inherent obligation on his part that he will in no manner use his position to advance his own interest as an individual as distinguished from that of the corporation: * * * And all secret profits derived by him in any dealings in regard to the corporate enterprise must be accounted for to the corporation,

Mo. App. 448; Ward v. Davidson, 89 Mo. 445, 1 S. W. 846; Bent v. Priest, 10 Mo. App. 543, aff'd 86 Mo. 475.

Montana. Coombs v. Barker, 31 Mont. 526, 79 Pac. 1.

Nebraska. Nebraska Power Co. v. Koenig, 93 Neb. 68, 139 N. W. 839.

New Hampshire. Pearson v. Concord R. Corporation, 62 N. H. 537, 13 Am. St. Rep. 590.

New Jersey. Guild v. Parker, 43 N. J. L. 430; Goodbody v. Delaney, 82 N. J. Eq. 140, 91 Atl. 724; Loudenslager v. Woodbury Heights Land Co., 56 N. J. Eq. 411, 41 Atl. 1115, aff'g 55 N. J. Eq. 78, 35 Atl. 436; Plaquemines Tropical Fruit Co. v. Buck, 52 N. J. Eq. 219, 27 Atl. 1094; Trenton Banking Co. v. McKelway, 8 N. J. Eq. 84; Landis v. Sea Isle City Hotel Co. (N. J. Ch.), 31 Atl. 755. See also Purchase v. Atlantic Safe Deposit & Trust Co., 81 N. J. Eq. 344, 87 Atl. 444, aff'd without opinion in 83 N. J. Eq. 353, 91 Atl. 1070.

New York. McClure v. Law, 161 N. Y. 78, 76 Am. St. Rep. 262, 55 N. E. 388, rev'g 20 App. Div. 459, 47 N. Y. Supp. 84; Van Cott v. Van Brunt, 82 N. Y. 535; Brooklyn Crosstown R. Co. v. Strong, 75 N. Y. 591; Blake v. Buffalo Creek R. Co., 56 N. Y. 485; Van Valkenburgh v. Thomasville, T. & G. R. Co., 52 Hun 610, 4 N. Y. Supp. 782; Dorris v. French, 4 Hun 292; Potomac Ins. Co. District of Columbia v. Kelly, 91 Misc. 335, 155 N. Y. Supp. 98; McCloskey v. Goldman, 62 Misc. 462, 115 N. Y. Supp. 189; Miller v. Crown Perfumery Co., 57 Misc. 383, 109 N. Y. Supp. 760; Morrison v. Ogdensburgh & L. C. R.

Co., 52 Barb. 173. See also Beatty v. Guggenheim Exploration Co., 167 App. Div. 864, 153 N. Y. Supp. 757.

North Carolina. Brite v. Penny, 157 N. C. 110, 72 S. E. 964. See Havens v. Hoyt, 6 Jones Eq. 115.

Oregon. Jameson v. Coldwell, 25 Ore. 199, 35 Pac. 245.

Pennsylvania. Hechelman v. Geyer, 248 Pa. 430, Ann. Cas. 1917 A 236, 94 Atl. 188; Provident Trust Co. v. Geyer, 248 Pa. 423, 94 Atl. 77; Danville, H. & W. R. Co. v. Kase, 39 Atl. 301; Bird Coal & Iron Co. v. Humes, 157 Pa. St. 278, 37 Am. St. Rep. 727, 27 Atl. 750; Simons v. Vulcan Oil & Mining Co., 61 Pa. St. 202, 100 Am. Dec. 628; Hill v. Frazier, 22 Pa. St. 320.

Texas. Tenison v. Patton, 95 Tex. 284, 67 S. W. 92, rev'g (Tex. Civ. App.), 64 S. W. 810; Moore v. Waco Bldg. Ass'n, 19 Tex. Civ. App. 68, 45 S. W. 974.

Utah. Center Creek Water & Irrigation Co. v. Lindsay, 21 Utah 192, 60 Pac. 559; McIntyre v. Ajax Min. Co., 17 Utah 213, 53 Pac. 1124.

Vermont. Rutland Elec. Light Co. v. Bates, 68 Vt. 579, 54 Am. St. Rep. 904, 35 Atl. 480.

West Virginia. Sweeny v. Grape Sugar & Refining Co., 30 W. Va. 443, 8 Am. St. Rep. 88, 4 S. E. 431.

Wisconsin. Spaulding v. North Milwaukee Town Site Co., 106 Wis. 481, 81 N. W. 1064; First Ave. Land Co. v. Hildebrand, 103 Wis. 530, 79 N. W. 753; Cook v. Berlin Woolen Mill Co., 43 Wis. 433; In re Taylor Orphan Asylum, 36 Wis. 534.

England. In re Olympia [1898] 2

even though the transaction in which they were made also advantaged the corporation of which he was director.”¹⁹ The law will “not permit them to make a private profit for themselves in the discharge of their official duties,”²⁰ and when officers “understand that these rules will be rigidly enforced, even without proof of actual fraud, the honest will keep clear of all dealings falling within their prohibition, and those dishonestly inclined will conclude that it is useless to exercise their wits in contrivances to evade it.”²¹ Directors and other officers must account (1) for the profits made by the use of the company’s assets and (2) for moneys made by a breach of trust.²²

The rule does not mean that an officer may not be entitled to compensation for his services, in a proper case,²³ nor does it mean that a director or other officer cannot, under any circumstances, contract with his corporation so as to preclude the contract being set aside by the corporation, thereby depriving the officer of the profits already gained or which would be made in the future.²⁴ It simply means, so

Ch. 153; *Aberdeen Ry. Co. v. Blakie*, 1 Macq. H. L. Cas. 461.

Canada. *Earle v. Burland*, 27 Ont. App. 540; *Bennett v. Havelock Elec. Light & Power Co.*, 21 Ont. L. R. 120, 18 Ann. Cas. 354.

Concisely stated, the rule is that “what the director [or other officer] makes in his office as such [excluding his compensation] belongs to the corporation.” *Bent v. Priest*, 86 Mo. 475, 486.

Stated in another way, directors or other corporate officers “cannot, as agents or trustees, enter into nor authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the benefits.” *Wardell v. Union Pac. R. Co.*, 103 U. S. 651, 658, 26 L. Ed. 509.

The directors hold a place of trust and must execute the trust with fidelity for the common benefit of the stockholders of the corporation rather than for their own benefit. *Koehler v. Black River Falls Iron Co.*, 67 U. S. 715, 720, 17 L. Ed. 339.

Directors are not at liberty to use their power of bargaining for the corporation to secure for themselves

an exclusive personal benefit. *Kelsey v. New England St. Ry. Co.*, 62 N. J. Eq. 742, 48 Atl. 1001.

This principle applies, of course, in a great variety of cases—in any case, in fact, in which an officer takes advantage of his position, or neglects his duty, in order to serve his private interests, and gain a personal profit or other advantage.

The president of a corporation, to whom a bond has been delivered by the board of directors for sale, has no right to convert it to his own use in payment of a claim due him from the corporation, without the consent of the board of directors. *Greenville Gas Co. v. Reis*, 54 Ohio St. 549, 44 N. E. 271.

¹⁹ *Bird Coal & Iron Co. v. Humes*, 157 Pa. St. 278, 287, 37 Am. St. Rep. 727, 731, 27 Atl. 750.

²⁰ *Farmers’ & Merchants’ Bank v. Downey*, 53 Cal. 466, 31 Am. Rep. 62.

²¹ *Bain v. Brown*, 56 N. Y. 288.

²² *Ward v. Davidson*, 89 Mo. 445, 458, 1 S. W. 846.

²³ *Infra*, chapter on Compensation of Officers.

²⁴ See §§ 2304, 2305, *infra*.

far as a contract or other transaction between the corporation and the officer, or between the corporation and a party in whom the officer is interested, is concerned, that if the contract or transaction is voidable by the corporation—and that is a question hereafter considered—,²⁵ then the corporation may elect to not repudiate the contract, which is voidable but not void,²⁶ but to merely recover from the officer the profits made by him.

In regard to trustees in general, Mr. Perry, in his work on Trusts, states that “they cannot use the trust property, nor their relation to it, for their own personal advantage. All the power and influence which the possession of the trust fund gives must be used for the advantage and profit of the beneficial owners, and not for the personal gain and emolument of the trustee. No other rule would be safe; nor would it be possible for courts to apply any other rule, as between trustee and cestui que trust.”²⁷

In respect to agents in general, Professor Mechem states the rule to be that “all profits made and advantage gained by the agent in the execution of the agency belong to the principal. And it matters not whether such profit or advantage be the result of the performance or of the violation of the duty of the agent if it be the fruit of the agency. * * * All profits and every advantage beyond lawful compensation, made by the agent in the business, or by dealing or speculating with the effects of his principal, though in violation of his duty as agent, and though the loss, if one had occurred, would have fallen on the agent, will, wherever they can be regarded as the fruit or the outgrowth of the agency, be deemed to have been acquired for the benefit of the principal.”²⁸

In such a case, the corporation or its receiver may sue to recover the profit made,²⁹ or, under certain circumstances, a suit in equity may

²⁵ See § 2330 et seq., *infra*.

²⁶ See § 2333, *infra*.

²⁷ 1 Perry, Trusts (6th Ed.), § 427.

See also Beach, Trusts, § 515.

²⁸ 1 Mechem, Agency (2nd Ed.), §§ 1224, 1225.

²⁹ *California*. Farmers' & Merchants' Bank of Los Angeles v. Downey, 53 Cal. 466, 31 Am. Rep. 62.

Connecticut. Yale Gas Stove Co. v. Wilcox, 64 Conn. 101, 25 L. R. A. 90, 42 Am. St. Rep. 159, 29 Atl. 303.

Missouri. Mt. Vernon Bank v.

Porter, 148 Mo. 176, 49 S. W. 982, rev'g 65 Mo. App. 448.

New York. McClure v. Law, 161 N. Y. 78, 76 Am. St. Rep. 262, 55 N. E. 388.

Pennsylvania. Bird Coal & Iron Co. v. Humes, 157 Pa. St. 278, 37 Am. St. Rep. 727, 27 Atl. 750; Simons v. Vulcan Oil & Mining Co., 61 Pa. St. 202, 100 Am. Dec. 628.

Vermont. Rutland Elec. Light Co. v. Bates, 68 Vt. 579, 54 Am. St. Rep. 904, 35 Atl. 480.

be maintained by a stockholder on behalf of himself and other stockholders.³⁰

The fact that the amount of the profit cannot be readily ascertained is immaterial since the burden of proving the amount is not on the corporation.³¹

This rule applies equally well to profits made by a director who owned nearly all of the stock of the corporation.³²

In scrutinizing the acts of such officers, it has been said that "the court will not heed mere forms when the substance which lurks behind them shows profits from a dealing in the corporation property."³³

If the person sought to be held liable is a mere agent, and not an officer, then the general rules of agency apply, without regard to whether the principal is a corporation or an individual.³⁴ So the question as to the liability of a corporate agent for profits in other business, where he has agreed to devote his entire time to the business of the company, is not peculiar to corporation law but is governed by the law relating to agents in general.³⁵

Secret profits made by promoters of a corporation, i. e., profits made without disclosing the same to the real parties in interest and obtaining their express or implied consent thereto, may be recovered by the parties in interest; and much of the law pertaining thereto, as stated in a preceding chapter,³⁶ is also applicable to secret profits retained by directors or other corporate officers. Furthermore, the rule stated in a preceding chapter that a sale by a promoter to the corporation even at a profit may be valid, provided the corporation is represented by an independent and impartial board of directors, and provided the promoters have made a full and fair disclosure of their ownership

³⁰ *Memphis & C. R. Co. v. Woods*, 88 Ala. 630, 7 L. R. A. 605, 16 Am. St. Rep. 81, 7 So. 108; *Chicago Hansom Cab Co. v. Yerkes*, 141 Ill. 320, 33 Am. St. Rep. 315, 30 N. E. 667; *Pearson v. Concord R. Corporation*, 62 N. H. 537, 13 Am. St. Rep. 590; *Earle v. Burland*, 27 Ont. App. (Can.) 540.

³¹ *Rutland Elec. Light Co. v. Bates*, 68 Vt. 579, 54 Am. St. Rep. 904, 35 Atl. 480.

³² *Central Mfg. Co. v. Montgomery*, 144 Mo. App. 494, 129 S. W. 460.

³³ *Commonwealth Title Insurance & Trust Co. v. Seltzer*, 227 Pa. 410, 136 Am. St. Rep. 896, 76 Atl. 77.

Directors or other corporate officers

"will not be permitted 'to derive any personal profit or advantage by reason of his position, distinct from his co-shareholders,'" and "the law has ceased to look at the mere form of the device employed," but instead "now pierces through the surface and seizes upon the evils which lie within." *Porter v. Healy*, 244 Pa. St. 427, 91 Atl. 428.

³⁴ General rules applicable to all agents, see 1 *Clark & Skyles, Agency*, § 406.

³⁵ This question is fully discussed in *Sheppard Pub. Co. v. Harkins*, 9 Ont. L. Rep. 504.

³⁶ See §§ 135-149, vol. 1.

or interest in the property, of the profit which they will make as a result of the transaction, and of all material facts generally,³⁷ is applicable to sales to the corporation by a director or other corporate officer.

§ 2304. Limitations of rule—In general. The doctrine that a director or other officer of a corporation cannot obtain a profit or advantage in dealings on behalf of the corporation only applies where the officer is acting for the corporation, or for some other reason owes a duty to the corporation which is inconsistent with his obtaining the profit or advantage. By the weight of authority, as hereafter stated, the fact that a person is a director or other officer of a corporation does not prevent him from entering into a contract with the corporation, or selling it property, or purchasing property from it, etc., if the corporation is represented by other officers, and there is no fraud.³⁸ And of course, if a contract between a corporation and one of its officers is a valid one, he cannot be compelled to account for profits subsequently made under such contract or in dealing with the subject-matter of the contract.³⁹ And the fact that directors are personally interested in a contract made with the corporation and to a certain extent are to profit by it, where the contract is not unfair and it is to the interest of the corporation that it be accepted, does not warrant a stockholder enjoining the carrying out of the contract.⁴⁰ So if a transfer of corporate property to a director is valid and there is no ground for setting it aside, his trusteeship as to such property ends, so that the corporation cannot hold him for profits thereafter made in connection with the property.⁴¹ Furthermore, the rule does not apply to commissions for making a sale of property agreed on long before the agent became an officer of the purchasing corporation and which both parties to the sale had knowledge of.⁴²

If a director or other officer purchases property, being at the time under no duty to purchase for the corporation, he may afterwards sell it to the corporation, if it is represented by other officers, without disclosing what he paid for it, and, if there is no fraud, he will not be compelled to account for the profit he may make in the transaction.⁴³ In like manner, it is generally held that an officer of a cor-

³⁷ See § 137, vol. 1.

³⁸ See §§ 2345-2347, *infra*.

³⁹ *Tenison v. Patton*, 95 Tex. 284, 67 S. W. 92.

⁴⁰ *Teller v. Tonopah & G. R. R.*, 155 Fed. 482.

⁴¹ *Tenison v. Patton*, 95 Tex. 284,

67 S. W. 92, *rev'g* (Tex. Civ. App.),

64 S. W. 810.

⁴² *In re Georgia Steel Co.*, 240 Fed.

473.

⁴³ See § 2318, *infra*.

poration may enforce claims against it for their full amount, although he may have purchased them at a discount, if he owed no duty to the company at the time he purchased.⁴⁴

§ 2305. — **Exception where corporation insolvent or unable to act.** When the corporation is insolvent, "its officers and directors do not owe it the duty of turning over to it the profits realized by the exercise of their skill and judgment, unless, at the time of the transaction out of which the profit arose, they were acting for said corporate interest and not in their own individual capacity."⁴⁵ It follows that if a corporation is financially unable to purchase property valuable or even necessary for corporate purposes, there is no breach of trust in a purchase of it for himself either by a director or other officer, and hence where he does purchase the property, and it increases in value, the corporation cannot hold the officer for the profits made.⁴⁶ For instance, where a corporation had leased realty for a term of years with the right to purchase at the end of a certain number of years by making a stipulated cash payment, but at the end of such time it was financially unable to make the payment, whereupon the president of the company purchased it for himself, the corporation cannot hold its president for profits realized by him in the purchase.⁴⁷

So, in a still stronger case, it was held that where a director of a gas company, after the company had become wholly insolvent, purchased at public sale a franchise to lay gas mains in a city, the company could not hold the director for profits realized from such purchase.⁴⁸ A like question arose at an early day in New York in a case where it appeared that Cornelius Vanderbilt had organized a transportation company for the purpose of transporting passengers and freight in and through Nicaragua. The company became financially embarrassed and unable to continue business whereupon Vanderbilt, then the president, decided to engage in the business on his own account, but the Pacific Mail Company, which was also engaged in the same business, on learning of Vanderbilt's intention, bought him off for a large sum said to amount to more than a million. It was held that a stockholder of the defunct company could not require him to account to such company for the money received.⁴⁹

⁴⁴ See § 2289, *supra*.

⁴⁵ *Jasper v. Appalachian Gas Co.*, 152 Ky. 68, Ann. Cas. 1915 B 192, 153 S. W. 50.

⁴⁶ *Hannerty v. Standard Theater Co.*, 109 Mo. 297, 19 S. W. 82.

⁴⁷ *Hannerty v. Standard Theater*

Co., 109 Mo. 297, 19 S. W. 82.

⁴⁸ *Jasper v. Appalachian Gas Co.*, 152 Ky. 68, Ann. Cas. 1915 B 192, 153 S. W. 50.

⁴⁹ *Murray v. Vanderbilt*, 39 Barb. (N. Y.) 140.

A director may purchase a majority of the outstanding stock of the corporation for himself, in order to protect his own interests, especially where the complaining stockholder was sent a written notice that the company was in financial difficulties and asking a pro rata advancement to preserve the property of the company, but he declined to contribute.⁵⁰

§ 2306. Secrecy as essential element. "The illegality of a profit made by a director," it is well said, "arises almost wholly by reason of some undisclosed and secret bias on his part against the interest of the corporation of which he is a director. If a profit is made in a transaction that is honest in itself and is open and fully disclosed, and the transaction is consummated after an honest statement of the facts to the board of directors and to the stockholders, there is no reason for criticism or for charging such director with any profits that he may make."⁵¹ However, it might well be thought, from reading many of the decisions, that this rule applies only in case of "secret" profits, but there is no doubt that the rule also applies in many cases to profits obtained openly, since, as has been stated, "the publicity alone of an illegal and unauthorized act * * * does not make it legal or valid."⁵² However, if the profit is not a secret one, then of course the question of ratification by the stockholders may arise, and the corporation may be barred from recovering the profits because of a ratification.⁵³

In a California case it was contended that "because the action of the directors was open, and not secret, the rule does not apply that a trustee is prohibited from making a profit out of his trust relation," but it was held that openness of the transaction did not of itself validate it, although if the transaction is open and the shareholders know of it, they may be precluded from recovering the profits either by expressly assenting thereto or by acquiescence for a considerable time.⁵⁴

In other words, when it is said that corporate officers cannot retain "secret" profits it is not meant that they may always retain profits

⁵⁰ It was held that since the corporation could not purchase its own stock, the director did nothing as an individual that he could have done as a trustee, and that he did nothing detrimental to the interests of the corporation. *Buchler v. Black*, 213 Fed. 880, 885.

⁵¹ *Continental Securities Co. v. Bel-*

mont, 83 N. Y. Misc. 340, 144 N. Y. Supp. 801.

⁵² *Goodell v. Verdugo Canon Water Co.*, 138 Cal. 308, 71 Pac. 354.

⁵³ *Goodell v. Verdugo Canon Water Co.*, 138 Cal. 308, 71 Pac. 354.

⁵⁴ *Goodell v. Verdugo Canon Water Co.*, 138 Cal. 308, 314, 71 Pac. 354.

openly made, but merely that, if the profits are secret, as they usually are, the rule applies without any qualification as to previous assent or subsequent ratification by the stockholders or of other officers, while if the transaction or arrangement is open and not a secret one, the right to sue for profits may be barred by laches⁵⁵ or by ratification. And it is held that a corporate officer, with the knowledge and consent of the corporation, may make a valid contract for the payment of commissions to him as an individual, with the other party to the contract.⁵⁶

§ 2307. Good faith of officer or want of damage to corporation as immaterial. The good faith of the officer obtaining the secret profit does not affect his liability therefor⁵⁷ nor does the fact that the corporation was not damaged by the transaction in which the profit was made.⁵⁸ "It is not essential," said the Missouri Court of Appeals, "to the liability of the director that the company has suffered a loss from what he has done; it is sufficient that he has gained a profit through it. Whether the contract which he has made, or in the making or ratification of which he has concurred, was in point of fact beneficial or injurious to the company, is wholly an immaterial inquiry. The broad principle is that whatever he acquires by virtue of his fiduciary relation, except in open dealings with the company, such as a director in common with strangers may sometimes have, belongs not to him, but to the company. Nothing else than this satisfies the demands of the law."⁵⁹

§ 2308. Lawfulness of means used to secure profit as immaterial. In all transactions in which corporate interests are involved, if it appears that the officer making the deal has acted against the interest of his corporation, "the mere fact that the means used to accomplish the unlawful end would, if standing alone, be lawful in themselves, will not save such officer from responsibility to account for profits thus made by him which otherwise might have gone into the coffers of his corporation."⁶⁰

⁵⁵ Keeney v. Converse, 99 Mich. 316, 318, 58 N. W. 325, delay of ten years.

⁵⁶ Jameson v. Coldwell, 23 Ore. 144, 147, 31 Pac. 279.

⁵⁷ Western States Life Ins. Co. v. Lockwood, 166 Cal. 185, 135 Pac. 496.

⁵⁸ Western States Life Ins. Co. v. Lockwood, 166 Cal. 185, 135 Pac. 496.

The fact that the transaction is ad-

vantageous to the corporation does not change the rule. Bird Coal & Iron Co. v. Humes, 157 Pa. St. 278, 37 Am. St. Rep. 727, 27 Atl. 750.

⁵⁹ Bent v. Priest, 10 Mo. App. 543, aff'd 86 Mo. 475.

⁶⁰ Commonwealth Title Insurance & Trust Co. v. Seltzer, 227 Pa. 410, 136 Am. St. Rep. 896, 76 Atl. 77.

§ 2309. Effect of acts being ultra vires. It has been contended in some cases that profits are not recoverable from an officer where the lines of endeavor in which the money was made are ultra vires, i. e., beyond the powers of the corporation, but this contention has been universally rejected,⁶¹ at least where the acts were not malum in se.⁶² For instance, where one was sued for profits made while serving as manager, and defended upon the ground that the corporation was without power to do the things that he had done in the production of the profits, the Minnesota court said: "It is not necessary to determine whether the corporation had power to purchase grain and sell it for profit. It may be conceded that it had not, yet the agent cannot, while engaged in the service of his employer or principal, act in the capacity of both buyer and purchaser [seller], without such principal's consent; and * * * in such cases 'all profits made in the course of an agency belong to the principal, whether they are the fruits of the performance or the violation of the agent's duty.'"⁶³

On a like theory, it has been held that land given the president of a railroad company in consideration of the extension of the line to the property of the grantor belongs to the company, even though it was without power to acquire such property.⁶⁴

§ 2310. Contracts as contrary to public policy. A contract between an officer of a corporation and a third person is contrary to public policy, and therefore illegal and void, where it contemplates a fraud upon the corporation, or where, by giving the officer a secret

⁶¹ *Memphis & Arkansas River Packet Co. v. Agnew*, 132 Tenn. 265, L. R. A. 1916 A 640, 177 S. W. 949, reviewing decisions at length. To same effect, *Mt. Vernon Bank v. Porter*, 148 Mo. 176, 49 S. W. 982; *St. Louis Stone-ware Co. v. Partridge*, 8 Mo. App. 217.

"Courts should close their ears when dishonest men attempt to wrest and quote rules of law in an effort to shield them from the consequences of their misdeeds." *Memphis & A. River Packet Co. v. Agnew*, 132 Tenn. 265, L. R. A. 1916 A 640, 177 S. W. 949.

The cashier of a bank cannot set up as a defense to an action by the bank for the proceeds of bonds sold

by him, that it was ultra vires for the bank to negotiate the bonds—such transaction not being malum in se. *Mt. Vernon Bank v. Porter*, 52 Mo. App. 244, 248.

The governing rule in cases of agency in general, in line with the statement in the text, is well stated in *Hertzler v. Geigley*, 196 Pa. St. 419, 79 Am. St. Rep. 724, 46 Atl. 366.

⁶² *Memphis & A. River Packet Co. v. Agnew*, 132 Tenn. 265, L. R. A. 1916 A 640, 177 S. W. 949.

⁶³ *Goodhue Farmers' Warehouse Co. v. Davis*, 81 Minn. 210, 83 N. W. 531.

⁶⁴ *Scott v. Farmers' & Merchants' Nat. Bank*, 97 Tex. 31, 104 Am. St. Rep. 835, 75 S. W. 7, rev'g (Tex. Civ. App.), 67 S. W. 343, 66 S. W. 485.

profit or personal advantage, or otherwise, it places his private interests in conflict with his duty to the corporation. Such a contract, therefore, cannot be enforced by either party,⁶⁵ and may be rescinded by the corporation.⁶⁶ In any event, this is the rule where the contract is executory. Thus, where a person contracted with a railroad company to construct its road for a certain per cent. of the cost of construction, and thereafter on the same day contracted with five of the seven directors of the road to pay them two-thirds of such per cent., the two contracts are to be treated as *pari materia* and as constituting one contract which is void as against public policy, and the contractor cannot sue for failure to carry out the contract, under the rule that where an illegal contract is executory neither party can ask the aid of a court to enforce it.⁶⁷ So if a secret advantage is given officers, the other party to the contract cannot enforce specific performance against the corporation.⁶⁸ Moreover, it seems that a stipulation in a sale of the property of one street railway company to another, that the purchaser was to operate its lines for a certain number of years to a tract

⁶⁵ **United States.** *West v. Camden*, 135 U. S. 507, 34 L. Ed. 254.

Illinois. *Linder v. Carpenter*, 62 Ill. 309; *Bestor v. Wathen*, 60 Ill. 138.

Kansas. *Noel v. Drake*, 28 Kan. 265, 42 Am. Rep. 162.

Massachusetts. *Guernsey v. Cook*, 120 Mass. 501.

Michigan. *Wilbur v. Stoepel*, 82 Mich. 344, 21 Am. St. Rep. 568, 46 N. W. 724.

Minnesota. *Lum v. McEwen*, 56 Minn. 278, 57 N. W. 662.

Missouri. *Sidway v. Missouri Land & Live Stock Co.*, 187 Mo. 649, 86 S. W. 150; *Attaway v. Third Nat. Bank*, 93 Mo. 485, 5 S. W. 16.

New York. *Koster v. Pain*, 41 App. Div. 443, 58 N. Y. Supp. 865.

North Carolina. *McDonald v. Houghton*, 70 N. C. 393.

See also § 2415, *infra*.

A contract is not enforceable against a corporation when the party dealing with the corporate officers has given to any of them a secret interest in the contract. *Kelsey v. New*

England St. Ry. Co., 62 N. J. Eq. 742, 48 Atl. 1001.

Rule applied to sale of shares of stock in another corporation by a special committee of the directors, where there was a stipulation in the contract that such members of the committee should have the option to sell shares held by them individually to the same vendee at the same price, where no such option was given to other stockholders who also owned shares in the other company. *Kelsey v. New England St. Ry. Co.*, 62 N. J. Eq. 742, 48 Atl. 1001.

A contract by a president and director of a bank for the sale of stock by him, stipulating that the purchaser shall be elected cashier of the bank, is contrary to public policy, and void. *Noel v. Drake*, 28 Kan. 265, 42 Am. Rep. 162.

⁶⁶ *Finck v. Canadaway Fertilizer Co.*, 152 N. Y. App. Div. 391, 136 N. Y. Supp. 914.

⁶⁷ *Stanton v. Sturgis*, 140 Fed. 789.

⁶⁸ *Kelsey v. New England St. Ry. Co.*, 62 N. J. Eq. 742, 48 Atl. 1001.

of land owned by the directors of the seller, is void as being for the benefit of the directors.⁶⁹

On the same theory, it is held that a contract made by an officer of a railroad company whereby he is to receive a personal benefit as the real consideration for locating a station at a particular place is void as against public policy.⁷⁰ So it was held at an early day in railroading that managing officers of a railroad company could not purchase lands in advance of the location of the line, with a view to locating the line on or near such lands—such a contract being held to be against public policy.⁷¹ So where a railroad company made a construction contract with a company and agreed that the payment should be made in mortgage bonds, but the construction company agreed as part of the transaction to assume the stock subscriptions of all the directors of the railroad company to the worthless capital stock of the railroad company, stockholders of the railroad company may attack the bonds as being voidable because of the voidable contract.⁷²

Likewise, if a special committee of a board of directors contracts to sell shares of stock in another company owned by the corporation, with the stipulation that they shall personally have an option to deliver their own shares in the same company at the same price, but the option is not extended to the other stockholders, the contract cannot be enforced against the corporation.⁷³

Moreover, if the contract on which the action is founded is against good morals, or expressly forbidden by statute, the corporation may plead its invalidity even though it was a participator in the wrong.⁷⁴ For instance, it has been held that where a corporation contracted for the construction of a building for its use, and a large bonus was added to the price, to be divided between the president of the company and the other contracting party, the latter could not recover on the con-

⁶⁹ *Scott v. Farmers' & Merchants' Nat. Bank*, 97 Tex. 31, 104 Am. St. Rep. 835, 75 S. W. 7, rev'g (Tex. Civ. App.), 67 S. W. 343, 66 S. W. 485.

⁷⁰ *Peckham v. Lane*, 81 Kan. 489, 25 L. R. A. (N. S.) 967, 19 Ann. Cas. 369, 106 Pac. 464.

A contract by which officers of a railroad company agreed to assist in establishing a town on certain lands which its contemplated line would cross, in consideration of a conveyance to them of a part of the land, was held illegal and void, as an attempt by the officers to use the cor-

poration for their private benefit. *Bestor v. Wathen*, 60 Ill. 138. And see *Linder v. Carpenter*, 62 Ill. 309.

⁷¹ *Woodstock Iron Co. v. Richmond & D. Extension Co.*, 129 U. S. 643, 32 L. Ed. 819; *Cook v. Sherman*, 20 Fed. 167.

⁷² *Thomas v. Brownville, Ft. K. & P. R. Co.*, 109 U. S. 522, 27 L. Ed. 1018.

⁷³ *Kelsey v. New England St. Ry. Co.*, 62 N. J. Eq. 742, 48 Atl. 1001.

⁷⁴ *Standard Lumber Co. v. Butler Ice Co.*, 146 Fed. 359, 7 L. R. A. (N. S.) 467.

tract where a statute made the conduct of the company a misdemeanor.⁷⁵

The transactions may be set aside by the company or its stockholders provided they act within a reasonable time.⁷⁶ "But if the reason for such repudiation [by the corporation] has ceased, on account of an assignment to a new party, who at the request of the corporation guarantees its fulfilment, a technical ratification is not necessary. The contract then stands by its own force, there being no longer a right of repudiation."⁷⁷

§ 2311. Bribes or presents from third persons. A corporate officer must account for bribes received from third persons, to influence his official conduct, and ordinarily for gifts from third persons where tending to induce him to violate his duty to the corporation as such officer.⁷⁸ Thus, if a director receives bonds from a third person for voting a certain way as a director, such bonds belong to the corporation.⁷⁹ However, it has been said that the rule that all profits and advantage made by the agent in the course of his agency belong to the principal, does not apply to mere personal gratuities or gifts from third persons to the agent which neither he nor the principal had any right to expect, and which did and could offer no inducement to the agent to violate his duty, although they were made in consideration of benefits incidentally derived from the performance of the agent.⁸⁰

In a case in a federal court, where it appeared that, as a condition to consolidation of two corporations, one of them insisted that the president of the other should agree not to compete in the business for a certain number of years, the consideration paid to such president by the corporation of which he was not an officer for agreeing to not compete, was held not a profit which his corporation could recover from him, where he, in conducting the negotiations for the consolidation, fully protected the interests of his corporation. The reasoning of the court was that this payment to the president was not a reward

⁷⁵ *Standard Lumber Co. v. Butler Ice Co.*, 146 Fed. 359, 7 L. R. A. (N. S.) 467.

⁷⁶ *Coombs v. Barker*, 31 Mont. 526, 79 Pac. 1.

⁷⁷ *Union Pac. Ry. Co. v. Credit Mobilier*, 135 Mass. 367, 377.

⁷⁸ The acceptance by a corporate officer of secret gifts from a company dealing with the corporation is a

breach of trust for which he must account to his corporation. *Holland Furniture Co. v. Knooihuizen*, — Mich. —, 163 N. W. 884.

See generally §§ 2318-2322.

⁷⁹ *Bent v. Priest*, 86 Mo. 475, 486.

⁸⁰ 1 *Mechem*, Agency (2nd Ed.), § 1231, and see *Aetna Ins. Co. v. Church*, 21 Ohio St. 492 which supports the rule.

for successfully effecting the consolidation, but on the contrary was a condition precedent to any consolidation at all.⁸¹

§ 2312. Right to patents or inventions. A corporation which uses the patented inventions belonging to a director, with his consent, may be held liable, in a proper case, notwithstanding such relationship, for a reasonable compensation therefor.⁸² In Massachusetts it is held that a patented invention made by the superintendent of the manufacturing department of a corporation, while employed as superintendent, belongs to him and not to the corporation, even though it was his duty to use his skill and inventive ability to further the interests of his employer by devising improvements generally in the appliances and machinery used in the employer's business.⁸³ This is also the settled doctrine of the federal courts.⁸⁴ However, under some circumstances, the employer is entitled to an irrevocable license under the patent to use the invention protected by it.⁸⁵

This question, however, is not peculiar to corporation law but is in reality governed by the rules of law relating to master and servant, and hence reference should be made to textbooks on that subject,⁸⁶ as well as to textbooks on the law of patents.

Where the manager of a corporation invented a gas tip which was thereafter, but before the issuance of a patent, manufactured by the corporation without any agreement as to royalties, and he sold the tips to himself under another name at a big profit to the company and then resold them for double the amount paid the corporation, he must account to the corporation for the profits, since he had no property right in the invention before it was patented.⁸⁷

§ 2313. Right of corporation to earnings of officer—In general. Ordinarily, it would seem, a corporation is not entitled to the earnings of one of its officers outside the corporate business, at least unless

⁸¹ *Bristol v. Scranton*, 63 Fed. 218.

⁸² *Deane v. Hodge*, 35 Minn. 146, 59 Am. Rep. 321, 27 N. W. 917.

⁸³ *American Circular Loom Co. v. Wilson*, 198 Mass. 182, 201, 126 Am. St. Rep. 409, 84 N. E. 133.

⁸⁴ *Dalzell v. Dueber Watch Case Mfg. Co.*, 149 U. S. 315, 37 L. Ed. 749; *Hapgood v. Hewitt*, 119 U. S. 226, 30 L. Ed. 369. See also *Pressed Steel Car Co. v. Hansen*, 137 Fed. 403, 415, 2 L. R. A. (N. S.) 1172.

⁸⁵ *Solomons v. United States*, 137 U. S. 342, 346, 34 L. Ed. 667. But see *American Circular Loom Co. v. Wilson*, 198 Mass. 182, 203-206, 126 Am. St. Rep. 409, 84 N. E. 133.

⁸⁶ The rights of employers in and to inventions of employees is treated at length in 5 *Labatt's Master and Servant* (2nd Ed.), §§ 2042-2047.

⁸⁷ *D. M. Steward Mfg. Co. v. Steward*, 109 Tenn. 288, 70 S. W. 808.

it is entitled to all his time.⁸⁸ Thus, a corporation is not entitled to the salary earned as a postmaster, by the manager of one of its supply stores, where there was no agreement to that effect.⁸⁹ So the fact that a director holds his qualification shares of stock as trustee for another company does not render him accountable to the second company for the fees which he earns as director of the first company.⁹⁰

§ 2314. — Compensation earned as receiver. In a Maryland case, a trust company was given power to act as receiver. Its president was individually appointed a receiver of a company. The trust company sued its president to recover the amount allowed him for services as receiver, but was not permitted to recover. It was held that no right to recover could be based on the fact (1) that he was appointed on the nomination of the trust company as provided for in a corporate deed of trust nor because (2) he was paid a salary as president where the receivership duties were not incidental thereto, nor because (3) the by-laws of the trust company provided that no office of receiver should be accepted by its president without the approval of the executive committee, nor because (4) the president agreed to turn over the compensation allowed him, where there was no consideration for the agreement.⁹¹

§ 2315. Right to reward offered by corporation. In an early case in Illinois, this rule was applied to the right of a director to a reward offered by his corporation for the discovery of a robbery of the bank. It was held that he could not recover because of his relationship to the bank. The court said: "He was a director of that branch at the time the robbery was committed, and when he procured the arrest of Towne. In that character, he, with the other officers of the branch, was charged with its control and management. He was placed there by the principal bank, in the capacity of a trustee, to act for the benefit of, and faithfully represent the interests of the stockholders and others interested in the concerns and conduct of the bank. If he obtained any information, which would in any manner lead to the recovery of the money stolen, or to the detection of the person taking it, it was his duty to communicate it promptly to the bank, without reward. He has done nothing more in the present case than his duty as director imposed on him. The fact of his receiving no compensation

⁸⁸ See generally 1 Mechem, Agency (2nd Ed.), §§ 1229, 1230.

⁸⁹ *Bailey v. Sibley Quarry Co.*, 168 Mich. 321, 129 N. W. 17.

⁹⁰ *In re Dover Coalfield Extension*, [1908] 1 Ch. 65.

⁹¹ *Citizens' Trust & Deposit Co. v. Tompkins*, 97 Md. 182, 54 Atl. 617.

for his services as director does not alter the case. He had voluntarily assumed the duties of the station, and he was bound as faithfully to discharge them, as if he was to be liberally paid for his services."⁹²

§ 2316. Miscellaneous applications of rule—In general. Cases illustrating the general rules already stated as to profits or benefits are so numerous, and in so many of them the application of the rule is self-evident, that only a few are noticed herein. In New York, where a corporation was largely indebted to the estate of a former officer, and the estate contracted with directors that if they would find a purchaser for part of the corporate property and pay part of the debt to the estate, the estate would assign the remainder of the debt to them, it was held that where it was possible for the corporation to make such payment from its treasury and a sale of the plant, but the payment was made by the directors individually, the directors must account for the secret profits.⁹³

§ 2317. — Speculations. Where corporate officers speculate with the funds of the corporation, they cannot keep the profits.⁹⁴

In a Minnesota case the general manager of a farmers' warehouse company, under the by-laws of which the stockholders were authorized to bring their grain to the warehouse, to be received, forwarded and sold, and for which they were to pay one cent a bushel to the company, himself purchased all the grain delivered and shipped and sold it for his own profit. He invested no money but paid for the grain through orders on the treasury of the company. The proceeds of the first sale furnished the capital for the next, and so on. It was held that "as the salaried agent of the plaintiff, the manager had no right to use his position, and the opportunities afforded by it, or to use its warehouse, business equipment, and its name, credit and money, for his personal profit. * * * It may be that the personal motive of the manager was not bad, but the rule is one which the law, upon the best considerations of public policy, has established, and it cannot be too rigidly enforced."⁹⁵

§ 2318. — Sales or leases by or to the corporation. The cases in which corporate officers have been held liable for profits, upon this trust principle, have generally arisen where, in the acquisition or disposition of property for the corporation, the officer has received per-

⁹²Stacy v. State Bank, 5 Ill. 91, 94.

⁹⁴Redmond v. Dickerson, 9 N. J. Eq. 507, 59 Am. Dec. 418.

⁹³Billings v. Shaw, 209 N. Y. 265, 103 N. E. 142.

⁹⁵Goodhue Farmers' Warehouse Co. v. Davis, 81 Minn. 210, 83 N. W. 531.

sonally a profit, as where he has sold property for one price, and accounted to the corporation for a less price, or has bought at one price and sold to the company at a larger one, or has received a secret bonus or advantage in the transaction in which he has acted for the corporation.⁹⁶

Generally it is held that a director will not be permitted to receive and retain a commission or other secret profit or advantage in the case of a sale or lease of property by or to the corporation.⁹⁷ Thus, a general manager of a company who sells the entire capital stock cannot retain a secret compensation from the purchaser for effecting the sale.⁹⁸ So where the manager of a corporation, as such, bought shares of stock of his corporation for a small sum and turned them into the company for over ten times the sum paid for them, as a credit on his debt to the company, he must account for the difference.⁹⁹ And where directors voted to purchase property from the promoter of the corporation for five hundred thousand dollars above what he paid for it, such excess to be divided between the promoter and the directors, they may be required to refund such excess to the corporation.¹ If a

⁹⁶ *Tenison v. Patton*, 95 Tex. 284, 67 S. W. 92, rev'g (Tex. Civ. App.), 64 S. W. 810.

⁹⁷ *Alabama*. *Perry v. Tuscaloosa Cotton-Seed Oil-Mill Co.*, 93 Ala. 364, 9 So. 217.

Arkansas. *Loewer v. Lonoke Rice Mill Co.*, 111 Ark. 62, 161 S. W. 1042.

California. *Farmers' & Merchants' Bank of Los Angeles v. Downey*, 53 Cal. 466, 31 Am. Rep. 62; *Highland Park Inv. Co. v. List*, 27 Cal. App. 761, 151 Pac. 162.

Minnesota. *Goodhue Farmers' Warehouse Co. v. Davis*, 81 Minn. 210, 83 N. W. 531.

New York. *Asphalt Const. Co. v. Bouker*, 150 App. Div. 691, 135 N. Y. Supp. 714; *Colonizers' Realty Co. of Brooklyn v. Shatzkin*, 129 App. Div. 609, 114 N. Y. Supp. 71; *Rickert v. White*, 54 Misc. 114, 105 N. Y. Supp. 653; *Goldshear v. Barron*, 42 Misc. 198, 85 N. Y. Supp. 395; *Ryan v. Grissinger*, 136 N. Y. Supp. 134.

Pennsylvania. *Bird Coal & Iron Co. v. Humes*, 157 Pa. St. 278, 37 Am. St. Rep. 727, 27 Atl. 750.

Vermont. *Rutland Elec. Light Co. v. Bates*, 68 Vt. 579, 54 Am. St. Rep. 904, 35 Atl. 480.

Profits derived by a cashier of a bank from a sale of bonds negotiated by him while cashier, and in discharge of his duties as such, belong to the bank. *Mt. Vernon Bank v. Porter*, 148 Mo. 176, 49 S. W. 982, rev'g 65 Mo. App. 448.

Where the president of a corporation was appointed to purchase land, and he bought for much less than the price he represented to the corporation, he is accountable to the corporation for the excess. *Malden & Melrose Gas Light Co. v. Chandler*, 209 Mass. 354, 95 N. E. 791.

Application of rule to promoters, see § 147, vol. 1.

⁹⁸ *Barber v. Martin*, 67 Neb. 445, 93 N. W. 722.

⁹⁹ *Badger Oil & Gas Co. v. Preston*, — Okla. —, 152 Pac. 383.

¹ *Brooker v. William H. Thompson Trust Co.*, 254 Mo. 125, 162 S. W. 187.

treasurer is especially authorized to sell property, and he at once sells to himself and associates at the minimum price authorized, without offering the property to others or making any attempt to find purchasers at a higher price, the corporation may recover the difference between the sum for which the property was sold and its cash value at the time of the sale.² If a corporate officer is intrusted with the power to make certain purchases, and he purchases from himself or from a firm in which he is a member, and conceals the situation from the corporation, the profits of the seller belong to the company.³ So where one who was the president, secretary and a director of a corporation which desired to procure a new location for its business, procured, in the name of another person, an option to buy land at a certain sum and then, without disclosing his interest, sold it to the corporation for more than twice such sum, it was held that he must account to the corporation for the secret profits.⁴ This rule also applies to sales of property acquired by the president of a company with the idea of selling it to the company.⁵

A peculiar case arose in Pennsylvania where a stockholder sued to enjoin a lease of coal lands by the company, on the ground that the royalty of fifteen cents a ton was grossly inadequate. The lessee obtained a discontinuance of the action by secretly agreeing to pay such stockholder individually three cents a ton on all coal mined under the lease. Thereafter the stockholder became a director and shortly afterwards the lessee obtained from the company a reduction of the royalty to twelve cents a ton because of the depression existing in the coal trade, without the new director divulging his secret arrangement. Afterwards the corporation, on learning the facts, sued the director for secret profits received by him. It was held that he was liable from the time of the reduction of the royalty, not to the extent of three cents a ton, but only for his actual profit which was figured at one-sixth of three cents, i. e., the amount saved to the director by deducting the three cents from the five-sixths of the royalty in place of from the whole royalty.⁶

So far as secret profits connected with the purchase of property and its resale to the corporation, by directors or other officers, is concerned, it is necessary to keep in mind the distinction between the class of

² *Greenfield Sav. Bank v. Simons*, 133 Mass. 415.

³ *Rickert v. White*, 54 N. Y. Misc. 114, 105 N. Y. Supp. 653.

⁴ *Douglas-Whisler Brick Co. v. Simpson*, 233 Pa. 515, 82 Atl. 759.

⁵ *Southwestern Portland Cement Co. v. Latta & Happer*, — Tex. Civ. App. —, 193 S. W. 1115.

⁶ *Bird Coal & Iron Co. v. Humes*, 157 Pa. St. 278, 37 Am. St. Rep. 727, 27 Atl. 750.

cases where the officer sells to his company property which is in equity as well as at law his own, and which he could dispose of as he thought fit, and the class of cases where the officer owns the property at law but in equity it belongs to his company. In the former class of cases it is held in England that if the company claims any interest by reason of the transaction, it can only be by affirming the sale, "in which case the sale, although initially voidable, would be validated by subsequent ratification. If the company refused to affirm the sale the transaction would be set aside and the parties restored to their former position, the directors getting the property and the company receiving back the purchase price. There would be no middle course. The company could not insist on retaining the property while paying less than the price agreed. This would be for the court to make a new contract between the parties. It would be quite another thing if the director had originally acquired the property which he sold to his company under circumstances which made it in equity the property of the company."⁷ In other words, in England, all transactions between officers, or at least directors, and the company, are voidable merely because of the relations of the parties without regard to the fairness of the transaction or the good faith of the parties;⁸ and if the only ground for avoiding the contract is the mere relation of the parties, then the company must either disaffirm the sale or approve it, and, if it approves it, it cannot recover the secret profits made by the officer.

§ 2319. — Sale of stock. If an officer is employed to sell stock, he cannot charge it to himself, or account for it at an arbitrary price, but must truly account for the whole price received.⁹ And if the president of a corporation cannot lawfully sell its treasury stock, he cannot charge it to himself at an arbitrary price and pocket the surplus resulting from a sale.¹⁰ So where unissued stock of the corporation is taken out of the treasury by its directors at par and then sold by them under a prior contract with a third person for considerably above par, the profits cannot be retained by the directors, where there never was any binding contract whereby the directors became owners of such stock.¹¹ Where a newly organized corpora-

⁷ *Cook v. Deeks*, [1916] A. C. 554, 563, approving *Burland v. Earle*, [1902] A. C. 83.

⁸ See § 2346, *infra*.

⁹ *Camden Land Co. v. Lewis*, 101 Me. 78, 63 Atl. 523.

¹⁰ *Camden Land Co. v. Lewis*, 101

Me. 78, 63 Atl. 523. See also *Pollitz v. Wabash R. Co.*, 207 N. Y. 113, 100 N. E. 721; modifying 150 N. Y. App. Div. 715, 135 N. Y. Supp. 789.

¹¹ *Provident Trust Co. v. Geyer*, 248 Pa. 423, 94 Atl. 77.

The profits were required to be dis-

tion employed a firm to sell its stock at a fixed net price, and thereafter the president contracted with the firm so that he was to receive a percentage of the net profits from the sales in so far as made above the fixed price, it was held in California that he must account to the corporation for such profits received by him.¹²

In a Pennsylvania case, a corporation had practically all its capital invested in a piece of real estate which it was willing to sell. The president of the company led a prospective purchaser to believe that it could not be purchased, but granted him an option to purchase a controlling interest in the stock in the corporation. The president then bought in a controlling interest of the stock and the deal was consummated so that the purchaser of such controlling interest eventually bought the real estate. The court held that the profit realized from the sale of stock was an incident of the sale of the property; that the stock dealing was for the purpose of diverting a part of the price for the real estate from the corporation into the pockets of the president; and that such officer was liable to the corporation for such profits.¹³ In another case in Pennsylvania, the directors, who were majority stockholders, accepted an offer to buy their stock as well as all the stock of the other stockholders, who should consent thereto, at a certain price per share. However, a further sum was paid directly to the directors, under a secret arrangement, for gaining immediate control of the organization. The supreme court held that it was proper to infer that the directors intended to, and did, include the sale of their positions, with the influence flowing therefrom, as part of the extra consideration, and that the directors should be adjudged to hold such further sum in trust for all the stockholders. The court quoted with approval a statement that "the law has ceased to look at the mere form of the device employed; it now pierces through the surface and seizes upon the evils which lie within."¹⁴

tributed pro rata among the stockholders of record when the sale was made; and the corporation itself, as an entity, was held not entitled to the profits. *Hechelman v. Geyer*, 248 Pa. 430, 94 Atl. 188.

¹² *Western States Life Ins. Co. v. Lockwood*, 166 Cal. 185, 135 Pac. 496.

On a subsequent appeal in this same case, after a trial, the right of recovery was reaffirmed and it was further held that the fact that the services of the officer in assisting in selling the stock were reasonably worth the

sum paid him, or that he gave up another position to assist the firm, or that the corporation could not have sold the stock without the aid of the president, or that the company knew the president was selling the stock where it did not know of his contract with the firm, were all immaterial. *Western States Life Ins. Co. v. Lockwood*, 173 Cal. 734, 161 Pac. 498.

¹³ *Commonwealth Title Insurance & Trust Co. v. Seltzer*, 227 Pa. 410, 136 Am. St. Rep. 896, 76 Atl. 77.

¹⁴ *Porter v. Healy*, 244 Pa. 427,

§ 2320. — **Loans.** A bank director may be required to account for a bonus in the shape of a share in profits, secured to himself to the exclusion of the other stockholders, in making a loan of the money of the bank.¹⁵ But while a transaction whereby a corporate officer loans money to a corporation for which he receives a commission of five per cent. is voidable at the option of the company where he was the only one acting for the company in making the loan, yet if the commission was a fair and usual one, and neither the directors nor any one else connected with the company ever objected thereto or took any steps to rescind the transaction, creditors cannot object to the commission on the theory that the officer had no right to make any profit on a transaction with the company in which he represented both himself and the company, especially where the officer took the notes of the company for the loan and it afterwards became insolvent and will not pay but a small per cent. on claims against it.¹⁶

§ 2321. — **Giving up office for consideration.** It is a breach of trust for officers to surrender control and pass their offices to others for a monetary consideration, and they are thereby rendered liable to account for the amount received.¹⁷ If certain directors agree to resign and deliver control of the corporation to others, in consideration of payment of debts owing them by the corporation which were uncollectible, the moneys received are moneys derived by virtue of the office for which the directors must account.¹⁸

§ 2322. — **Money paid to procure election to corporate office.** In a New York case it was held that, where a president and director of a corporation was paid money by outside parties upon the condition that he should procure their election as directors of the corporation, and that they should be given the control and management of the corporation, he must be regarded as having received the money by virtue of his office and by reason of his official acts, and must account for it to the corporation, and that the fact that his act was illegal and unauthorized was immaterial. In this case, the Appellate Division treated the transaction as a bribe, and held that the money did not belong to

91 Atl. 428, quoting from Tenth Nat. Bank of Philadelphia v. Smith Const. Co., 242 Pa. 269, 287, 89 Atl. 76.

¹⁵ Farmers' & Merchants' Bank v. Downey, 53 Cal. 466, 31 Am. Rep. 62.

¹⁶ In re Knox Automobile Co., 229 Fed. 241, 246.

¹⁷ Heineman v. Marshall, 117 Mo. App. 546, 92 S. W. 1131.

¹⁸ McClure v. Law, 161 N. Y. 78, 76 Am. St. Rep. 262, 55 N. E. 388, rev'g 20 N. Y. App. Div. 459, 47 N. Y. Supp. 84. See also Bosworth v. Allen, 168 N. Y. 157, 55 L. R. A. 751, 85 Am. St. Rep. 667, 61 N. E. 163.

the corporation. In reversing the judgment, the Court of Appeals held that the defendant could not thus set up his own wrong as a defense, and treated the money as having come into his hands by virtue of his official acts.¹⁹

§ 2323. — Contracts of private persons to pay officers for services as such. In a case in England, a financier agreed to assist a corporation which was financially embarrassed, on condition that he be given two representatives on the board of directors, and the agreement, with the condition, was approved and ratified at a general meeting of the shareholders. The financier appointed a person to act with himself as the two members of the board, and agreed to pay him a certain sum per year so long as he remained director, but this agreement was not known by the other directors or the stockholders. The director sued for his compensation under the agreement, and the defense was interposed that the agreement was illegal, but the court held that the arrangement for compensation must have been contemplated by the stockholders when they ratified the agreement to give the financier two representatives on the board of directors.²⁰

§ 2324. Liability to account to third person as officer of trustee. If property is put into the hands of a corporation as trustee for sale, and the latter pays to one of its directors out of the funds of the cestui que trust a compensation for disclosing a purchaser for the trust property, believing that the purchaser was a stranger, when in fact he was the director himself, he may be compelled to account to the cestui que trust for all profits flowing to him from the purchase including such compensation.²¹

F. Rights as Creditors of Corporation

§ 2325. In general. A director or other corporate officer loans money to a corporation, or advances money for use of the company, or otherwise becomes a creditor of the corporation, and then comes the question as to what are his rights as such creditor as compared with other creditors who are not officers of the company. This matter will now be considered.

¹⁹ McClure v. Law, 161 N. Y. 78, 76 Am. St. Rep. 262, 55 N. E. 388, rev'g 20 N. Y. App. Div. 459, 47 N. Y. Supp. 84.

²⁰ Kregor v. Hollins, 109 L. T. Rep. 225.

²¹ Purchase v. Atlantic Safe Deposit & Trust Co., 81 N. J. Eq. 344, 87 Atl. 444, aff'd without opinion in 83 N. J. Eq. 353, 91 Atl. 1070, holding that corporation was secondarily liable.

That a director or other corporate officer may, in a proper case, become a creditor of the corporation, cannot be controverted. If he can become a creditor, he ought to have the same right, and the same remedies, to enforce his claim, as any other creditor, and there is no question but what his rights in these respects are as extensive as those of a creditor who is not a corporate officer. Thus he may sue the corporation as a creditor just as if he was not a director,²³ and he may secure a preference, where the corporation is not insolvent, by issuing attachment or garnishment.²³

§ 2326. Security for or payment of debt. So long as a corporation is solvent, it may borrow money from or otherwise contract with an officer or director, and may pay him, or mortgage or pledge property to secure him, just as it may pay or secure any other creditor, and, if it afterwards becomes insolvent, the conveyance, mortgage or pledge will be valid as against other creditors, although the result may be to leave them unpaid.²⁴ In other words, if there is an indebtedness

²³ *Hutchinson v. Philadelphia & G. S. S. Co.*, 216 Fed. 795. See also *infra*, chapter on Actions Against Corporations.

²³ *McCormick v. Cornell & Wardlaw*, — Tex. Civ. App. —, 193 S. W. 1083. See also *infra*, chapter on Attachment and Garnishment.

²⁴ *United States. Sanford Fork & Tool Co. v. Howe, Brown & Co.*, 157 U. S. 312, 39 L. Ed. 713, rev'g 44 Fed. 231; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328; *Childs v. N. B. Carlstein Co.*, 76 Fed. 86; *Rickerson Roller-Mill Co. v. Farrell Foundry & Machine Co.*, 75 Fed. 554; *Brown v. Grand Rapids Parlor Furniture Co.*, 58 Fed. 286, 22 L. R. A. 817; *Gould v. Little Rock, M. River & T. Ry. Co.*, 52 Fed. 680.

Alabama. *O'Conner Min. & Mfg. Co. v. Coosa Furnace Co.*, 95 Ala. 614, 36 Am. St. Rep. 251, 10 So. 290; *Globe Iron Roofing & Corrugating Co. v. Thacher*, 87 Ala. 458, 6 So. 366.

California. *Santa Cruz R. Co. v. Spreckles*, 65 Cal. 193, 3 Pac. 661, 802.

Colorado. *Burns v. National Mining, Tunnel & Land Co.*, 23 Colo. App.

545, 130 Pac. 1037; *St. Joe & M. F. Consol. Min. Co. v. First Nat. Bank*, 10 Colo. App. 339, 50 Pac. 1055.

Connecticut. For the purpose of enabling a manufacturing company to pay its debts and continue its business, its directors may guarantee payment of its notes, and take a mortgage on all of its property as security for their liability. *Hopson v. Aetna Axle & Spring Co.*, 50 Conn. 597.

Georgia. *Rylander v. Sheffield*, 108 Ga. 111, 34 S. E. 348.

Illinois. *Illinois Steel Co. v. O'Donnell*, 156 Ill. 624, 31 L. R. A. 265, 47 Am. St. Rep. 245, 41 N. E. 185; *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655, 25 Am. St. Rep. 401, 26 N. E. 640; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439; *Hudlun v. Blakeslee*, 70 Ill. App. 664.

Iowa. *Bloomfield Woolen Mills v. State Bank of Bloomfield*, 101 Iowa 181, 70 N. W. 115. See also *Rollins v. Shaver Wagon & Carriage Co.*, 80 Iowa 380, 20 Am. St. Rep. 427, 45 N. W. 1037.

Kansas. *Baker v. Harpster*, 42 Kan. 511, 22 Pac. 415.

owing a corporate officer from the corporation, and the corporation is solvent, there is no question but that the corporation may give its officer security for the debt,²⁵ such as a note,²⁶ mortgage,²⁷ pledge of

Kentucky. Lexington Life, Fire & Marine Ins. Co. v. Page, 17 B. Mon. 412, 66 Am. Dec. 165.

Maine. Clay v. Towle, 78 Me. 86, 2 Atl. 852.

Massachusetts. Saltmarsh v. Spaulding, 147 Mass. 224, 17 N. E. 316.

Missouri. Foster v. Belcher's Sugar Refining Co., 118 Mo. 238, 24 S. W. 63.

Montana. "An officer lending money to the corporation may even demand and receive security for his advancements. So long as he has acquired by the transaction no advantage which might not be accorded to any other creditor under the same circumstances, his claim will be upheld and enforced." O'Rourke v. Grand Opera House Co., 47 Mont. 459, 133 Pac. 965.

New Jersey. Montgomery v. Phillips, 53 N. J. Eq. 203, 31 Atl. 622.

New York. Converse v. Sharpe, 161 N. Y. 571, 56 N. E. 69, 37 App. Div. 399, 55 N. Y. Supp. 1080; Paulding v. Chrome Steel Co., 94 N. Y. 334.

North Carolina. Powell Bros. v. McMullan Lumber Co., 153 N. C. 52, 68 S. E. 926.

Oregon. Jones v. Hale, 32 Ore. 465, 52 Pac. 311; Sabin v. Columbia Fuel Co., 25 Ore. 15, 42 Am. St. Rep. 756, 35 Pac. 854, 34 Pac. 692.

Pennsylvania. Hill v. Standard Tel. Mfg. Co., 198 Pa. 446, 48 Atl. 432; Creighton v. Scranton Lace Curtain Mfg. Co., 191 Pa. St. 231, 43 Atl. 134; Finch Mfg. Co. v. Stirling Co., 187 Pa. St. 596, 41 Atl. 294; Cowan v. Pennsylvania Plate Glass Co., 184 Pa. St. 1, 38 Atl. 1075; Mueller v. Monongahela Fire Clay Co., 183 Pa. St. 450, 38 Atl. 1009; Neal's Appeal, 129 Pa. St. 64, 18 Atl. 564.

Tennessee. In re New Memphis Gaslight Co. Cases, 105 Tenn. 268, 80 Am. St. Rep. 880, 60 S. W. 206.

Utah. Singer v. Salt Lake City Copper Mfg. Co., 17 Utah 143, 70 Am. St. Rep. 773, 53 Pac. 1024.

Wisconsin. South Bend Chilled Plow Co. v. George C. Cribb Co., 97 Wis. 230, 72 N. W. 749.

The president may take security from the corporation for an actual indebtedness to him. First Nat. Bank of Binghamton v. Commercial Traveler's Home Ass'n of America, 108 N. Y. App. Div. 78, 95 N. Y. Supp. 454, aff'd without opinion in 185 N. Y. 575, 78 N. E. 1103.

A director may, like any other creditor, where the corporation is solvent, take security for the debt. In re Estate of Mechanics' Bldg. & Sav. Ass'n No. 2, 202 Pa. 589, 52 Atl. 58.

²⁵ First Nat. Bank of Binghamton v. Commercial Travelers' Home Ass'n of America, 108 N. Y. App. Div. 78, 95 N. Y. Supp. 454, aff'd without opinion in 185 N. Y. 575, 78 N. E. 1103. See also Schnittger v. Old Home Consol. Min. Co., 144 Cal. 603, 78 Pac. 9.

²⁶ Star Mills v. Bailey, 140 Ky. 194, 140 Am. St. Rep. 370, 130 S. W. 1077; Tatem v. Eglanol Min. Co., 42 Mont. 475, 113 Pac. 295.

²⁷ In re Estate of Mechanics' Bldg. & Sav. Ass'n No. 2, 202 Pa. 589, 52 Atl. 58.

The corporation may secure directors by a mortgage against liability on their guaranty made in good faith to enable the corporation to obtain money. Minnesota Loan & Trust Co. v. Peteler Car Co., 132 Minn. 277, 156 N. W. 255.

corporate bonds²⁸ or the like, and thereby prefer such officer as a creditor.²⁹ This is true of a mortgage or pledge by a corporation to secure a debt upon which its officers are liable as sureties or indorsers, or to secure the officers themselves against liability or loss by reason of their guaranty, suretyship or indorsement.³⁰ So the acceptance of a note by the president of a corporation who was also a director, for expenses incurred prior to his becoming a director, is not obtaining an advantage for himself, so as to make the obligation voidable.³¹ A fortiori, where a corporation borrows money from an officer, it may be agreed at the time, if the parties act in good faith, that a certain chose in action should be assigned as security.³²

A question which has sometimes arisen is this: Suppose a majority of the directors are creditors of the corporation and they direct security to be issued to protect their debts, or their debts as well as those of others. On the face of it, this is a case where the interested directors represent both sides, and if the general rule applicable to such a situation should be applied, it would be necessary to hold that the corporation could set aside the security merely because of the relationship of the parties without regard to good faith or fairness.³³ A holding that directors cannot vote to renew notes of the corporation to themselves, is in line with this reasoning;³⁴ and where all of the

²⁸ *Rawlings v. New Memphis Gaslight Co.*, 105 Tenn. 268, 80 Am. St. Rep. 880, 60 S. W. 206.

²⁹ *Wyman v. Bowman*, 127 Fed. 257; *Wolf v. Erwin & Wood Co.*, 71 Ark. 438, 75 S. W. 722; *Heidbreder v. Superior Ice & Cold Storage Co.*, 184 Mo. 446, 456, 83 S. W. 466.

A corporation may legally prefer directors as creditors by transferring enough of its property to reasonably secure or pay them. *Heidbreder v. Superior Ice & Cold Storage Co.*, 184 Mo. 446, 456, 83 S. W. 466.

³⁰ *Montgomery v. Phillips*, 53 N. J. Eq. 203, 31 Atl. 622; *Sabin v. Columbia Fuel Co.*, 25 Ore. 15, 42 Am. St. Rep. 756, 35 Pac. 854, 34 Pac. 692; *New Memphis Gaslight Co. Cases*, 105 Tenn. 268, 80 Am. St. Rep. 880, 60 S. W. 206.

The directors of a corporation, who, with the knowledge and assent of the stockholders, become guarantors of a

debt created by the corporation for a loan secured by a mortgage on the corporate property, and who pay the debt when due, and take an assignment of the mortgage, may enforce the mortgage by foreclosure and sale, notwithstanding the fact that the corporation is solvent, and able, if granted indulgence, to finally pay off the debt from its income, and that the value of the property is far in excess of the debt. *Rylander v. Sheffield*, 108 Ga. 111, 34 S. E. 348.

³¹ *Smith v. New Hartford Water Co.*, 73 Conn. 626, 48 Atl. 754.

³² *Anglo-American Provision Co. v. Davis Provision Co.*, 112 Fed. 574.

³³ See § 2353, *infra*.

³⁴ *Smith v. Los Angeles Immigration & Land Co-operative Ass'n*, 78 Cal. 289, 12 Am. St. Rep. 53, 20 Pac. 677.

In California it is held that where there are four directors present, and

directors were interested in the pledge of corporate bonds to secure them against obligations incurred by them on behalf of the corporation, it was held in Texas that the pledge was "void" where all the stockholders had not concurred therein, on the theory that a director of a corporation cannot act for it in a matter in which he has an adverse interest.³⁵ So it is held that if the mortgage is to be executed in favor of one of the directors present at a directors' meeting, he cannot be counted to make up a quorum nor can his vote be counted to constitute a majority vote.³⁶ Apparently out of line with these decisions are those holding that directors of a solvent corporation may secure themselves on their debts, or against possible loss by reason of being an indorser or guarantor of debts of the corporation, by voting themselves indemnity or security, if done in good faith.³⁷ And it has been held that directors who advanced money to keep the corporation going may issue bonds secured by mortgage as security not only for their debts but also for all the debts of the corporation, especially where the holders of the bonds have paid or permitted to be paid all other debts of the company, and where the bonds and mortgage confer upon the directors no greater right or remedy than a court of equity would award to them upon the facts shown if there were no bonds or mortgage.³⁸ Perhaps the strongest case to be found which holds that

two of them were interested, neither one of the latter can vote upon a resolution authorizing the renewal of separate notes in their favor, even as to that part of the resolution authorizing the renewal of the notes of the other, where the resolution was inseparable. *Smith v. Los Angeles Immigration & Land Co-operative Ass'n*, 78 Cal. 289, 12 Am. St. Rep. 53, 20 Pac. 677.

³⁵ *Scott v. Farmers' & Merchants' Nat. Bank*, 97 Tex. 31, 104 Am. St. Rep. 835, 75 S. W. 7, rev'g (Tex. Civ. App.), 67 S. W. 343, 66 S. W. 485. To same effect, *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639, 26 N. W. 184.

³⁶ *Curtin v. Salmon River Hydraulic Gold Mining & Ditch Co.*, 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552.

³⁷ *In re New Memphis Gaslight Co.*, 105 Tenn. 268, 80 Am. St. Rep. 880, 60 S. W. 206, which is distinguished in *Attalla Iron Ore Co. v. Virginia*

Iron, Coal & Coke Co., 111 Tenn. 527, 533, 77 S. W. 774.

A corporate mortgage is not necessarily invalidated because ordered by directors who were personally secured thereby. *Webster v. Ypsilanti Canning Co.*, 149 Mich. 489, 113 N. W. 7, 14 Det. L. N. 519.

³⁸ "The defense is put upon the ground that the bonds and the trust deed were wholly void because they were made in part for the benefit of the directors as creditors, and that such directors were therefore wholly disqualified to act for the corporation in such regard. The contention is that the bonds and the trust deed are wholly null and void, regardless of any question of fraud, and regardless of any merit or equity upon which they may rest. The legal question thus raised is involved in some conflict of authority. The rule adopted in an early day in this state is adverse

security so voted will not be set aside, unless unfair or voted in bad faith, was recently decided in Minnesota,³⁹ but that case seems to apply the extreme rule not only to security for debts but also to all other dealings, so that, if so broadly construed, it is against the decided weight of authority.⁴⁰ In any event, if the directors, a majority not being disinterested, authorize a mortgage or deed of trust to secure debts, including debts due to themselves, the burden is upon the interested directors to show the fairness of the transaction and their good faith.⁴¹

In all cases the transaction must be free from fraud. A transaction in which a corporation conveys, mortgages or pledges property to its directors or other managing officers will be closely scrutinized when attacked by a creditor upon the insolvency of the corporation, and will not be sustained if it was in fact made, not in good faith and for a bona fide debt, but with intent to hinder and delay or defraud creditors.⁴² Moreover, corporate directors and officers cannot legally, by concerted action, obtain security for their debts on all the property of the corporation, for the purpose of transferring such securities pursuant to a prior agreement whereby they were to be paid the face value of their claims and interest in cash, and make a favorable disposition of their stock to the principal stockholder in a rival corporation, with knowledge of his purpose and intent to use them to obtain control of the corporate property and thus render the stock of the minority holders worthless.⁴³ Where a director loans money to his corporation and is given a note therefor for more than the loan

to appellant's contention [citing Iowa cases]. The rule thus announced is that such transaction will be scrutinized closely, and that the directors will be held strictly to fair dealing. In the case before us, the fairness and the equity of the transaction is beyond debate." *Ramsey v. W. M. Welch Co.*, 163 Iowa 324, 144 N. W. 323.

³⁹ *Minnesota Loan & Trust Co. v. Peteler Car Co.*, 132 Minn. 277, 156 N. W. 255.

⁴⁰ See § 2353, *infra*.

⁴¹ *Sweeny v. Grape Sugar Refining Co.*, 30 W. Va. 443, 8 Am. St. Rep. 88, 4 S. E. 431. To same effect, *Minnesota Loan & Trust Co. v. Peteler Car Co.*, 132 Minn. 277, 156 N. W. 255; *Chouteau v. Allen*, 70 Mo. 290.

⁴² *Sidell v. Missouri Pac. Ry. Co.*, 78 Fed. 724; *Rickerson Roller-Mill Co. v. Farrell Foundry & Machine Co.*, 75 Fed. 554; *Montgomery v. Phillips*, 53 N. J. Eq. 203, 31 Atl. 622.

In *Brashear v. Alexandria Coöperage Co.*, 50 La. Ann. 587, 23 So. 540, a creditor of a corporation, who had advanced money to it on the faith of a mortgage by the corporation to him, was held to be entitled to preference over a director, or his transferee, claiming under a mortgage given to the director by the corporation on the same day.

⁴³ *Jacobus v. Diamond Soda Water Mfg. Co.*, 94 N. Y. App. Div. 366, 88 N. Y. Supp. 302, modifying 38 N. Y. Misc. 371, 77 N. Y. Supp. 898.

and at an excessive rate of interest, he can enforce the note only for the amount loaned and for interest figured at a reasonable rate.⁴⁴

It is no breach of trust for a corporate director to take security for a debt owed him by the corporation, from one indebted to the corporation.⁴⁵

Directors who are secured creditors of the corporation cannot, in effect, foreclose the equity of redemption in the collateral without notice to the corporation.⁴⁶

§ 2327. Preferences after insolvency. This matter is treated of in a subsequent chapter dealing with insolvency.

§ 2328. Right of officer to appropriate property to payment of his claim. An officer of a corporation who has, as such, been intrusted with money or property of the corporation for a specific purpose, or for safe-keeping, cannot apply the same to a debt due to him from the corporation. The president of a corporation, for example, to whom a bond has been delivered in trust for sale, cannot convert the bond or its proceeds to his own use in payment of a debt due from the corporation, without the consent of the board of directors.⁴⁷ So the president of a corporation, in the absence of a valid vote of a quorum of disinterested directors, cannot cause treasury stock to be issued to himself in payment of the corporation's debt to him.⁴⁸ In a Missouri case, directors transferred to themselves the corporate property to pay what the company honestly owed them, and what the company owed others, which they assumed to pay. At the time the company was wholly unable to go on with its usual business, and was without money or credit, and the property transferred was inadequate in its then shape for the purpose of continuing the business. The complaining stockholder refused to aid the company financially or to buy the property at the price at which it was turned over. The lower court set aside the transfer on the ground that the directors could not

⁴⁴ Sutter St. R. Co. v. Baum, 66 Cal. 44, 4 Pac. 916.

⁴⁵ Murray v. Smith, 166 N. Y. App. Div. 528, 152 N. Y. Supp. 102.

⁴⁶ Endicott v. Marvel, 81 N. J. Eq. 378, 87 Atl. 230, applying rule to directors who held stock as collateral security and who adopted a resolution, without notice to the corporation, limiting the period of redemption to one year.

⁴⁷ Greenville Gas Co. v. Reis, 54 Ohio St. 549, 44 N. E. 271.

⁴⁸ Camden Land Co. v. Lewis, 101 Me. 78, 63 Atl. 523.

If the president sells such stock, the proceeds are impressed with a trust which may be followed into his estate so long as distinguishable. Camden Land Co. v. Lewis, 101 Me. 78, 63 Atl. 523.

lawfully sell the corporate property to themselves at a valuation fixed by themselves. On appeal, however, the supreme court upheld the transfer as one "fair, honest, legal, and for the best interests of the company, as well as of its creditors."⁴⁹

§ 2329. Estoppel of officers by reason of mismanagement. It has been held that, where the directors of a corporation, who are also creditors, have permitted the corporation to become indebted in excess of the limit prescribed by its charter or articles, they must be postponed to other creditors, who had no knowledge of the financial condition of the company when they dealt with it and gave it credit.⁵⁰ If a director advances money to pay corporate debts in excess of the debt limit, he is estopped to claim repayment, from a fund belonging to the stockholders, of moneys which he had paid out for the corporation under an illegal contract creating a debt in excess of the debt limit and with knowledge that there would be no surplus of corporate earnings—it being agreed that the repayment should be from the first surplus of the earnings—until the debts of the corporation are paid and the stockholders restored the stock subscriptions paid by them.⁵¹

XXV. PERSONAL DEALINGS OF OFFICER WITH CORPORATION OR WITH CORPORATE PROPERTY

§ 2330. General considerations. A casual perusal of the opinions of the courts as to the validity of dealings of a corporation where one or more of its officers is adversely interested, is apt to confuse because of the statements therein of two apparently diametrically opposed rules but which in fact are readily susceptible of complete reconciliation. Thus, the statement is often made that a corporate officer cannot contract with himself or represent the corporation in any transaction in which he, as an individual, has a conflicting interest.⁵² Further investigation of this line of cases shows, however, that what they really intend to decide is that a transaction wherein a corporate officer represents the corporation on one side and himself (either individually or as partner or as officer of corporation or the like) on the other side of the transaction, is voidable (not void)⁵³ and that it may be set aside by the corporation merely because of the

⁴⁹ *Heidbreder v. Superior Ice & Cold Storage Co.*, 184 Mo. 446, 456, 83 S. W. 466.

⁵⁰ *Gunther v. Basket Coal Co.*, 107 Ky. 44, 21 Ky. L. Rep. 655, 52 S. W. 931.

⁵¹ *Croninger v. Bethel Grove Camp Ground Ass'n*, 156 Ky. 356, 161 S. W. 230.

⁵² See §§ 2332, 2338, *infra*.

⁵³ See § 2333, *infra*.

relationship of the parties without regard to whether it is fair or unfair to the company or whether the officer acted in good faith or in bad faith.⁵⁴

On the other hand, the statement often made, which is apparently in conflict with the preceding, is that a corporate officer may contract with his corporation.⁵⁵ What is meant by this statement is that such a contract is not void as distinguished from voidable, and that it is not even voidable, according to the weight of authority, where the officer acts in good faith and the transaction is fair to the corporation.⁵⁶

In other words, it must always be kept in mind that the two general rules governing trustees and fiduciaries in general which are applicable, and the difference between which is often of great importance, as pointed out by Mr. Machen,⁵⁷ are (1) that "no agent, trustee, or other fiduciary is permitted to contract with himself, or to represent his principal or cestui que trust in any transaction in which he himself has a private conflicting interest, and that if he undertakes to do so the contract or transaction is voidable by the principal or cestui que trust without reference to the question whether or not the transaction was fair and beneficial to the latter"; and (2) "that all contracts or dealings between a trustee and his cestui que trust are prima facie voidable, but if the trustee can prove that he acted with the utmost good faith and made full disclosure of all material circumstances to the person towards whom he occupies a confidential relationship, then the transaction may stand. In other words, the burden of proof is upon the fiduciary to show the utmost fairness and the fullest disclosure; but he is not under an absolute disability irrespective of the bona fides of the transaction, as a fiduciary is who undertakes to contract with himself or to represent his principal or cestui que trust in a transaction in which he himself has some adverse individual interest." The general rules relating to trusts and trustees are applicable, at least so far as the basic principles are concerned.

§ 2331. Effect of statutes and by-laws. Sometimes, but not often, the effect of dealings between corporations and others wherein one or more directors or other corporate officers are interested adversely to the corporation is expressly fixed by a statute or by-law; and in case of municipal corporations, municipal charters and laws usually forbid members of the council and all other local officers from being

⁵⁴ See § 2340, *infra*.

⁵⁵ See § 2345, *infra*.

⁵⁶ See § 2347, *infra*.

⁵⁷ See 2 Machen, Corporations, § 1563.

directly or indirectly interested in any contract with the municipality.⁵⁸ In at least one state, a statute provides that officers and directors of a railroad corporation shall not be directly or indirectly interested in contracts for furnishing supplies or materials to the corporation.⁵⁹ So statutes sometimes expressly prohibit loans by banks or other corporations to directors or other corporate officers⁶⁰ or prohibit the issuance of bonds to a director.⁶¹

Sometimes the by-laws expressly authorize contracts between officers and their corporations. For instance, the by-laws of the United States Steel Corporation provide that "any director individually may be a party to, or may be interested in, any contract or transaction of this company, provided that such contract or transaction shall be approved or be ratified by the affirmative vote of at least ten directors not so interested,"—the by-laws calling for twenty-four directors.⁶²

In England, the articles of a company provided that contracts between corporations and a director should not be avoided merely because of the fiduciary relation, "provided he discloses the nature of his interest; but no director shall vote in respect of any contract in which he is concerned."⁶³ In England, where the articles of association of a corporation provided that a director should vacate his office if he was concerned in, or participated in the profits of, any contract with the company, without declaring his interest, but that he should not vacate his office merely because of his membership or interest in a corporation or firm dealing with the company, but his vote should not be counted, it is held that if an officer is a heavy stockholder in the other party to the contract, and he discloses that he is such stockholder, the contract cannot be attacked merely because of his relationship.⁶⁴

⁵⁸ 2 McQuillin, *Municipal Corporations*, § 513.

One who is a stockholder in a private corporation has been held to be "directly or indirectly interested" within a statute prohibiting contracts by municipal corporations in which their officers are directly or indirectly interested. *City of London Elec. Lighting Co. v. London Corporation*, [1901] 1 Ch. 602.

⁵⁹ *Baumhoff v. Grueninger*, — Mo. —, L. R. A. 1916 A 779 with note, 178 S. W. 102.

⁶⁰ See § 2640, *infra*.

⁶¹ *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.*, 95 Fed. 497, 525.

⁶² *Fletchers, Corp. Forms*, 687.

⁶³ *Transvaal Lands Co. v. New Belgium Land & Development Co.*, [1914] 2 Ch. 488, 505, holding provision not applicable where director voted.

⁶⁴ *Costa Rica Ry. Co., Ltd. v. Forwood*, [1901] 1 Ch. 746, *aff'g* [1900] 1 Ch. 756, and see, construing like provisions, *Imperial Mercantile Credit Ass'n v. Coleman*, L. R. 6 Ch. 558.

§ 2332. General rules without reference to whether interested officer represents corporation or whether corporation represented by other officers—In general. In many decisions it does not appear—and no reference is made in the opinion, in regard thereto—whether the officer who is interested in or the other party to the transaction or contract, also acted in the deal as the agent or representative of the corporation, or whether the corporation was represented by other officers, but nevertheless the courts⁶⁵ in such decisions rule as to the validity of dealings between interested corporate officers and the corporation. Moreover, in certain aspects, so far as the governing rule of law is concerned, it is immaterial whether the officer represents the corporation or whether it is represented by other officers. Without regard to whether the officer or officers dealing with the corporation were the principal or sole representative of the corporation in the transaction, or whether the corporation was represented wholly or principally by other officers, there are certain rules common to both classes of transactions, viz.:

1. The transaction or contract is not void but is merely voidable, according to the great weight of authority.⁶⁶ What is meant by this is merely that if no steps are taken to rescind or set aside the contract, it remains in force as a valid contract, although perhaps if application should be made to set it aside, the court would grant relief merely because of the relationship of the parties without regard to the fairness of the deal or the good faith of the parties.

2. Such transactions or contracts, in all cases where attacked, will be subjected to careful and close scrutiny to ascertain if they are fair and bona fide, even if not voidable merely because of the relationship of the parties.⁶⁷

3. Such transactions or contracts may always be set aside, or other proper relief granted, where unfair or entered into in bad faith, if proper steps so to do are taken by the corporation or its stockholders, where there is no bar by delay or estoppel.⁶⁸

⁶⁵ To reiterate: in studying the decisions relating to this subject, it is noticeable that many of them either in no way refer to the difference, or else fail to in any way distinguish, between contracts or other transactions (1) between a corporation and one or more of its officers where the corporation is represented by other officers or other directors making up a quorum and a majority of the quorum, and (2) those where the officer who acts on the

other side of the transaction acts also as the sole representative of the corporation or else is a director whose presence is necessary to make up a quorum or whose vote is necessary to make a majority vote.

⁶⁶ See § 2333, *infra*.

⁶⁷ See § 2334, *infra*.

⁶⁸ See § 2335, *infra*, and also *Ekgberg v. Swedish-American Pub. Co.*, 114 Minn. 196, 130 N. W. 1029.

4. If there has been actual fraud on the part of the officer, then the corporation may have the transaction set aside, independently of the relationship of the parties thereto.⁶⁹

5. The burden of showing that the transaction or contract is fair and entered into in good faith, when it is attacked, is on the corporate officer.⁷⁰

§ 2333. — Dealings as void or voidable. Except for a few straggling cases, of more or less doubtful authority, it is well settled in nearly all jurisdictions that transactions or contracts wherein a director or other corporate officer is interested adversely to the corporation are not void, but are merely voidable at the option of the corporation,⁷¹

⁶⁹ See § 2335, *infra*.

⁷⁰ See § 2337, *infra*.

⁷¹ **United States.** *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 588, 589, 23 L. Ed. 328; *In re Castle Braid Co.*, 145 Fed. 224.

Arizona. *Zeckendorf v. Steinfeld*, 12 Ariz. 245, 100 Pac. 784.

California. *Copsey v. Sacramento Bank*, 133 Cal. 659, 85 Am. St. Rep. 238, 66 Pac. 7, 204; *Aetna Indemnity Co. v. Altadena Min. & Inv. Co.*, 11 Cal. App. 26, 165, 104 Pac. 470.

Montana. *Tatem v. Eglanol Min. Co.*, 42 Mont. 475, 113 Pac. 295.

New Jersey. *United States Steel Corporation v. Hodge*, 64 N. J. Eq. 807, 60 L. R. A. 742, 54 Atl. 1.

New York. *Skinner v. Smith*, 134 N. Y. 240, 31 N. E. 911; *Hyde v. Equitable Life Assur. Soc. of United States*, 61 Misc. 518, 116 N. Y. Supp. 219.

Oregon. *Marsters v. Umpqua Oil Co.*, 49 Ore. 374, 12 L. R. A. (N. S.) 825, 90 Pac. 151.

Utah. *Singer v. Salt Lake City Copper Mfg. Co.*, 17 Utah 143, 70 Am. St. Rep. 773, 53 Pac. 1024.

Washington. *Inland Nursery & Floral Co. v. Rice*, 56 Wash. 21, 104 Pac. 1117.

"The transaction was valid until avoided, not void until confirmed." *Wyman v. Bowman*, 127 Fed. 257, 272.

A purchase by a director of all the assets of the corporation is not void but is merely voidable for fraud. *Nedry v. Vaile*, 109 Ark. 584, 160 S. W. 880.

Where an officer has power to confess judgment, and does so, it is not void because in favor of the executor of an estate in which the officer is interested as a legatee. *Manley v. Mayer*, 68 Kan. 377, 1 Ann. Cas. 825, 75 Pac. 550.

Where there were three directors, but only two voted on the question of authorizing a chattel mortgage to a co-director whose vote was necessary to pass the resolution, the mortgage is not void *ab initio*, but is merely voidable at the instance of the corporation or its stockholders. *Lackenbach v. Finn*, 26 Cal. App. 482, 147 Pac. 471.

Cal. Civ. Code, § 2230, providing that "neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he or any one for whom he acts as agent has an interest, present or contingent, adverse to that of his beneficiary," although applicable to directors of corporations, is held not to make "a transaction between a director and his corporation in which the former has a personal interest ipso facto void." *Snediker v. Ayers*, 146 Cal. 407, 80 Pac. 511.

unless such dealings are otherwise void as against public policy.⁷²

Some decisions, however, seem to hold that contracts where the interested officer represents both himself and the corporation as the adverse parties to the contract, including contracts between all or a majority of the directors as representing the corporation on one side and themselves as individuals on the other side, are void,⁷³ although some of the decisions which apparently so hold are doubtlessly merely illustrations of a loose use of the word "void," without intending to mean "absolutely void."⁷⁴ In South Dakota it is held that if a resolution is passed in which one of the directors is interested, and it is passed by his vote or by the vote of a director under his controlling influence, without which vote or votes there would not have been a majority in favor of said resolution, it is "absolutely void" as against the corporation.⁷⁵

§ 2334. — Transaction as subject to careful scrutiny by courts. Merely because of the fiduciary relationship existing between a corporation and its officers, a court, when the company is seeking to set aside or resist the enforcement of a contract between it and one or more of its officers, or in which one or more of its officers are interested adversely to the corporation, will, for the protection of the corporation and its stockholders, i. e., the cestui que trust, carefully

⁷² A contract between a corporation and a director is not necessarily "illegal." Vonoh v. Sixty-Seventh St. Atelier Building, 55 N. Y. Misc. 222, 105 N. Y. Supp. 155.

⁷³ Miner v. Belle Isle Ice Co., 93 Mich. 97, 17 L. R. A. 412, 53 N. W. 218; Doyle v. Mizner, 42 Mich. 332, 3 N. W. 968; Gallery v. National Exch. Bank, 41 Mich. 169, 32 Am. Rep. 149, 2 N. W. 193; Flint & P. M. Ry. Co. v. Dewey, 14 Mich. 477; People v. Township Board of Overysel, 11 Mich. 222; Scott v. Farmers' & Merchants' Nat. Bank, 97 Tex. 31, 104 Am. St. Rep. 835, 75 S. W. 7, rev'g (Tex. Civ. App.), 67 S. W. 343, 66 S. W. 485. See also Peerless Fire Ins. Co. v. Reveire, — Tex. Civ. App. —, 188 S. W. 254.

So held where local agent of insurance company issued policy to himself. Wildberger v. Hartford Fire Ins.

Co., 72 Miss. 338, 28 L. R. A. 220, 48 Am. St. Rep. 558, 17 So. 282.

In North Dakota, it is held that, in the absence of affirmative evidence of authority from the board of directors to make the deed, "a deed made by the cashier of a bank to himself as an individual is presumptively void and of no effect." Northwestern Fire & Marine Ins. Co. v. Lough, 13 N. D. 601, 102 N. W. 160. This, however, involves a different proposition, and in addition it is doubtful whether the word "void" is used as meaning anything more than "voidable."

⁷⁴ See, for instance, Haines Mercantile Co. v. Highland Mines Co., 49 Ore. 71, 88 Pac. 865, where statement that contract or transaction is "void" was probably inadvertent.

⁷⁵ Crocker v. Cumberland Mining & Milling Co., 31 S. D. 137, 139 N. W. 783.

look into and investigate the contract to see that the corporation has not been imposed upon by one or more of its officers. In other words, even if the contract is not voidable merely because of the adverse interests of one or more corporate officers, it will not be sustained, if attacked, unless the fairness of the contract and the good faith of the interested officer or officers is clearly evident. In a leading case in the Supreme Court of the United States, the true rule is stated as follows: "That a director [and the rule applies to other managing officers] of a joint stock corporation occupies one of those fiduciary relations where his dealings with the subject-matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality, and which has received the clearest recognition in this court and in others."⁷⁶ The decisions all support this view.⁷⁷ As said by a federal court, such contracts "should be scanned, if not with suspicion, at least with the most scrupulous care. The validity of such a contract must therefore depend upon the nature and terms of the contract itself and the circumstances under which it is made. The motives of the parties are not necessarily material, but the effect of the provisions of the contract must be especially regarded, and if they are pernicious and tend to work a fraud on the rights of the corporation and stockholders, in such case the directors must be regarded as having no authority to enter into it."⁷⁸ The rule is that even if a director or other corporate officer may deal with the corporation or with cor-

⁷⁶ *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 588, 23 L. Ed. 328.

⁷⁷ *United States*. In re *Castle Braid Co.*, 145 Fed. 224; *Union Trust Co. of Maryland v. Carter*, 139 Fed. 717.

Alabama. *Mobile Land Improvement Co. v. Gass*, 142 Ala. 520, 39 So. 229.

California. *Dundon v. McDonald* 146 Cal. 585, 80 Pac. 1034; *Snediker v. Ayers*, 146 Cal. 407, 80 Pac. 511.

Colorado. *Mosher v. Sinnott*, 20 Colo. App. 454, 79 Pac. 742; *Mackey v. Burns*, 16 Colo. App. 6, 64 Pac. 485.

Kentucky. *Oregon Gold Min. Co. v. Schmidt*, 22 Ky. L. Rep. 1330, 60 S. W. 530.

New Jersey. *Hollins v. American*

Union Elec. Co., 66 N. J. Eq. 457, 60 Atl. 359; *Robotham v. Prudential Ins. Co.*, 64 N. J. Eq. 673, 53 Atl. 842; *Davis v. Thomas & Davis Co.*, 63 N. J. Eq. 572, 52 Atl. 717.

Tennessee. *Rawlings v. New Memphis Gaslight Co.*, 105 Tenn. 268, 80 Am. St. Rep. 880, 60 S. W. 206.

Courts of equity subject the transactions of corporate officers with their corporations to most searching scrutiny, and place the burden upon them to show that they hold bona fide, honest and just claims against the corporation. *Schneider v. Johnson*, 161 Mo. App. 375, 143 S. W. 78.

⁷⁸ *Hubbard v. New York, N. E. & W. Inv. Co.*, 14 Fed. 675, 676.

porate property, under some conditions, as for instance where he contracts with his corporation which is represented wholly by disinterested officers (according to the weight of authority), yet in all cases the liberty must "be exercised subject to the rules which belong to his peculiar position," and the court will look at the acts of the officer "with far greater scrutiny" than as if he sustained no relation to the company, and is justified in setting aside the transaction "upon much slighter ground."⁷⁹

If a director is a sole director, or one of a small number vested with certain powers, it is said that the obligation to be candid and act in good faith in dealing with the corporation is stronger than in case where there are several directors, "and his acts subject to more severe scrutiny, and their validity determined by more rigid principles of morality, and freedom from motives of selfishness."⁸⁰

§ 2335. — **Necessity that transaction be fair and not a breach of trust.** Now, having stated that the transaction will be closely scrutinized, the next proposition is that the corporation may always have the transaction set aside, or defend against its enforcement, if it is unfair or entered into in bad faith by the officer adversely interested. Regardless of whether an interested officer contracts or deals with himself as the representative of the corporation, or with other officers who represent the corporation, in no case can the transaction be upheld, where attacked by the corporation or, in a proper case, by its stockholders, unless the transaction is shown to be fair, above board, and entered into in good faith,⁸¹ provided the transaction has not been expressly or impliedly ratified⁸² and the right to attack the trans-

⁷⁹ *Hallam v. Indianola Hotel Co.*, 56 Iowa 178, 9 N. W. 111.

⁸⁰ *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 590, 23 L. Ed. 328.

⁸¹ *United States. Burnes v. Burnes*, 137 Fed. 781, aff'g 132 Fed. 485.

Georgia. Fricker v. Americus Manufacturing & Improvement Co., 124 Ga. 165, 52 S. E. 65.

Kansas. El Capitan Land & Cattle Co. v. Boston-Kansas City Cattle Loan Co., 65 Kan. 359, 69 Pac. 332.

Massachusetts. Elliott v. Baker, 194 Mass. 518, 80 N. E. 450.

Minnesota. Savage v. Madelia

Farmers' Warehouse Co., 98 Minn. 343, 108 N. W. 296; *Minneapolis Threshing Mach. Co. v. Jones*, 95 Minn. 127, 103 N. W. 1017.

New Jersey. Robotham v. Prudential Ins. Co., 64 N. J. Eq. 673, 53 Atl. 842.

Directors may become creditors of the corporation, but the contracts by which they become creditors are subject to close scrutiny and will be enforced only when fair and equitable. *Coombs v. Barker*, 31 Mont. 526, 79 Pac. 1.

⁸² See §§ 2394-2400, *infra*.

action has not been lost by laches.⁸³ Stated in another way, all the courts agree, when a director or other officer is dealing with a corporation, even where the latter is represented by the other directors or officers, that such officer cannot deal unfairly, or act in bad faith towards the corporation. If the transaction is not open, fair and free from all suspicion of fraud, the corporation is entitled to have it set aside, or to prevent its enforcement,⁸⁴ and, in determining whether there has been unfair dealing, the court will subject the transaction to the most rigid scrutiny, as already stated.⁸⁵ But it may be asked when a transaction may be considered "unfair" or entered into in "bad faith"; and the answer is that whether, in a particular case, the courts will enforce or set aside a contract wherein a director or other officer is interested adversely to the corporation, on the ground it is unfair or in bad faith, depends in a great measure upon the facts of the particular case, since no inflexible rule has been established.⁸⁶ However, it is self-evident that there need be no actual showing of fraud such as would be necessary to avoid the contract if entered into with a stranger. The unfairness relied on often consists in the opposing side in which the officer is interested having acquired the best of the deal in a financial way. Thus, a general manager cannot purchase all the corporate property, or take it over in payment of his debts and in consideration of his assuming the other corporate debts, at a grossly inadequate price, as against the rights of a minority stockholder.⁸⁷ So where a director acquired timber land from his

⁸³ See §§ 2041, 2402, *infra*.

⁸⁴ **United States.** *Thomas v. Brownville, Ft. K. & P. R. Co.*, 109 U. S. 522, 27 L. Ed. 1018, rev'g 2 Fed. 877; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328; *Koehler v. Black River Falls Iron Co.*, 2 Black 715, 17 L. Ed. 339; *Howland v. Corn*, 232 Fed. 35; *Meeker v. Winthrop Iron Co.*, 17 Fed. 48; *Hubbard v. New York, N. E. & W. Inv. Co.*, 14 Fed. 675.

California. *Woodroof v. Howes*, 88 Cal. 184, 26 Pac. 111; *Graves v. Mono Lake Hydraulic Min. Co.*, 81 Cal. 303, 22 Pac. 665.

Illinois. *Higgins v. Lansingh*, 154 Ill. 301, 40 N. E. 362; *Charter Gas Engine Co. v. Charter*, 47 Ill. App. 36.

Iowa. *Hallam v. Indianola Hotel Co.*, 56 Iowa 178, 9 N. W. 111.

Kentucky. *Ecker v. Kentucky Refining Co.*, 144 Ky. 264, 138 S. W. 264.

Louisiana. *Crescent City Brewing Co. v. Flanner*, 44 La. Ann. 22, 10 So. 384.

Maryland. *Mish v. Main*, 81 Md. 36, 31 Atl. 799.

Minnesota. *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854.

New Jersey. *Wilkinson v. Bauerle*, 41 N. J. Eq. 635, 7 Atl. 514.

Pennsylvania. *Schmid v. Lancaster Ave. Theater Co.*, 244 Pa. 373, 91 Atl. 363.

⁸⁵ See § 2334, *supra*.

⁸⁶ *City Nat. Bank v. Merchants' & Planters' Nat. Bank* (Tex. Civ. App.), 105 S. W. 338.

⁸⁷ *Ekberg v. Swedish-American Pub. Co.*, 114 Minn. 196, 130 N. W. 1029.

corporation for a very small part of its real value, although under an option to the company to repurchase it within a certain time, the corporation may have the transfer set aside.⁸⁸ But, even in a case of inadequacy of consideration, if the corporation was represented by disinterested officers and the officer adversely interested informs them of his interest and fully discloses all of the facts pertinent to the transaction, within his knowledge, it would seem that the courts would be loath to relieve the corporation even though it had received the worst of the deal.

On this theory that officers must deal fairly with the corporation, directors have no right to take a note secured by mortgage, as a creditor of the company, when at the same time they are indebted to the company in a larger sum.⁸⁹ Three directors cannot pass a valid resolution acknowledging indebtedness to two of them and instructing the secretary to execute corporate notes therefor, where the basis of the alleged debt was a loan to the corporation which was to be repaid only out of the net proceeds from the sale of ore, and no such proceeds had been received, since such a ratification would be practically making a new contract which would be unfair.⁹⁰

In any event, if there is actual fraud, such as false representations on the part of the officer who is adversely interested, the transaction may be set aside by the corporation or it may defend its enforcement on that ground.⁹¹ Thus, if the corporation has relied upon an officer to aid it in conducting its business, as where a president of a bank has been in the habit of helping a bank to make loans, with knowledge that it relied on his advice, it may rescind a sale by him to it of negotiable paper where he misrepresented the credit of the names

⁸⁸ *Wing v. Dillingham*, 239 Fed. 54.

⁸⁹ *Schneider v. Johnson*, 161 Mo. App. 375, 143 S. W. 78.

⁹⁰ *Gold Glen Min. Co. v. Stimson*, 44 Colo. 406, 98 Pac. 727.

⁹¹ *Hicks v. Steel*, 126 Mich. 408, 85 N. W. 1121.

Where the president and treasurer of a mining company, who controlled nearly two-thirds of its stock, induced nonresident stockholders, one of whom was a director, not to oppose a purchase by the company from the president of a mining claim for more than double what it cost him, and what it was worth, by false representations as to its value and cost, and by stat-

ing that the purchase was necessary to protect the lateral rights of the company in its mine, and that, if they did not consent, the purchase would be made nevertheless; and the purchase was afterwards authorized at a directors' meeting attended by such officers, the secretary and another resident director, the president not voting, it was held that the purchase was a fraud upon the corporation, and should be set aside, although the two directors other than the president and treasurer were innocent of actual fraud. *Gerry v. Bismarck Bank*, 19 Mont. 191, 47 Pac. 810.

on the paper.⁹² So where the purpose of the sale of new stock by a vote of a majority of the directors was to wrest control of the corporation from a dissenting director and the majority of the stockholders, and to transfer control to the majority directors and the recipient of the stock, it was held that "such sale was a breach of the duty of the directors, and could confer no rights upon the beneficiary, who knew of and participated in the unlawful act and purpose."⁹³

However, it has been held that this rule as to dealings between a corporation and its officers, requiring them to be absolutely fair, does not apply to a transfer of a stock of goods to the corporation by an officer in payment for stock of the company, although the company has not received full value in money for the stock, where no rights of creditors are involved.⁹⁴

§ 2336. — Effect of insolvency of corporation. The right of directors and other corporate officers to deal with the corporation is considerably decreased when the corporation is insolvent,⁹⁵ especially in regard to taking security for debts owing by the corporation to the officer.⁹⁶ This question, as to dealings after the corporation becomes insolvent, is treated of in a subsequent volume in the chapter relating to insolvency.

§ 2337. — Presumptions and burden of proof. As hereafter stated, there is some diversity of opinion in the decisions as to whether transactions between a corporation and its officers, where the corporation is represented in the transaction by other officers, is voidable at the option of the corporation merely because of the relationship of the parties, or whether the transaction can be avoided only where unfair or entered into in bad faith.⁹⁷ The weight of authority is in favor of the latter rule, although if the officer represents both parties to the transaction it is almost universally held that it is voidable merely because of the relationship.⁹⁸ In this connection, however, the question to be considered is what are the presumptions and upon whom the burden of proof rests where the ground urged for setting aside the transaction is that it is unfair or entered into in bad faith. As

⁹² Hicks v. Steel, 126 Mich. 408, 85 N. W. 1121.

⁹³ Luther v. C. J. Luther Co., 118 Wis. 112, 99 Am. St. Rep. 977, 94 N. W. 69.

⁹⁴ Iowa Drug Co. v. Souers, 139 Iowa 72, 19 L. B. A. (N. S.) 115, 117 N. W. 300.

⁹⁵ Beach v. Miller, 130 Ill. 162, 17 Am. St. Rep. 291, 22 N. E. 464, rev'g 23 Ill. App. 151, explaining and limiting Harts v. Brown, 77 Ill. 226 and Merrick v. Peru Coal Co., 61 Ill. 472.

⁹⁶ *Infra*, chapter on Insolvency.

⁹⁷ See §§ 2346, 2347, *infra*.

⁹⁸ See § 2340, *infra*.

to this matter, the courts agree that while there is no presumption of unfairness or bad faith in the first instance,⁹⁹ unless the facts of the particular case are such as to naturally raise such a presumption, yet the burden of proving that the transaction was fair and in good faith is always upon the officer seeking to uphold it.¹ Thus, where an officer loaned money to his corporation, the court said that "the burden is imposed upon him to show by a preponderance of the evidence that he acted bona fide, and that the corporation got the benefit of his act to the extent charged. This rule of the law is not to prevent directors of a corporation from dealing with it, but to prevent them from claiming to have done so when they had not, as well as to prevent their overreaching the trust which they had essayed to protect."² Where, however, a director purchases corporate property from trustees whose selection the stockholders and creditors, and not the director, determined, the trustees being empowered to sell the property to pay the debts of the corporation, the burden rests upon one who attacks the purchase. The case stated does not come within the strict rule casting the burden upon a director purchasing property directly from the corporation.³

The presumption that a deed or mortgage is authorized by the stockholders where executed in the manner prescribed by statute and with the corporate seal attached does not apply but is rebutted when executed to officers of the corporation.⁴

⁹⁹ A transfer of negotiable paper held by a corporation, to a director, for an adequate consideration, is not prima facie invalid or fraudulent. *Beach v. McKinnon*, 148 Fed. 734.

¹ *California*. *Woodroof v. Howes*, 88 Cal. 184, 26 Pac. 111.

Louisiana. *Crescent City Brewing Co. v. Flanner*, 44 La. Ann. 22, 10 So. 384.

Minnesota. *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854.

Missouri. *Pitman v. Chicago Lead Co.*, 93 Mo. App. 592, 67 S. W. 946.

Montana. *Hanson Sheep Co. v. Farmers' & Traders' State Bank*, 53 Mont. 324, 163 Pac. 1151; *Coombs v. Barker*, 31 Mont. 526, 79 Pac. 1.

New Jersey. *Robotham v. Prudential Ins. Co.*, 64 N. J. Eq. 673, 53 Atl. 842; *Wilkinson v. Bauerle*, 41 N. J. Eq. 635, 7 Atl. 514.

New York. *Polhemus v. Polhemus*, 114 App. Div. 781, 100 N. Y. Supp. 263.

But see *MacNaughton v. Osgood*, 41 Hun (N. Y.) 109, holding rule otherwise where action brought by stockholder instead of corporation.

Where action is instituted by the corporation, the burden of proof rests on the officer to show the bona fide character of the transaction, where deemed material. *Coombs v. Barker*, 31 Mont. 526, 79 Pac. 1.

² *Star Mills v. Bailey*, 140 Ky. 194, 140 Am. St. Rep. 370, 130 S. W. 1077.

³ *Kessler & Co. v. Ensley Co.*, 141 Fed. 130, aff'd 148 Fed. 1019 (mem. dec.).

⁴ *Edwards v. Snow Hill Supply Co.*, 150 N. C. 171, 63 S. E. 742.

§ 2338. Dealings where officers adversely interested represent the corporation—General considerations. The law is well settled, so far as the governing rules are concerned, as to the effect of corporate transactions or contracts where the corporation is represented by an officer who is also the opposing party to the transaction or contract or whose interests in the particular transaction or contract are adverse to those of his corporation, as follows, viz.:

1. Such transactions or contracts are not void but merely voidable, except perhaps in a very few jurisdictions.⁵

2. The corporation may evade liability on, or set aside, the transaction or contract merely because of the dual relation of the corporate officer, without regard to its fairness or his good faith.⁶

3. The transaction or contract may be ratified by the corporation so as to preclude it attacking the deal on this ground,⁷ or the right to attack may be barred by the laches of the corporation.⁸

The difficulties encountered are these: (1) when and under what conditions may the corporation be said to be represented by the officer?;⁹ (2) when and under what conditions may a corporate officer be said to be adversely interested, within this rule?;¹⁰ (3) how far does the rule apply, if at all, where a corporation deals with another corporation, and the officers of the two corporations are wholly or in part identical?¹¹

§ 2339. — Dealings as invalid because two persons are necessary to a contract. One of the reasons for holding this class of transactions to be voidable is that a person cannot, as a director or other officer of a corporation, enter into a valid contract on behalf of the corporation with himself in his individual capacity, or be both vendor and purchaser, since two persons are a necessary element in the formation of a contract. The fact that he acts as an officer of the corporation on one side, and for himself on the other, can make no difference.¹² This rule, however, does not prevent an officer or agent of a corporation from executing a conveyance, lease or other contract

⁵ See § 2333, *supra*.

⁶ See § 2340, *infra*.

⁷ See § 2394 et seq., *infra*.

⁸ See §§ 2401, 2402, *infra*.

⁹ See §§ 2348-2356, *infra*.

¹⁰ See §§ 2357-2363, *infra*.

For instance, is an officer "interested," as the term is used herein, not only when he is the other party to the contract with whom the corpora-

tion, through him, deals, but also where he is indirectly interested, as for instance where he is a member of a firm contracting with the corporation, or a stockholder or officer in another company dealing with the corporation?

¹¹ See §§ 2376-2391, *infra*.

¹² *California*. *Pacific Vinegar & Pickle Works v. Smith*, 145 Cal. 352,

between himself individually and the corporation, both for himself and on behalf of the corporation, where he acts for the corporation under the immediate direction of a superior officer, since in such a case the latter is to be regarded as acting for the corporation.¹³

§ 2340. — Dealings as voidable because of fiduciary relation. If an officer of a corporation, either alone or with other officers, represents the corporation in making or authorizing a contract or other transaction, in which he is personally interested, either directly or indirectly, and his action or consent is necessary, the contract or transaction, even though it may not be void or voidable for want of two parties, comes within the well-settled rule that a trustee cannot become interested to the detriment of his cestui que trust, or an agent to the detriment of his principal.¹⁴ No principle in the law of corporations, therefore, is founded on sounder reasons, or more surely settled, than the principle that the directors, trustees or other officers of a corporation, who are intrusted with its interests, and occupy a fiduciary relation towards it, will not be allowed to contract with the

104 Am. St. Rep. 42, 78 Pac. 550; Wilbur v. Lynde, 49 Cal. 290, 19 Am. Rep. 645.

Massachusetts. Hill v. Marston, 178 Mass. 285, 59 N. E. 766.

Michigan. Miner v. Belle Isle Ice Co., 93 Mich. 97, 17 L. R. A. 412, 53 N. W. 218; People v. Township Board of Overyssel, 11 Mich. 222.

Texas. Tenison v. Patton, 95 Tex. 284, 67 S. W. 92.

Wisconsin. Haywood v. Lincoln Lumber Co., 64 Wis. 639, 59 Am. Rep. 466, note, 26 N. W. 184.

"It is a well-settled principle that the same person cannot be vendor and purchaser, because his contract lacks the necessary element of two parties." Per Campbell, J., in People v. Township Board of Overyssel, supra.

"Directors, officers and agents, and other like trustees, cannot mortgage or convey to themselves any more than one can contract with himself. The idea that the same persons constitute different identities of themselves by being called directors or officers of a corporation, so that, as directors or

officers, they can convey or mortgage to or contract with themselves as private persons, is in violation of common sense." Per Orton, J., in Haywood v. Lincoln Lumber Co., supra.

The president of a corporation may not execute a bill of sale of the corporate assets to himself and wife without authority from the directors. Hill v. Marston, 178 Mass. 285, 59 N. E. 766.

Where the president has been commissioned to sell treasury stock it is a violation of trust for him to charge the stock to himself and then retain the proceeds of the sales. Camden Land Co. v. Lewis, 101 Me. 78, 63 Atl. 523.

The cashier of a bank may not accept the note of a third person in favor of the bank in payment of his personal indebtedness to the bank. First Nat. Bank of Emmetsburg v. Gunhus, 133 Iowa 409, 9 L. R. A. (N. S.) 471, 110 N. W. 611.

¹³ See § 2356, infra.

¹⁴ Campbell, J., in People v. Township Board of Overyssel, 11 Mich. 222.

corporation, directly or indirectly, or to sell property to it, or purchase property from it, where they act both for the corporation and for themselves. In such a case, the transaction is, at the least, voidable at the option of the corporation;¹⁵ and it may be avoided and set

15 United States. Wardell v. Union Pac. R. Co., 103 U. S. 651, 26 L. Ed. 509; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328; Burnes v. Burnes, 132 Fed. 485, aff'd 137 Fed. 781; Hook v. Ayers, 80 Fed. 978; Davis v. Memphis City Ry. Co., 22 Fed. 883; Bill v. Western U. Tel. Co., 16 Fed. 14; Thomas v. Brownville, Ft. K. & P. Ry. Co., 2 Fed. 877, 109 U. S. 522, 27 L. Ed. 1018.

Alabama. O'Conner Min. & Mfg. Co. v. Coosa Furnace Co., 95 Ala. 614, 36 Am. St. Rep. 251, 10 So. 290; Memphis & C. R. Co. v. Woods, 88 Ala. 630, 7 L. R. A. 605, 16 Am. St. Rep. 81, 7 So. 108.

California. Western States Life Ins. Co. v. Lockwood, 166 Cal. 185, 135 Pac. 496; Sims v. Petaluma Gas Light Co., 131 Cal. 656, 63 Pac. 1011; Curtin v. Salmon River Hydraulic Gold Mining & Ditch Co., 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552; Porter v. Lassen County Land & Cattle Co., 127 Cal. 261, 59 Pac. 563; Smith v. Los Angeles Immigration & Land Co-operative Ass'n, 78 Cal. 289, 12 Am. St. Rep. 53, 20 Pac. 677; Davis v. Rock Creek Lumber, Flume & Mining Co., 55 Cal. 359, 36 Am. Rep. 40; Wilbur v. Lynde, 49 Cal. 290, 19 Am. Rep. 645; San Diego v. San Diego & L. A. R. Co., 44 Cal. 106.

Colorado. Morgan v. King, 27 Colo. 539, 63 Pac. 416.

Connecticut. Mallory v. Mallory Wheeler Co., 61 Conn. 131, 23 Atl. 708; Alford v. Miller, 32 Conn. 543.

Illinois. Higgins v. Lansingh, 154 Ill. 301, 40 N. E. 362; Chicago Hansom Cab Co. v. Yerkes, 141 Ill. 320, 33 Am. St. Rep. 315, 30 N. E. 667; Gilman, C. & S. R. Co. v. Kelly, 77 Ill.

426; Alling v. Wenzell, 27 Ill. App. 511.

Indiana. Port v. Russell, 36 Ind. 60, 10 Am. Rep. 5; Paine v. Lake Erie & L. R. Co., 31 Ind. 283.

Iowa. Stetson v. Northern Inv. Co., 104 Iowa 393, 73 N. W. 869.

Kansas. Sargent v. Kansas Midland R. Co., 48 Kan. 672, 29 Pac. 1063; Ryan v. Leavenworth, A. & N. W. Ry. Co., 21 Kan. 365.

Maine. European & N. A. Ry. Co. v. Poor, 59 Me. 277.

Maryland. Cumberland Coal & Iron Co. v. Parish, 42 Md. 598; Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co., 16 Md. 456, 77 Am. Dec. 311.

Massachusetts. Hill v. Marston, 59 N. E. 766; Greenfield Sav. Bank v. Simons, 133 Mass. 415; Parker v. Nickerson, 112 Mass. 195. Compare Union Pac. R. Co. v. Credit Mobilier of America, 135 Mass. 356. See also Old Dominion Copper Mining & Smelting Co. v. Bigelow, 188 Mass. 315, 108 Am. St. Rep. 479, 74 N. E. 653.

Michigan. German Corp. of Negaunee v. Negaunee German Aid Society, 172 Mich. 650, 138 N. W. 343; Miner v. Belle Isle Ice Co., 93 Mich. 97, 17 L. R. A. 412, 53 N. W. 218; Ten Eyck v. Pontiac, O. & P. A. R. Co., 74 Mich. 226, 3 L. R. A. 378, 16 Am. St. Rep. 633, 41 N. W. 905; Doyle v. Mizner, 42 Mich. 332, 3 N. W. 968; Gallery v. National Exch. Bank, 41 Mich. 169, 32 Am. Rep. 149, 2 N. W. 193; Flint & P. M. Ry. Co. v. Dewey, 14 Mich. 477; People v. Township Board of Overysel, 11 Mich. 222.

Minnesota. Jones v. Morrison, 31 Minn. 140, 16 N. W. 854.

Mississippi. Wildberger v. Hart-

aside, or affirmed and any profits recovered, without proof of actual

ford Fire Ins. Co., 72 Miss. 338, 28 L. R. A. 220, 48 Am. St. Rep. 558, 17 So. 282; Greenwood Ice & Coal Co. v. Georgia Home Ins. Co., 72 Miss. 46, 17 So. 83.

Missouri. Hill v. Rich Hill Coal Min. Co., 119 Mo. 9, 24 S. W. 223.

Nebraska. Leonhardt v. Citizens' Bank of Ulysses, 56 Neb. 38, 76 N. W. 452.

New Hampshire. Pearson v. Concord R. Corporation, 62 N. H. 537, 13 Am. St. Rep. 590.

New Jersey. Guild v. Parker, 43 N. J. L. 430; Stewart v. Lehigh Valley R. Co., 38 N. J. L. 505; Landis v. Sea Isle City Hotel Co., 53 N. J. Eq. 654, 33 Atl. 964; Gardner v. Butler, 30 N. J. Eq. 702; Redmond v. Dickerson, 9 N. J. Eq. 507, 59 Am. Dec. 418.

New York. Barr v. New York, L. E. & W. R. Co., 125 N. Y. 263, 26 N. E. 145; Munson v. Syracuse, G. & C. R. Co., 103 N. Y. 58, 8 N. E. 355; Coleman v. Second Ave. R. Co., 38 N. Y. 201; New York Cent. Ins. Co. v. National Protection Ins. Co., 14 N. Y. 85; Copeland v. Johnson Mfg. Co., 47 Hun 235; Flaum v. Kaiser Bros. Co., 66 Misc. 586, 122 N. Y. Supp. 100, aff'd 144 App. Div. 897, 129 N. Y. Supp. 1122; Cumberland Coal & Iron Co. v. Sherman, 30 Barb. 553; Spofford v. Texas Land Co., 50 How. Pr. 522.

Ohio. United States Rolling Stock Co. v. Atlantic & G. W. R. Co., 34 Ohio St. 450, 32 Am. Rep. 380; Goodin v. Cincinnati & W. Canal Co., 18 Ohio St. 169, 98 Am. Dec. 95.

Oklahoma. Barnes v. Lynch, 9 Okla. 11, 156, 59 Pac. 995.

Oregon. Stanley v. Luse, 36 Ore. 25, 58 Pac. 75; Jameson v. Coldwell, 25 Ore. 119, 35 Pac. 245.

Pennsylvania. Danville, H. & W. R. Co. v. Kase, 39 Atl. 301.

Texas. San Antonio St. Ry. Co. v.

Adams, 87 Tex. 125, 26 S. W. 1040; Green v. Hugo, 81 Tex. 452, 26 Am. St. Rep. 824, 17 S. W. 79; Tobin Canning Co. v. Fraser, 81 Tex. 407, 17 S. W. 25; Austin City R. Co. v. Swisher, 1 White & W. Civ. Cas. Ct. App. § 76.

Utah. Bear River Valley Orchard Co. v. Hanley, 15 Utah 506, 50 Pac. 611.

Vermont. Rutland Elec. Light Co. v. Bates, 68 Vt. 579, 54 Am. St. Rep. 904, 35 Atl. 480; Stark Bank v. United States Pottery Co., 34 Vt. 144.

West Virginia. Griffith v. Blackwater Boom & Lumber Co., 46 W. Va. 56, 33 S. E. 125; Sweeney v. Grape Sugar Refining Co., 30 W. Va. 443, 8 Am. St. Rep. 88, 4 S. E. 431.

Wisconsin. Haywood v. Lincoln Lumber Co., 64 Wis. 639, 26 N. W. 184; Cook v. Berlin Woolen Mill Co., 43 Wis. 433.

England. Albion Steel & Wire Co. v. Martin, 1 Ch. Div. 580; Aberdeen Ry. Co. v. Blaikie, 1 Macq. H. L. Cas. 461.

"The reason given by courts of equity for the rule that a trustee may not sell to himself the property of the cestui que trust is that the latter is entitled to the disinterested management and judgment of the trustee, in effecting a sale, and that his self-interest must not be allowed to intervene to conflict with and probably prejudice that of his constituent." Tension v. Patton, 95 Tex. 284, 67 S. W. 92.

"Contracts and transactions between individuals and corporations of which they are controlling directors or officers, which are unfair, in which the individuals secure any undue or unjust advantage, in which an antagonism between the interest of the individuals and the duty of the officials has resulted in the triumph of the former, are voidable at the option of the corporation or its creditors or

fraud, or of actual injury to the corporation.¹⁶ Generally, this rule is applied in case of directors but it is equally applicable to other officers.¹⁷

§ 2341. — Extent of interest as immaterial. The doctrine that a director or other officer of a corporation cannot be personally interested in a contract or other transaction in which he, alone or with other directors or officers, also represents the corporation, is not limited to cases in which he is alone interested in the contract or transaction, and, as a general rule, the extent of his interest is not material.¹⁸

§ 2342. — Fairness of contract or injury to corporation as immaterial. It is to be noted that the main, if not the only difference, between dealings with a corporation as dependent upon whether the officer adversely interested to the corporation acts also for the corporation in the transaction, or whether the corporation acts through other officers, is that in the former case the corporation may have the contract or other transaction set aside merely because of the relationship of the parties and without regard to whether the corporation has been injured, or the contract is fair or unfair, or the officer has acted in good faith or in bad faith,¹⁹ while in the latter class

stockholders." *Burnes v. Burnes*, 137 Fed. 781, 790, aff'g 132 Fed. 485.

Rule applied where agent was known to be promoting a corporation, and he made a sale to the corporation which did not know that he was an agent for the seller. *Hall v. Catherine Creek Development Co.*, 78 Ore. 585, L. R. A. 1916 A 996, 153 Pac. 97.

¹⁶ See § 2342, *infra*.

¹⁷ "The principle acted upon in these cases is a general principle of the law of agency, and applies to every agent of a corporation, whatever may be his position. Thus, a president, cashier, or managing agent, having authority to sign the name of the corporation to negotiable instruments, cannot execute a note or indorse a note to himself, or certify a check for his own benefit." 1 *Morawetz, Corporations*, § 517.

¹⁸ See §§ 2357-2363, *infra*.

¹⁹ *Pacific Vinegar & Pickle Works v. Smith*, 145 Cal. 352, 104 Am. St. Rep. 42, 78 Pac. 550; *Goodell v. Verdugo Canon Water Co.*, 138 Cal. 308, 71 Pac. 354; *Sims v. Petaluna Gas Light Co.*, 131 Cal. 656, 63 Pac. 1011, rev'g 62 Pac. 300, and following *Wickersham v. Crittenden*, 93 Cal. 17, 29, 28 Pac. 788; *Davis v. Rock Creek Co.*, 55 Cal. 359, 364, 36 Am. Rep. 40; *Higgins v. Lansingh*, 154 Ill. 301, 40 N. E. 362; *Bingham v. Bell & Zoller Coal Co.*, 175 Ill. App. 469, 476; *Hutchison v. Rock Hill Real Estate & Loan Co.*, 65 S. C. 45, 43 S. E. 295; *Nueces Valley Irr. Co. v. Davis* (Tex. Civ. App.), 116 S. W. 633, rev'd on other grounds 103 Tex. 243, 126 S. W. 4. To same effect, *Fricker v. Americus Manufacturing & Improvement Co.*, 124 Ga. 165, 52 S. E. 65.

Where one acts in a dual capacity, representing both sides, the act is al-

of cases the weight of authority holds that in order to set the contract or other transaction aside there must be proof of unfairness causing actual injury or of bad faith of the officer or officers.²⁰ "Actual injury is not the principle the law proceeds on" in holding such transactions liable to be set aside. "Fidelity in the agent is what is aimed at, and as a means of securing it, the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal."²¹ "The philosophy of this rule is quite apparent," says Justice Lorigan of the Supreme Court of California, "and its inflexibility is the strongest safeguard which the law can offer for the protection of the interests of the beneficiary. The great purpose of the law is to secure fidelity in the agent. When one undertakes to deal with himself in different capacities—individual and representative—there is a manifest hostility in the position he occupies. His duty calls upon him to act for the best interests of his principal; his self-interest prompts him to make the best bargain for himself. Humanity is so constituted that when these conflicting interests arise the temptation is usually too great to be overcome, and duty is sacrificed to interest. In order that this temptation may be avoided, or, if

ways voidable without further grounds, upon the grounds of public policy, without reference to the fairness or good faith of the transaction. *Shaw v. Crandon State Bank*, 145 Wis. 639, 129 N. W. 794.

"The right of a principal to refuse to be bound by a transaction in which the agent assuming to represent him has an adverse interest, is unconditional. It is immaterial whether the transaction was fair to the principal or not." 1 Morawetz, *Corporations*, § 522.

If the president of a corporation executes a corporate note and mortgage to secure his own debt, they are fraudulent. *Wharton v. Washington County State Bank*, — Tex. Civ. App. —, 153 S. W. 699.

This question is discussed by Commissioner Dibell in a late Minnesota case and he sums up the cases apparently forbidding such dealings by stating that "in none of these cases did the court refuse to examine the

transaction and determine its validity by finding whether it was fair and free of bad faith and of wrong and injury." *Minnesota Loan & Trust Co. v. Peteler Car Co.*, 132 Minn. 277, 156 N. W. 255. However, this case is out of line, and is correctly decided only if the giving of a mortgage by a majority of the directors to secure themselves is to be considered as not a case of individual officers dealing with themselves, or else is to be deemed as fixing a different rule where security is voted to officers than is applicable to other transactions.

²⁰ See § 2347, *infra*.

²¹ Manning, J., in *People v. Township Board of Overysel*, 11 Mich. 222.

"The two positions impose different obligations, and their union would at once raise a conflict between interest and duty; and, 'constituted as humanity is, in the majority of cases duty would be overborne in the struggle.'" *Wardell v. Union Pac. R. Co.*, 103 U. S. 651, 26 L. Ed. 509.

indulged in, must be at the peril of the trustee, it has been wisely provided that the trustee shall not be permitted to make or enforce any contract arising between himself as trustee and individually with reference to any matter of the trust, nor will the court enter into any examination of the honesty of the transaction."²² "The law," said Judge Andrews in a New York case, "permits no one to act in such inconsistent relations. It does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside the transaction or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case. It prevents frauds by making them as far as may be impossible, knowing that real motives often elude the most searching inquiry, and it leaves neither to judge nor jury the right to determine upon a consideration of its advantages or disadvantages, whether a contract made under such circumstances shall stand or fall."²³

So it has been held in New Jersey that "where directors contract with themselves, such contract is voidable at the option of a shareholder who promptly applies to the court; and that where work, services or material has been furnished under such contract the court will disregard its terms, and * * * the burden of showing what the work is worth, or what the materials and services are worth, is upon the contracting parties, and is not upon the complaining stockholder."²⁴ This general rule has been said to be "fully recognized and enforced by the courts of this country, but has not always been carried to quite the same extent as in England. Thus, in this and some other states it has been held not to prohibit purchases by mortgagees at their own public sales made under powers given in the mortgages."²⁵

To illustrate further: if a president of a company takes notes payable to the company and indorses them to himself as an officer of the corporation, no investigation as to the fairness or good faith of the

²² *Pacific Vinegar & Pickle Works v. Smith*, 145 Cal. 352, 104 Am. St. Rep. 42, 78 Pac. 550.

²³ *Munson v. Syracuse, G. & C. R. Co.*, 103 N. Y. 58, 8 N. E. 355. See also *Pearson v. Concord R. Corporation*, 62 N. H. 537, 13 Am. St. Rep. 590; *Sweeny v. Wheeling Grape Sugar Refining Co.*, 30 W. Va. 443, 8 Am. St. Rep. 88.

This rule is "the settled law of this state." *Brooklyn Heights R. Co. v. Brooklyn City R. Co.*, 151 N. Y. App. Div. 465, 135 N. Y. Supp. 990.

²⁴ *Booth v. Land Filling & Improvement Co.*, 68 N. J. Eq. 536, 59 Atl. 767.

²⁵ *Tenison v. Patton*, 95 Tex. 284, 67 S. W. 92, rev'g (Tex. Civ. App.), 64 S. W. 810.

transaction is permissible, where the corporation seeks to set the transfers aside.²⁶ Another familiar illustration of this rule is where a director votes himself a salary.²⁷ And this rule applies equally well where the vote of the interested director is necessary to constitute a quorum or to make a majority vote.²⁸

§ 2343. — Directors as to whom rule is applicable. This rule does not apply to a person who has been elected a director without his knowledge, and who has never accepted the office or acted as such.²⁹ But it applies to de facto directors, although their election may have been illegal or irregular, and to persons who have been elected and are acting as directors, although they may not be stockholders, or otherwise qualified for the office.³⁰ So it applies to a director, in office at the time his proposal to contract was made, who had ceased to be a director when the contract was executed.³¹

§ 2344. — Effect of ownership of all of stock by contracting directors. Directors who own all the stock of a corporation are not within the rule prohibiting persons in a fiduciary relation from contracting for their own advantage in the name of the beneficiaries.³²

§ 2345. Dealings between director or other officer and the corporation when it is represented by other directors or officers—General rules. In the case stated in the catch line, it is settled beyond controversy (1) that the transaction is not, at any event, void as distinguished from voidable,³³ and (2) that the transaction is always voidable where not fair and entered into in good faith by the officers of the corporation.³⁴

On the other hand, there is some conflict of opinion as to the effect of a contract or other transaction between a director or other officer of a corporation and the corporation, when it is represented by other officers, as to whether it may be avoided by the corporation solely upon the ground of the relationship of the parties. If the interested director takes part in making or authorizing the contract or other

²⁶ *Pacific Vinegar & Pickle Works v. Smith*, 145 Cal. 352, 104 Am. St. Rep. 42; 78 Pac. 550.

²⁷ *Infra*, chapter on Compensation of Officers.

²⁸ See §§ 2352, 2354, *infra*.

²⁹ *Rozeerans Gold Min. Co. v. Morey*, 111 Cal. 114, 43 Pac. 585.

³⁰ *Stetson v. Northern Inv. Co.*, 104 Iowa 393, 73 N. W. 869.

³¹ *Kessler & Co. v. Ensley Co.*, 141 Fed. 130, 162, *aff'd* 148 Fed. 1019 (mem. dec.).

³² *McCracken v. Robison*, 57 Fed. 375.

³³ See § 2333, *supra*.

³⁴ See § 2335, *supra*.

transaction, and his vote is necessary to bind the corporation, all of the courts agree that the transaction is, at least, voidable by the corporation, without regard to whether the deal is fair or unfair or whether the officer acted in good or in bad faith.³⁵ The reason for this rule, however, does not apply to the full extent when the interested director or officer does not take part at all in representing the corporation in the transaction, or where, although he may take part, there are enough votes by other directors to bind the corporation, without counting his vote. Transactions under these circumstances are generally held voidable only where unfair or entered into in bad faith,³⁶ although there is authority to the contrary.³⁷

In order properly to apply the one or the other conflicting rules, it is necessary to determine when and under what conditions the corporation may be said to be represented by other directors or officers so as to bring the case within the rule applicable where the transaction is with other officers instead of the rule where the officer represents both sides,³⁸ to ascertain the rule applicable where two corporations deal with each other and they have one or more common directors or other officers,³⁹ and to find out how far the rule where the officer deals with the corporation as an individual is applicable where his interest is merely that of a member of a firm or a stockholder of a corporation or the like.⁴⁰

Applications of these rules to purchases of property and other particular acts are to be found in subsequent sections.⁴¹

§ 2346. — Minority rule that transaction is voidable although fair and entered into in good faith. In view of the fact that it is the duty of individual directors, and other officers intrusted with the management of a corporation, to conduct its affairs to the best advantage, and to act solely in the interest of the corporation, it has been held in some jurisdictions that they will not be permitted to assume a position which will bring their private interests into competition or conflict with this duty. And it has been held, therefore, that a contract or other transaction between a corporation and one or more of its directors or other managing officers, or a contract or transaction in which they are otherwise personally interested, is always voidable at the option of the corporation, although it may have been fair and entered into in good faith. This doctrine has been applied where the

³⁵ See § 2342, *supra*.

³⁶ See § 2347, *infra*.

³⁷ See § 2346, *infra*.

³⁸ See §§ 2348-2356, *infra*.

³⁹ See §§ 2376-2392, *infra*.

⁴⁰ See §§ 2357-2363, *infra*.

⁴¹ See §§ 2364-2374, *infra*.

interested director or officer took part in the transaction on behalf of the corporation, although the corporation was also represented by other directors or officers, and his vote or consent was not necessary; and it has also been applied where he took no part on behalf of the corporation, but was at the time, by reason of his official position, under a duty to look out for the interests of the corporation.⁴³ This is the rule laid down in an early case in England⁴³ and which prevails in a very few of the states in this country. In some cases often cited in support of this rule, however, and where the rule is laid down flatly that the fairness and justness of the agreement is immaterial, it appears that the contract was made by directors all or a majority of whom were common to both corporations, in which case the same officers represent both contracting parties within the rule governing in such cases as already stated.⁴⁴

New Jersey adheres to this rule which was adopted in an early case.⁴⁵ In that state the rule uniformly maintained is that these contracts are not absolutely void, "but voidable at the option of the corporation or its representative, provided the option is exercised within a reasonable time under all the circumstances of the case. * * * Except for the power of ratification which this rule reserves to the stockholders of a corporation, * * * it may be said to be essentially the same as the rule which holds such contracts absolutely void, for as against the will of the corporation, exercised within a reasonable time, such engagements are given no contractual force, however open, fair and honest they may be."⁴⁶ Thus it is said that "the rule that directors cannot lawfully enter into a contract in the

⁴³ *Morgan v. King*, 27 Colo. 539, 63 Pac. 416; *Mosher v. Sinnott*, 20 Colo. App. 454, 79 Pac. 742, reviewing Colorado decisions at length; *Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456, 77 Am. Dec. 311; *Pearson v. Concord R. Corporation*, 62 N. H. 537, 13 Am. St. Rep. 590; *Stewart v. Lehigh Valley R. Co.*, 38 N. J. L. 505, 522; *Purchase v. Atlantic Safe Deposit & Trust Co.*, 81 N. J. Eq. 344, 87 Atl. 444; *Mitchell v. United Box Board & Paper Co.*, 72 N. J. Eq. 580, 66 Atl. 938. But see *St. Joe & M. F. Consol. Min. Co. v. First Nat. Bank*, 10 Colo. App. 339, 50 Pac. 1055.

⁴⁴ *Aberdeen Ry. Co. v. Blaikie*, 1

Macq. H. L. Cas. 461. But see *In re Pyle Works*, [1891] 1 Ch. 173.

⁴⁵ See § 2338 et seq., supra.

As illustrating this class of decisions which are decided right but where the rule is stated so broad as to conflict with the weight of authority, see *Pearson v. Concord R. Corporation*, 62 N. H. 537, 13 Am. St. Rep. 590.

⁴⁶ *Stewart v. Lehigh Valley R. Co.*, 38 N. J. L. 505, 522. But see *Stratton v. Allen*, 16 N. J. Eq. 229.

⁴⁷ *Purchase v. Atlantic Safe Deposit & Trust Co.*, 81 N. J. Eq. 344, 87 Atl. 444, aff'd without opinion 83 N. J. Eq. 353, 91 Atl. 1070.

This question is reviewed and the

benefit of which even one of their number participates without the knowledge and consent of the stockholders is so firmly entrenched in our jurisprudence that it is not open to debate."⁴⁷ But it is held in New Jersey that a single stockholder cannot sue to set aside a sale or other contract between the corporation and an officer thereof, since the option to affirm or disaffirm such contracts rests in the stockholders as a body.⁴⁸

In New York, there is some early authority in support of this minority rule.⁴⁹ But a later decision of the Court of Appeals of New York, sometimes cited as upholding this minority rule, is not entitled, when properly construed, to be so considered. In that case there was a contract between a number of persons and a railroad company, and one of such persons was also a director of the railroad company, and took part in the resolution of the directors making the contract, although the nine other directors voted for the resolution. "The law," said the court, "permits no one to act in such inconsistent relations. It does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside the transaction or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case. It prevents frauds by making them as far as may be impossible, knowing that real motives often elude the most searching inquiry, and it leaves neither to judge nor jury the right to determine upon a consideration of its advantages or disadvantages, whether a contract made under such circumstances shall stand or fall. It can make no difference in the application of the rule in this case that Munson's associates were not themselves disabled from contracting with the corporation, or that Munson was only one of ten directors who voted in favor of the contract. The contract on its face,

law in New Jersey, with the limitations on the power of the corporation to avoid such contracts, is clearly stated in *Stephany v. Marsden*, 75 N. J. Eq. 90, 71 Atl. 598.

"It must be regarded as the settled policy of the law of this state that express contracts between a corporation and one of its directors are voidable at the instance of the corporation." *Voorhees v. Nixon*, 72 N. J. Eq. 791, 66 Atl. 192.

⁴⁷ *United States Steel Corporation*

v. Hodge, 64 N. J. Eq. 807, 60 L. R. A. 742, 54 Atl. 1.

⁴⁸ *Endicott v. Marvel*, 81 N. J. Eq. 378, 87 Atl. 230. But see *Mitchell v. United Box Board & Paper Co.*, 72 N. J. Eq. 580, 66 Atl. 938.

⁴⁹ *Hoyle v. Plattsburgh & M. R. Co.*, 54 N. Y. 314, 329, 13 Am. Rep. 595, which, however, related to a purchase at an execution sale; *Cumberland Coal & Iron Co. v. Sherman*, 30 Barb. (N. Y.) 553.

notified Munson's associates of his relation to the corporation, and that the contract was subject to be defeated on that ground, and on the other hand a corporation in order to defeat a contract entered into by directors, in which one or more of them had a private interest, is not bound to show that the influence of the director or directors having the private interest, determined the action of the board. The law cannot accurately measure the influence of a trustee with his associates, nor will it enter into the inquiry, in an action by the trustee in his private capacity, to enforce the contract in the making of which he participated. The value of the rule of equity, to which we have adverted, lies to a great extent in its stubbornness and inflexibility. Its rigidity gives it one of its chief uses as a preventive or discouraging influence, because it weakens the temptation to dishonesty or unfair dealing on the part of trustees, by vitiating, without attempt at discrimination, all transactions in which they assume the dual character of principal and representative."⁵⁰ In this case, it is submitted that notwithstanding the forcible language used, the court did not intend to decide that all transactions between corporations and interested officers are voidable merely because of the relationship of the parties even where the corporation is represented by other disinterested officers; but that what was really decided was that the corporation cannot be said to be represented by disinterested officers where one of the directors is adversely interested, although his vote was not necessary to bind the transaction because there was a majority vote without counting his vote, although in so holding the court decided against the great weight of authority as hereinafter noticed.⁵¹ In later decisions, lower courts of New York have recognized the majority rule as being the true rule.⁵² In a New York decision of the Supreme Court, it was held by Justice Gaynor that while a contract of sale by a director to the corporation was voidable merely because of the relationship of the parties, yet the directors were under no duty to avoid the purchase for the corporation unless it was fraudulent or wasteful, and hence a stockholder could not set it aside without proving that it was fraudulent or wasteful, since a stockholder has only a secondary right to interfere.⁵³

§ 2347. — Majority rule that contract or transaction is valid if fair and in good faith. The great weight of authority is that in case

⁵⁰ Judge Andrews, in *Munson v. 66 Hun (N. Y.) 75, 20 N. Y. Supp. Syracuse, G. & C. R. Co., 103 N. Y. 788; Burden v. Burden Iron Co., 39 58, 8 N. E. 355. N. Y. Misc. 559, 80 N. Y. Supp. 390.*

⁵¹ See § 2351, *infra*.

⁵² *Polhemus v. Polhemus, 43 N. Y.*

⁵³ *Beers v. New York Life Ins. Co., Misc. 141, 88 N. Y. Supp. 273.*

of dealings between an interested director or other officer with his corporation, where the corporation is represented by other officers,⁵⁴ the transaction is valid and cannot be set aside merely because of the relationship of the parties, where the transaction is not unfair to the corporation and the officers have acted in good faith.⁵⁵ When a per-

⁵⁴ When corporation can be said to be represented by other officers, see §§ 2348-2356, *infra*.

⁵⁵ **United States.** *McKittrick v. Arkansas Cent. Ry. Co.*, 152 U. S. 473, 38 L. Ed. 518; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328; *Kessler & Co. v. Ensley Co.*, 141 Fed. 130, 162, *aff'd* 148 Fed. 1019 (mem. dec.); *Union Trust Co. of Maryland v. Carter*, 139 Fed. 717, 731; *Wyman v. Bowman*, 127 Fed. 257; *Ryan v. Williams*, 100 Fed. 172; *Barr v. Pittsburgh Plate-Glass Co.*, 57 Fed. 86; *Bradly v. Marine & R. P. Min. & Mfg. Co.*, 3 Hughes 26, Fed. Cas. No. 1,789, 105 U. S. 175, 26 L. Ed. 1034.

Arizona. *Zeckendorf v. Steinfeld*, 12 Ariz. 245, 100 Pac. 784.

California. *Schnittger v. Old Home Consol. Min. Co.*, 144 Cal. 603, 607, 78 Pac. 9; *Copsey v. Sacramento Bank*, 133 Cal. 659, 85 Am. St. Rep. 238, 66 Pac. 7, 204; *California & A. Land Co. v. Cuddeback*, 27 Cal. App. 450, 150 Pac. 379; *Ætna Indemnity Co. v. Altadena Min. & Inv. Co.*, 11 Cal. App. 26, 165, 104 Pac. 470.

Connecticut. *Hopson v. Aetna Axle & Spring Co.*, 50 Conn. 597; *Smith v. Skeary*, 47 Conn. 47.

Georgia. *Griffin v. Inman*, 57 Ga. 370.

Illinois. *Illinois Steel Co. v. O'Donnell*, 156 Ill. 624, 31 L. R. A. 265, 47 Am. St. Rep. 245, 41 N. E. 185; *Louisville, N. A. & C. Ry. Co. v. Carson*, 151 Ill. 444, 38 N. E. 140; *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655, 25 Am. St. Rep. 401, 26 N. E. 640; *Roseboom v. Whittaker*, 132 Ill. 81, 23 N. E. 339; *Beach v. Miller*, 130 Ill. 162, 17 Am. St. Rep. 291, 22 N. E. 464,

rev'g 23 Ill. App. 151; *Harts v. Brown*, 77 Ill. 226; *Merrick v. Peru Coal Co.*, 61 Ill. 472; *Hudlum v. Blakeslee*, 70 Ill. App. 664; *Matson v. Alley*, 41 Ill. App. 72, *aff'd* 141 Ill. 284, 31 N. E. 419.

Indiana. *Wainwright v. P. H. & F. M. Roots Co.*, 176 Ind. 682, 97 N. E. 8, reviewing question at some length; *First Nat. Bank of Crawfordsville v. Dovetail Body & Gear Co.*, 143 Ind. 550, 52 Am. St. Rep. 435, 40 N. E. 810; *Hill v. Nisbet*, 100 Ind. 341; *Ward v. Polk*, 70 Ind. 309. *Contra*, see *Port v. Russell*, 36 Ind. 60, 10 Am. Rep. 5.

Iowa. *Hitt v. Sterling-Goold Mfg. Co.*, 111 Iowa 458, 82 N. W. 919; *Stetson v. Northern Inv. Co.*, 104 Iowa 393, 73 N. W. 869; *Garrett v. Burlington Plow Co.*, 70 Iowa 697, 59 Am. Rep. 461, 29 N. W. 395; *Hallam v. Indianola Hotel Co.*, 56 Iowa 178, 9 N. W. 111; *Buell v. Buckingham*, 16 Iowa 284, 85 Am. Dec. 516.

Kentucky. *Blake v. Ray*, 110 Ky. 705, 62 S. W. 531.

Maine. *Vermeule v. Hover*, 113 Me. 74, 93 Atl. 37.

Maryland. *Urner v. Sollenberger*, 89 Md. 316, 43 Atl. 810.

Massachusetts. *Ft. Payne Rolling Mill v. Hill*, 174 Mass. 224, 54 N. E. 532; *Saltmarsh v. Spaulding*, 147 Mass. 224, 17 N. E. 316; *Holt v. Bennett*, 146 Mass. 437, 16 N. E. 5; *Parker v. Nickerson*, 137 Mass. 487.

Michigan. *Reynick v. Allington & Curtis Mfg. Co.*, 179 Mich. 630, 146 N. W. 252; *Barnes v. Spencer & Barnes Co.*, 162 Mich. 509, 139 Am. St. Rep. 587, 127 N. W. 752; *Ten Eyck v. Pontiac, O. & P. A. R.*

sonal interest of a director "springs up, adverse to that of the corporation," says Justice Williams in a well-considered decision of the Texas Supreme Court, "it disqualifies him to act concerning it as one of the representatives or agents. But the others do not lose their representative capacity, and still have power to bind the company. The disqualified director cannot deal with them as a stranger, because the position of confidence which he has held has enabled him to gather an intimate knowledge of the affairs of the corporation, and to exercise influence upon those associated with him in their management. But the company is represented by those who alone can act for it, and, if they are disinterested, he can, we think, deal with them as any other trustee can deal with his cestui que trust, if he makes a full disclosure of all facts known to him about the subject, takes no advantage of his position, deals honestly and openly, and concludes a contract fair and

Co., 74 Mich. 226, 3 L. R. A. 378, 16 Am. St. Rep. 633, 41 N. W. 905.

Minnesota. Minnesota Loan & Trust Co. v. Peteler Car Co., 132 Minn. 277, 156 N. W. 255; Savage v. Madelia Farmers' Warehouse Co., 98 Minn. 343, 108 N. W. 296.

Mississippi. Millsaps v. Chapman, 76 Miss. 942, 71 Am. St. Rep. 547, 26 So. 369.

Missouri. Schufeldt v. Smith, 131 Mo. 280, 29 L. R. A. 830, 52 Am. St. Rep. 628, 31 S. W. 1039; Hill v. Gould, 129 Mo. 106, 30 S. W. 181.

Montana. See O'Bourke v. Grand Opera House Co., 47 Mont. 459, 183 Pac. 965, presentation of claim of director to board where claimant does not vote.

Nebraska. Gordor v. Plattsmouth Canning Co., 36 Neb. 548, 54 N. W. 830.

Ohio. Merchants' Nat. Bank of Cincinnati v. Pomeroy Flour Co., 41 Ohio St. 552; United States Rolling Stock Co. v. Atlantic & G. W. R. Co., 34 Ohio St. 450, 32 Am. Rep. 380; Browne v. United States Board & Paper Co., 20 Ohio Cir. Ct. 351, 11 Ohio Cir. Dec. 102.

Oregon. Jones v. Hale, 32 Ore. 465, 52 Pac. 311.

Pennsylvania. Cowan v. Pennsylvania Plate Glass Co., 184 Pa. St. 1, 38 Atl. 1075; Neal's Appeal, 129 Pa. St. 64, 18 Atl. 564.

South Dakota. Troy Min. Co. v. White, 10 S. D. 475, 42 L. R. A. 549, 74 N. W. 236.

Tennessee. In re New Memphis Gaslight Co. Cases, 105 Tenn. 268, 80 Am. St. Rep. 880, 60 S. W. 206.

Texas. Tenison v. Patton, 95 Tex. 284, 67 S. W. 92, rev'g on other grounds (Tex. Civ. App.), 64 S. W. 810; City Nat. Bank v. Merchants' & Planters' Nat. Bank (Tex. Civ. App.), 105 S. W. 338.

Utah. Singer v. Salt Lake City Copper Mfg. Co., 17 Utah 143, 70 Am. St. Rep. 773, 53 Pac. 1024; Leavitt v. Oxford & G. Silver Min. Co., 3 Utah 265, 1 Pac. 356.

Washington. Roy & Co. v. Scott, Hartley & Co., 11 Wash. 399, 39 Pac. 679; Budd v. Walla Walla Prtg. & Pub. Co., 2 Wash. T. 347, 7 Pac. 896.

West Virginia. Griffith v. Blackwater Boom & Lumber Co., 55 W. Va. 604, 69 L. R. A. 124, 48 S. E. 442. But see, same case, 46 W. Va. 56, 33 S. E. 125.

Wisconsin. Figge v. Bergenthal, 130 Wis. 594, 110 N. W. 798, 109 N.

beneficial to the company. * * * Such a transaction is always to be subjected to the closest examination, and a contract between those so situated which is prejudicial to the corporation should be held to be a fraud upon it; but it by no means follows from this, we think, that they can make no contract at all which is binding on the company and stockholders. The true interests of all may be best promoted in this way. * * * We are therefore of the opinion that, situated as was this corporation, the mere fact that Tenison was a director of the corporation and was interested on both sides of the transaction in question, does not conclusively establish its voidability. That, at the worst, it was only voidable, nearly all of the authorities agree; the principal difference being upon the question whether or not it was voidable at the mere option of beneficiaries, without inquiry into its inherent fairness."⁵⁶ In a leading case in

W. 581; Pratt v. Oshkosh Match Co., 89 Wis. 406, 62 N. W. 84; Wausau Boom Co. v. Plumer, 35 Wis. 274.

"It is not the law that an officer of a corporation cannot deal with the corporation if his acts are open and fair and known to the directors and stockholders." Barnes v. Spencer & Barnes Co., 162 Mich. 509, 139 Am. St. Rep. 587, 127 N. W. 752, 17 Det. L. N. 717.

"Most of the courts have held that a director or other officer of a corporation is not precluded from lending it money and taking a mortgage or other security, selling it property, or purchasing property from it, or otherwise contracting or dealing with it, if for the purpose of the transaction he does not represent the corporation at all, but it is adequately represented by its other directors or officers, and the transaction is entirely free from fraud. And by the weight of authority, a transaction between a director or other officer and the corporation, or a transaction in which a director or other officer is interested, is valid, if entirely free from fraud, even when he has acted as a member of the board in authorizing the same, if there were enough of disinterested votes in favor of the transaction to render his vote

unnecessary." 3 Clark & Marshall, Private Corporations, p. 2304.

Rule was applied to hiring of a director as branch manager. Wainwright v. P. H. & F. M. Roots Co., 176 Ind. 682, 97 N. E. 8.

A director may contract to perform services for which he is to be paid. Henry v. Michigan Sanitarium & Benevolent Ass'n, 147 Mich. 142, 110 N. W. 523, 13 Det. L. N. 989.

In Texas, this question is discussed pro and con at some length by Justice Williams in an able opinion showing the difference between cases where the officer represents the corporation and where other officers represent it. It was held that a sale made at a director's meeting at which the interested director did not vote, where he disclosed to the board all facts within his knowledge affecting the advisability of making it, and where it was fair and for an adequate consideration, and was beneficial to the corporation, was not subject to attack. Tenison v. Patton, 95 Tex. 284, 67 S. W. 92, rev'g (Tex. Civ. App.), 64 S. W. 810. But see Canadian Country Club v. Johnson, — Tex. Civ. App. —, 176 S. W. 835.

⁵⁶ Tenison v. Patton, 95 Tex. 284, 67 S. W. 92.

the Supreme Court of the United States, where a director had loaned money to the corporation, and taken a mortgage as security, it was said by Mr. Justice Miller: "While it is true that the defendant, as a director of the corporation, was bound by all those rules of conscientious fairness which courts of equity have imposed as the guides for dealing in such cases, it cannot be maintained that any rule forbids one director among several from loaning money to the corporation when the money is needed, and the transaction is open, and otherwise free from blame. No adjudged case has gone so far as this. Such a doctrine, while it would afford little protection to the corporation against actual fraud or oppression, would deprive it of the aid of those most interested in giving aid judiciously, and best qualified to judge of the necessity of that aid, and of the extent to which it may safely be given."⁵⁷

The mere fact that officers dealing with the corporation do not disclose that they have a personal interest in the transaction is not alone ground for avoidance thereof.⁵⁸

An agreement between the secretary of a corporation and its board of directors, he not being a director, is not an agreement with himself, but comes within this rule.⁵⁹ And a secretary of a corporation may procure oil leases from third persons and exchange them with the corporation for corporate stock, if there is no fraud nor concealment of facts.⁶⁰ If a contract is made between a single director and his corporation, then the corporation is ordinarily represented by other officers unless the director is, in addition, some other officer of the company or is an agent of the company.

This rule has been applied where one who was both president, director and general manager of a corporation, secured the exclusive state license for a patented machine after the board of directors had refused to use it, and then obtained a lease from his corporation of that part of its plant wherein such machine would be used and also a contract to furnish all the barrels made by such machine which were required in the corporate business, at a fixed price, where the contract price was less than the average cost of the barrels before, and everything was fair and above board.⁶¹

The effect of conveyances, mortgages, etc., between a corporation

⁵⁷ *Twin-Lick Oil Co. v. Marbury*,
91 U. S. 587, 23 L. Ed. 328.

⁶⁰ *Garretson v. Pacific Crude Oil Co.*, 146 Cal. 184, 79 Pac. 838.

⁵⁸ *Schnittger v. Old Home Consol. Min. Co.*, 144 Cal. 603, 78 Pac. 9.

⁶¹ *Cowell v. McMillin*, 177 Fed. 25.

⁵⁹ *Hitt v. Sterling-Goold Mfg. Co.*,
111 Iowa 458, 82 N. W. 919.

and its officers as against creditors of the corporation is considered in a subsequent chapter.⁶²

§ 2348. Under what circumstances officer may be said to represent corporation—General considerations. As already stated, certain rules of law apply where (1) a director or other corporate officer represents the corporation as one party to a transaction or contract and also is, or represents, or is interested in, the other party to the contract;⁶³ and other rules, different in some respects, apply where (2) a director or other corporate officer is the other party, or represents him or it, or is interested in such other party, in a transaction with his corporation, but the corporation is represented by other disinterested officers so that it is really a case of a quasi trustee dealing with his cestui que trust rather than a case of a quasi trustee or agent dealing with himself or representing his principal or cestui que trust in a transaction in which he has an adverse interest.⁶⁴ It now becomes necessary to consider under what conditions a director or other corporate officer may be said to represent his corporation so as to make the transaction come within the rules governing the first class of cases, and when he may be said to not represent his corporation so that the transaction comes within the rules governing the second class of cases. The courts have sometimes disregarded this distinction or else merely alluded thereto incidentally, but nevertheless it is the dividing line, according to the better considered decisions, as already stated, although some of the governing rules are equally applicable to both classes of cases.⁶⁵

The question now under consideration has been the subject of some conflict of opinion as hereinafter noticed, but for the most part is settled beyond controversy. The ways in which it arises is indicated in the next following sections.

If a director, or several directors less than a majority, are adversely interested in a corporate transaction, but they do not act with the other directors in any way as the representatives of the corporation in connection with the particular transaction, then it is submitted that the law governing dealings between a corporation represented by other officers, and an interested officer, applies, rather than the law applicable where the officer represents both sides to the transaction. And it is held in Missouri that the fact that an interested director was present at the meeting of the directors does not render the trans-

⁶² *Infra*, chapter on Insolvency.

⁶³ See §§ 2338-2344, *supra*.

⁶⁴ See §§ 2345-2347, *supra*.

⁶⁵ See §§ 2332-2337, *supra*.

actions voidable where he does not vote, but that the proceedings will be given the same effect as if he had been absent.⁶⁶

§ 2349. — Where interested officer presides at meeting of directors. It has been held in New York that the corporation was not represented by disinterested officers where its president, who was ex officio director, presided at the directors' meeting, put the question as to the making of the contract with himself, superintended the vote upon the resolution, and announced the result.⁶⁷ The soundness of this decision, however, is questionable.

§ 2350. — Where interested director is present at meeting, but it does not appear whether he voted or not. Where a deal is on between a corporation and another, and one or more of the directors are interested on the other side of the deal, it sometimes happens that it appears that the interested director or directors were present at the directors' meeting when the deal was considered and voted upon, but it does not appear whether or not he or they voted. In such a case, it would seem that if the fact of his or their voting would render the transaction voidable merely because of relationship, it should be presumed that he or they did not vote, and that his or their vote was not necessary to the passage of the resolution, so that the transaction cannot be avoided except for cause other than the mere relationship of the parties. In West Virginia, a statute provided that no member of the board of directors shall vote on a question in which he is interested otherwise than as a stockholder "or be present at the board while the same is being considered"; and it would seem that if a director was present at the meeting while a deal in which he was interested is being discussed or voted upon, in violation of the statute, the deal ought to be held voidable without reference to its fairness or the good faith of the directors.⁶⁸

§ 2351. — Where interested director votes in favor of contract but there is a majority without his vote. It has been held that the

⁶⁶ *Hax v. R. T. Davis Mill Co.*, 39 Mo. App. 453, 460.

⁶⁷ *Beers v. New York Life Ins. Co.*, 66 Hun (N. Y.) 75, 20 N. Y. Supp. 788. See also *Ashley v. Kinnan*, 18 N. Y. St. Rep. 791, 2 N. Y. Supp. 574.

⁶⁸ "Woodyard was present, and presumably took part in this action, and

we may say voted for it; and we may say his vote might have been essential to its passage. It does not appear to the contrary, and this renders that action prima facie fraudulent and void." *Ravenswood, S. & G. Ry. Co. v. Woodyard*, 46 W. Va. 558, 33 S. E. 285.

fact that interested directors vote in favor of a contract between the corporation and themselves personally does not vitiate it where there was a majority vote in favor thereof without counting the votes of such interested directors.⁶⁹ In other words, in such a case, the rule applying to transactions between the corporation on the one side represented by disinterested officers, with interested officers as the other party to the contract, is applicable. For instance, it is held that a director's vote for his own salary does not make the resolution voidable, where otherwise fair and in good faith, if the result would have been the same if he had not voted.⁷⁰ In discussing this question, it has been said that "as the interested director's vote was not necessary to the passage of the resolution, the argument is plausible that the contract should be regarded as made between the director, or trustee, on the one side, and the corporation, or cestui que trust, represented by the other directors, on the other; and that consequently the contract, being governed by the second of the two broad principles above stated, should be enforceable against the company if the interested director sustains the burden of proving affirmatively that he acted with the utmost good faith and that the contract was entirely fair to the company. An answer to this argument is, however, that the influence of the interested director is not measured by his vote alone, but that his participation in the meeting, his arguments, and the weight of his judgment may have prevailed mightily with his colleagues, so that in substance he should be deemed to have made the

⁶⁹ *Schnittger v. Old Home Consol. Min. Co.*, 144 Cal. 603, 78 Pac. 9; *Porter v. Lassen County Land & Cattle Co.*, 127 Cal. 261, 59 Pac. 563; *Leavitt v. Oxford & Geneva Silver Mining Co.*, 3 Utah 265, 273, 1 Pac. 356. To same effect, *Tenison v. Patton*, 95 Tex. 284, 67 S. W. 92.

See also, generally, § 1889, vol. 3.

In Washington, in one case, it appeared, although not clearly stated, that there was a majority of directors not counting the interested director. The court said: "Giving his vote was a formal, but not a substantial, participation in the doings of the board. On the business in hand, he had no power to pass; and, therefore, his seeming exercise of power cannot be considered as real or effective. Doubt-

less, in the absence of a statute to the contrary, the corporation could contract with him, for its interest might lie that way. Admitting this, it would seem to follow that he could treat with the corporation through its proper business functionaries, the trustees other than himself, doing it in a fair and openhanded manner; and he could appear before them in his own interest, and in good faith press them to comply with his desires or necessities." *Budd v. Walla Walla Prtg. & Pub. Co.*, 2 Wash. T. 347, 7 Pac. 896.

⁷⁰ *Clark v. American Coal Co.*, 86 Iowa 436, 17 L. R. A. 557, 53 N. W. 291. See also *infra*, chapter on Compensation of Officers.

contract, in part at least, on behalf of the company as well as on his own behalf. According to this view, the contract would be voidable even though the utmost good faith were proved."⁷¹

The leading case in this country on the other side of this question was decided by the Court of Appeals of New York in 1886. In that case a director dealt with his corporation but it was expressly stated that there was no unfairness or bad faith connected therewith. The director was one of ten directors (and it may be assumed that there were no other directors or that nine constituted a majority) and all voted in favor of the contract. Justice Andrews, in deciding that the transaction was voidable merely because of the relationship of the parties, said: "The contract on its face notified Munson's associates of his relation to the corporation, and that the contract was subject to be defeated on that ground; and, on the other hand, a corporation, in order to defeat a contract entered into by directors, in which one or more of them had a private interest, is not bound to show that the influence of the director or directors having the private interest determined the action of the board. The law cannot accurately measure the influence of a trustee with his associates, nor will it enter into the inquiry in an action by the trustee in his private capacity to enforce the contract, in the making of which he participated. The value of the rule of equity to which we have adverted, lies, to a great extent, in its stubbornness and inflexibility."⁷²

It is also held in New York that the effect of such rule cannot be obviated by an agreement between the directors that several resolutions should be proposed—one in favor of each director—and that each of the directors should vote for the resolution in favor of the director interested who should not vote.⁷³

The application of this rule is most often found in connection with the voting of salaries to directors or other officers by the board of directors.⁷⁴

§ 2352. — Where vote of interested officer necessary to make up a majority vote. It has already been stated in a preceding volume that the vote of an interested director cannot be counted to make up

⁷¹ *Machen, Corporations*, § 1566.

⁷² *Munson v. Syracuse, G. & C. R. Co.*, 103 N. Y. 58, 8 N. E. 355, citing in support of this rule *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 252, and *Aberdeen R. Co. v. Blaikie*, 1 Macq. H. L. 461. See also *Lowndes v. Gar-*

nett Gold Min. Co., 33 L. J. Ch. 418.

⁷³ *McNab v. McNab & Harlin Mfg. Co.*, 62 Hun (N. Y.) 18, 24, 16 N. Y. Supp. 448.

⁷⁴ *Infra*, chapter on Compensation of Officers.

a majority vote necessary to pass a resolution of the board of directors.⁷⁵

In such a case, where a director is the other party to a transaction with his corporation, or is the agent of the other party, or is personally interested in the other party, and he votes in favor of the transaction as a director of his corporation, and his vote is necessary to make up a majority necessary to pass the resolution, there is no question but that the transaction is included in the class where the officer deals with himself and represents both sides of the transaction,⁷⁶ and hence is voidable at the option of the corporation merely because of the relationship of the parties, without any other ground and regardless of the fairness or good faith of the transaction. Thus, if one director necessary to make up a majority vote of the board to authorize a lease is interested in the lessee corporation, the lease is voidable.⁷⁷ So it has been held that the acceptance of a deed to the corporation from a director is not binding on the corporation where there were seven directors but the acceptance was by only four, one of whom was the grantor in the deed.⁷⁸

This rule is often applied in connection with the vote of a director

⁷⁵ See § 1889, vol. 3.

⁷⁶ **United States.** Hardee v. Sunset Oil Co., 56 Fed. 51; Bill v. Western U. Tel. Co., 16 Fed. 14; Sellers v. Phoenix Iron Co., 13 Fed. 20.

Arizona. Martin v. Santa Cruz Water Storage Co., 4 Ariz. 171, 36 Pac. 36.

California. Wickersham v. Crittenden, 106 Cal. 327, 39 Pac. 602; Graves v. Mono Lake Hydraulic Min. Co., 81 Cal. 303, 320, 22 Pac. 665; Lowe v. Los Angeles Suburban Gas Co., 24 Cal. App. 367, 141 Pac. 399.

Colorado. Burns v. National Mining Tunnel & Land Co., 23 Colo. App. 545, 130 Pac. 1037.

Michigan. Miner v. Belle Isle Ice Co., 93 Mich. 97, 17 L. R. A. 412, 53 N. W. 218.

Minnesota. Jones v. Morrison, 31 Minn. 140, 16 N. W. 854.

Missouri. Ward v. Davidson, 89 Mo. 445, 1 S. W. 846; Bennett v. St. Louis Car-Roofing Co., 19 Mo. App. 349.

Montana. McConnell v. Combination Mining & Milling Co., 30 Mont.

239, 104 Am. St. Rep. 703, 76 Pac. 194, aff'd 31 Mont. 563, 79 Pac. 248.

New York. Butts v. Wood, 37 N. Y. 317; Copeland v. Johnson Mfg. Co., 47 Hun (N. Y.) 235.

West Virginia. Sweeny v. Grape Sugar Refining Co., 30 W. Va. 443, 8 Am. St. Rep. 88, 4 S. E. 431.

If an adversely interested director whose vote is necessary to the passage of a resolution is present and votes therefor, the transaction is at least prima facie voidable. Ravenswood, S. & G. Ry. Co. v. Woodyard, 46 W. Va. 558, 33 S. E. 285.

A salary voted to the president by a quorum of three directors, two being absent, and the president being one of the three, is not enforceable. Copeland v. Johnson Mfg. Co., 47 Hun (N. Y.) 235.

⁷⁷ Parsons v. Tacoma Smelting & Refining Co., 25 Wash. 492, 65 Pac. 765.

⁷⁸ Chilton v. Bell County Coke & Improvement Co., 153 Ky. 775, 156 S. W. 889.

his own salary or other compensation as the incumbent of office, or for services to be performed by him outside of the ordinary duties of his office, where his vote is necessary to the passage of the resolution.⁷⁹

§ 2353. — Where majority of directors deal with themselves. It is self-evident that if a majority of the directors are adversely interested, then any transaction between themselves and the corporation as represented by its board of directors is simply a case of officers dealing with themselves.⁸⁰ It has been held that the entire board of directors cannot contract with the corporation, since there is no one to represent the corporation.⁸¹ This is undoubtedly true if it means that such a contract is voidable as distinguished from being void. Furthermore, such dealings undoubtedly are to be considered as dealings between interested officers acting for themselves as one party to the contract and acting for the corporation as the other party to the contract, so as to authorize the corporation to set aside the contract merely on the ground of the relationship of the parties without reference to its fairness or the good faith of the parties.⁸²

For instance, it was so held where a settlement was made between a corporation and its creditors where a majority of the board of directors were interested in the matter adversely to the corporation, and it was well said that "it has not been held that the company or its stockholders may not avoid a contract requiring the action of the board of directors to make it, whether made in good faith or not, where so many of the directors are interested in the contract, adversely to the company, that the company is not represented by a disinterested majority of the directors voting. On the contrary, it is held that the directors, without the sanction of the stockholders, have no power to contract, for the corporation, with themselves, or for the benefit of themselves, and if they attempt to do so the contract may be avoided by the corporation or its stockholders not consenting, whether the contract appears to be fair and just or not."⁸³

⁷⁹ *Infra*, chapter on Compensation of Officers.

⁸⁰ See *Parker v. Nickerson*, 112 Mass. 195.

⁸¹ *Scott v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.), 67 S. W. 343, 66 S. W. 485, rev'd on other grounds in 97 Tex. 31, 104 Am. St. Rep. 835, 75 S. W. 7.

⁸² *Graves v. Mono Lake Hydraulic Min. Co.*, 81 Cal. 303, 320, 22 Pac. 665; *Coleman v. Second Ave. R. Co.*, 38 N. Y. 201.

⁸³ *Higgins v. Lansingh*, 154 Ill. 301, 40 N. E. 362.

In Minnesota, however, the question recently arose as to the effect of such a transaction between the corporation and a majority of its directors who acted for the corporation and for themselves, and it was held that where a majority of the directors advance money or procure it to be advanced on their guaranty, and take security, the transaction will be upheld "if affirmatively shown upon close scrutiny to be fair and not to involve a breach of fiduciary duty and not to result in wrong" but "if otherwise, it may be avoided."⁸⁴ And it seems that a board of directors, all of whom are creditors of the company, may vote security to themselves, at least if the corporation is solvent, where they act fairly and in good faith.⁸⁵

The fact that the action of a majority of directors in dealing with themselves or for their benefit is open, and not secret, does not validate the transaction, where otherwise voidable, where the stockholders have not agreed to the transaction.⁸⁶

§ 2354. — Where presence of interested director necessary to make a quorum. "The same rules," says the Supreme Court of California, "which preclude an interested director from uniting with other directors in the creation of an obligation in favor of himself by his vote forbid him from uniting with them in creating such obligation by any act or exercise of his official position; and a meeting at which there is not a majority of the directors, exclusive of such interested director, is not a competent board for the transaction of any corporate business."⁸⁷

This is the well-settled rule,⁸⁸ as already stated in a preceding volume in connection with the law as to meetings of directors.⁸⁹ In such a case the interested director is disqualified from acting because he cannot deal with himself, and without him there is no quorum of the directors such as is necessary to transact business.⁹⁰ It follows that if the presence of an interested director is necessary to the

⁸⁴ *Minnesota Loan & Trust Co. v. Peteler Car Co.*, 132 Minn. 277, 156 N. W. 255.

⁸⁵ *Ramsey v. W. M. Welch Co.*, 163 Iowa 324, 144 N. W. 323; *Webster v. Ypsilanti Canning Co.*, 149 Mich. 489, 113 N. W. 7, and see § 2326, *supra*.

⁸⁶ *Goodell v. Verdugo Canon Water Co.*, 138 Cal. 308, 314, 71 Pac. 354.

⁸⁷ *Curtin v. Salmon River Hydraulic Gold Mining & Ditch Co.*, 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552.

⁸⁸ *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854; *Vanhook v. Somerville Mfg. Co.*, 5 N. J. Eq. 137, 169; *Butts v. Wood*, 37 N. Y. 317; *Copeland v. Johnson Mfg. Co.*, 47 Hun (N. Y.) 235; *United States Ice & Refrigerating Co. v. Reed*, 2 How. Pr. N. S. (N. Y.) 253; *San Antonio St. R. Co. v. Adams*, 87 Tex. 125, 132, 26 S. W. 1040.

⁸⁹ See § 1889, vol. 3.

⁹⁰ *Butts v. Wood*, 37 N. Y. 317.

existence of a quorum, action taken is voidable at the instance of the corporation,⁹¹ and it would seem that no question as to fairness or good faith can be raised.

§ 2355. — Where interested director dominates other directors. If the director who is adversely interested in fact directs, influences and controls the board of directors, i. e., if the other directors are mere dummies who have no personal interest in the affairs of the company and who exercise not their own judgment and discretion but merely the will of the dominating director, a case is presented of an officer dealing with himself.⁹² In other words, if a director or other officer dealing with his corporation is in reality in complete control of the corporation and its board of directors, and he dictates the acts of the board, or as has been said if they are "pegs to fill the required places,"⁹³ then it would seem that the situation is one where the officer represents both sides although in fact he is only one of several directors or did not in reality formally act as officer of the corporation in connection with the transaction.⁹⁴ But the fact that the officer who is the other party to the contract holds the majority of the stock, and that his co-directors who made the contract with him, were chosen by him in the sense that the majority of the stock elects the directors, or the fact that some of such directors owned only a single share of stock, does not make the contract one between himself personally and himself as director.⁹⁵

§ 2356. — Where corporate officer or agent acts under immediate instructions of superior officer. An agent may "represent the corporation in executing a contract with himself personally," says Mr. Morawetz, "provided he acts under immediate instructions from some other superior agent or from the board of directors."⁹⁶

⁹¹ *Mobile Land Improvement Co. v. Gass*, 142 Ala. 520, 39 So. 229; *Bassett v. Fairchild*, 132 Cal. 637, 52 L. R. A. 611, 64 Pac. 1082; *Smith v. Los Angeles Immigration & Land Co-operative Ass'n*, 78 Cal. 289, 12 Am. St. Rep. 53, 20 Pac. 677; *Burns v. National Mining, Tunnel & Land Co.*, 23 Colo. App. 545, 130 Pac. 1037.

⁹² See *Miner v. Belle Isle Ice Co.*, 93 Mich. 97, 17 L. R. A. 412, 53 N. W. 218.

Where the chief stockholder, who is

also president, induces the directors, who are under his influence and control, to vote a large salary to him, the corporation may defeat an action by him to recover it. *Davis v. Memphis City Ry. Co.*, 22 Fed. 883.

⁹³ *Adams v. Burke*, 201 Ill. 395, 66 N. E. 235.

⁹⁴ See *Bingham v. Bell & Zoller Coal Co.*, 175 Ill. App. 469, 478.

⁹⁵ *Cowell v. McMillin*, 177 Fed. 25, 43.

⁹⁶ 1 Morawetz, *Corporations*, § 527.

This rule was applied in Illinois where the Supreme Court said that the manager, "in making the lease, was acting under the instructions of the president and directors of the railway company. The lease was not his act as agent of the railway company, but it was the act of his superior, the president of the corporation, and hence he cannot be regarded as dealing with himself."⁹⁷

§ 2357. Manner in which individual interest of officer is evidenced—General considerations. How far does the rule making voidable the dealings between a corporation and one or more of its directors or other officers, apply where the director or other officer is not individually the other party to the contract but is merely a member of a firm contracting with the company, or a mere stockholder or officer of another corporation which is the other contracting party? This question, and other kindred cases, are discussed in the following sections. The validity or invalidity of a transaction wherein a director or other officer is adversely interested cannot depend, it is held, "upon the extent of the adverse interest of the fiduciary agent any more than upon how far in any particular case the terms of a contract have been the best obtainable for the interest of the cestui que trust, upon which subject no inquiry is permitted."⁹⁸ This statement must be explained, however, by saying that it was made in an English case, and that the rule in England is that all corporate dealings are voidable where a director or other officer is adversely interested, merely because of the relationship and without regard to the fairness of the deal or the good faith of the officers.

Interlocking officers, i. e., where one or more directors or other officers represent both corporations which are the opposing parties in a transaction, present some troublesome questions concerning which the courts have not always been in harmony.⁹⁹

§ 2358. — Officer acting as agent both for corporation and for adverse party. The form of the interest of the corporate officer in the transaction, on the side opposed to the corporation, may be that of an agent for such other party to the contract or transaction with the corporation. The rule governing the relation of principal and agent where there is a double agency—and this rule applies equally well where an officer of a corporation acts as agent both for the cor-

⁹⁷ Louisville, N. A. & C. R. Co. v. Carson, 151 Ill. 444, 38 N. E. 140. See also Fudickar v. East Riverside Irrigation Dist., 109 Cal. 29, 41 Pac. 1024.

⁹⁸ Transvaal Lands Co. v. New Belgium Land & Development Co., [1914] 2 Ch. 488, 503.

⁹⁹ See §§ 2376-2391, *infra*.

poration and also for the other party to the transaction or contract—has been correctly stated as follows: "If the agent * * *, by reason of being or becoming the agent of the opposite party, * * * has an interest of the latter to protect which may conflict with the interest of the principal, it is his duty to fully advise his principal of the circumstances, and not to undertake to act without the principal's consent. If, after a full and frank disclosure, the principal is willing to confide his interests to him the principal cannot afterwards object. Otherwise, it is the practically invariable rule that the agent may not, in the same transaction, be both agent and opposite party, or while agent of one, become the agent of the other party whose interests may conflict. If, without such knowledge and consent, he does undertake to contract, the law deems the principal in that transaction to be practically unrepresented, and any bargain in his name, or act done on his account, is usually voidable at the principal's option. He need not show himself injured, and his right to repudiate the transaction is not affected by the good faith of the opposite party."¹

In such a case, the corporation may set aside the contract,² provided it did not, with knowledge of the double agency, either expressly authorize it or thereafter ratify it. And the corporation may rescind the contract and obtain a return of the consideration paid from the other party who knew of the double agency.³ However, the fact that one of three directors acts in the double capacity of agent for both borrower and lender has been held not to invalidate the note where

¹ 1 Mechem, Agency (2nd Ed.), § 1206.

² Compare *Pauly v. Pauly*, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29; *Adams Min. Co. v. Senter*, 26 Mich. 73.

"One man cannot serve two masters with reference to any matter where their interests are adverse, and it matters not, where one of those masters be a corporation, whether the servant be a director or agent. His duty to his master is none the less imperative." *Estate of Smythe v. Evans*, 209 Ill. 376, 381, 70 N. E. 906, rev'g 108 Ill. App. 145.

Where one acts both for a corporation in his own behalf and as agent

for a third person, his acts are not binding on the corporation. *Smith v. Courant Co.*, 23 N. D. 297, 136 N. W. 781.

An attorney for a director, who is also a director qualified to act as such by a transfer of shares to him by his client without consideration, is to be counted as personally interested where he presents a proposal at a directors' meeting, on behalf of his client, to loan money to the company on a chattel mortgage. In re *Webster Loose Leaf Filing Co.*, 240 Fed. 779, 782.

³ *Hall v. Catherine Creek Development Co.*, 78 Ore. 585, L. R. A. 1916 A 996, 153 Pac. 97.

the corporation suffers no detriment thereby—⁴ the decision being based, apparently, upon the theory that the director did not represent the corporation. In any event, if an officer of a corporation sacrifices its interests in dealing with a third person whose agent he is, the agreement may be set aside.⁵

The rights of the corporation where it deals with another corporation, and there are one or more common directors or other officers, are considered in subsequent sections.⁶

§ 2359. — Transactions between corporation and firm of which officer is a member. A director or other officer cannot represent the corporation in making or authorizing a contract or other transaction with a partnership of which he is a member, except subject to the right of the corporation to avoid the same,⁷ unless there was express authority to act for the corporation in making the contract.⁸ In any event, if the majority directors are also members of a firm contracted with to act as agent in selling the products of the company on a commission, they have the burden of showing that the contract was fair and reasonable.⁹

On the other hand, suppose a contract is made between a corporation and a firm, a member of which is a director or other officer of the corporation, but the corporation is represented in the transaction wholly by other directors or officers. In such a case, upon principle, the contract may be avoided by the corporation but only, according to the weight of authority, where the contract is shown to be unfair or entered into by the firm or partner in bad faith.¹⁰

⁴ *Buck v. Troy Aqueduct Co.*, 76 Vt. 75, 56 Atl. 285.

⁵ *Fox v. Robbins* (Tex. Civ. App.), 62 S. W. 815, where waiver of service of process was held invalid.

⁶ See § 2376 et seq., *infra*.

⁷ *Salem Iron Co. v. Lake Superior Consol. Iron Mines*, 112 Fed. 239; *Sims v. Petaluma Gas Light Co.*, 131 Cal. 656, 63 Pac. 1011, *aff'g* 62 Pac. 300; *Davis v. Rock Creek Lumber, Flume & Mining Co.*, 55 Cal. 359, 36 Am. Rep. 40; *Aberdeen Ry. Co. v. Blaikie*, 1 Macq. H. L. Cas. 461. And see *Doe v. Northwestern Coal & Transportation Co.*, 78 Fed. 62.

⁸ *Leigh v. American Brake Beam*

Co., 205 Ill. 147, 68 N. E. 713, *aff'g* 107 Ill. App. 444.

⁹ *Ross v. Quinnesec Iron Min. Co.*, 227 Fed. 337.

Where the president of a corporation signed a contract as such for the corporation and also as a member of a firm which was the other contracting party, it was held voidable but not void, and that if fair and not one-sided it cannot be set aside by the corporation. *Salem Iron Co. v. Lake Superior Consol. Iron Mines*, 112 Fed. 239.

¹⁰ For law governing such a situation see §§ 2345-2347, *supra*.

§ 2360. — Transactions between corporate officers as such and another corporation in which they are stockholders. That the directors "cannot represent it in transactions with another corporation in which they are shareholders, if their interest in the latter company might induce them to favor it at the expense of the company whose interests have been intrusted to their care" is stated in a recent Vermont decision¹¹ citing Mr. Morawetz's valuable work on Corporations as authority for the statement.¹² However, this statement may mislead, since it should be qualified by stating that such a transaction is not void, according to the weight of authority, but only voidable.¹³ The extent of the interest of the corporate officers in the other corporation ought to have some weight. For instance, if they held only one share of stock apiece in the other company or a very small percentage of the outstanding stock, or if their interest in the corporation in which they are officers is much greater than their interest in the other company in which they are merely stockholders, then it would seem that the transaction should not be so closely scrutinized as if the officers' interest in the other company was much greater than in the company in which they are officers.¹⁴

Dealings between two corporations where officers of the one are stockholders in the other are not void as distinguished from voidable, and whether they will be enforced generally depends upon whether the deal was fair and in good faith.¹⁵ If all or a majority of the

¹¹ Corry v. Barre Granite & Quarry Co., — Vt. —, 101 Atl. 38.

Of course such transactions are always voidable if the directors who act for the corporation do not act in good faith for the benefit of the company in which they are officers, but instead for the benefit of the other corporation in which they are stockholders.

¹² 1 Morawetz, Private Corporations, § 520.

¹³ The fact that a majority of the directors of a corporation are stockholders in another corporation does not make a contract between the two corporations void as distinguished from voidable. Jesup v. Illinois Cent. R. Co., 43 Fed. 483, 503.

¹⁴ See note 15, *infra*, and also Corry v. Barre Granite & Quarry Co., — Vt. —, 101 Atl. 38, where nearly all the

stock of the transferee company was owned by the four directors whom the resolution empowered to make the sale, and the court said: "Upon the case as thus presented there could be no room to doubt. The directors of the defendant company would, in effect, be selling the property to themselves. The right to do this is denied to all persons acting in a fiduciary capacity."

¹⁵ If the officer participating as such in making contracts between his corporation and another corporation is a very small stockholder in the corporation in which he is an officer but is a heavy stockholder in the other corporation, and the terms of the contract are grossly inequitable in favor of the latter company, the former may repudiate and set aside the contract. *Globe Woolen Co. v.*

directors or other managing officers are heavily interested as stockholders in another corporation with whom a contract is made, the contract will be closely scrutinized and will be set aside where an undue advantage has been taken or an unconscionable bargain made.¹⁶

It is immaterial, so far as the validity of such transactions are concerned, that they are open and not secret, where not agreed to by the stockholders of the company in which they are officers.¹⁷ In England, however, it is held that a corporation cannot buy shares of stock or other property from a company in which one of its directors is pecuniarily interested as a shareholder, without regard to whether he holds his shares as trustee or otherwise;¹⁸ and extent of the interest of the officer in the other company is immaterial, according to the English decisions.¹⁹

It has been held that "no director could rightfully become a member of the improvement [construction] company, with whom the railroad company had a contract to furnish the means with which to build the road, with a view to share in the profits, and that if any gains should be realized in the enterprise, they would belong to the railroad company, upon the equitable principle which forbids the trustee, or person acting in a fiduciary capacity, from speculating out of the subject of the trust. * * * The duties devolving on a director of the railroad company were in antagonism with his interest and relation to the improvement company. What might be to the advantage of one company might be detrimental to the best interests of the other."²⁰

Utica Gas & Electric Co., 151 N. Y. App. Div. 184, 136 N. Y. Supp. 24, rev'g 75 N. Y. Misc. 539, 136 N. Y. Supp. 16.

If directors lease corporate property to another company in which they are financially interested for a much less rental than that offered by another responsible party, minority stockholders may enjoin the execution of the lease: Schmid v. Lancaster Ave. Theater Co., 244 Pa. 373, 91 Atl. 363.

¹⁶ Hill v. Gould, 129 Mo. 106, 112, 30 S. W. 181.

Rule applied to irrigation contract by directors of water company, a majority of whom were members of an association for whose benefit the contract was made. Goodell v. Verdugo

Canon Water Co., 138 Cal. 308, 313, 71 Pac. 354.

¹⁷ Goodell v. Verdugo Canon Water Co., 138 Cal. 308, 314, 71 Pac. 354.

¹⁸ Transvaal Lands Co. v. New Belgium Land & Development Co., [1914] 2 Ch. 488, 501.

¹⁹ Transvaal Lands Co. v. New Belgium Land & Development Co., [1914] 2 Ch. 488, 503, citing Todd v. Robinson, 14 Q. B. Div. 739, as an instance of a very small interest as shareholder of a company being held to make a person "interested" in a contract.

²⁰ Gilman, C. & S. R. Co. v. Kelly, 77 Ill. 426, 433, in which case it will be noticed that the directors did not become interested in the construction company until after the contract with it was executed.

A fortiori, where managing officers of a corporation, without the knowledge of the corporation, organize with others a company for the purpose of making a contract with the corporation of which they are officers whereby the new company was to sell property to the old one at a large profit, the old corporation may have the contract set aside;²¹ and the governing principle is stated by the Supreme Court of the United States as follows: "Hence, all arrangements by directors of a railroad company, to secure an undue advantage to themselves at its expense, by the formation of a new company as an auxiliary to the original one, with an understanding that they or some of them shall take stock in it, and then, that valuable contracts shall be given to it, in the profits of which they, as stockholders in the new company, are to share, are so many unlawful devices to enrich themselves to the detriment of the stockholders and creditors of the original company, and will be condemned whenever properly brought before the courts for consideration."²²

On the other hand, where a street railway company leased its lines to another company in which a majority of the directors were interested, the corporation or minority stockholders cannot have the lease set aside where it has been beneficial not only to the public but also to the stockholders as a body by placing it upon a dividend-paying basis for the first time and by advancing its stock almost fifty per cent. upon the market.²³

The fact that a minority of the board of directors are stockholders in another corporation where a transaction between the two corporations is approved by a majority of the directors, who are not interested in the other company, does not of itself invalidate the transaction.²⁴

§ 2361. — Contracts between corporation and subsidiary corporation. Where one corporation controls another of which it holds a majority of the stock, by electing sufficient of its employees to control the board of directors of the latter, contracts between the two corporations must be regarded as if between a corporation and its directors or other trustees, and must be governed by the same prin-

²¹ "The principle here announced authorizes the annulment of a contract such as the present one, if seasonably challenged, without regard to whether it is favorable or unfavorable to the complaining principal." *Attalla Iron Ore Co. v. Virginia Iron, Coal & Coke Co.*, 111 Tenn. 527, 537,

77 S. W. 774, where the question is ably considered at some length.

²² *Wardell v. Union Pac. R. Co.*, 103 U. S. 651, 26 L. Ed. 509.

²³ *Dickinson v. Consolidated Trac-tion Co.*, 114 Fed. 232, 250.

²⁴ *Jesup v. Illinois Cent. R. Co.*, 43 Fed. 483, 503.

ciples, so that the courts will set aside such contracts unless they are fair and reasonable.²⁵ This rule is practically the same as the one laid down in the preceding section where a director or other corporate officer organizes a dummy corporation in order to deal directly with his company.²⁶

§ 2362. — Dealings between corporation and wife of officer. The policy which makes voidable a contract between a corporation and its director necessarily includes a director's wife.²⁷ As to this matter, a prominent textbook writer has commented as follows: "If the husband acted in the matter on behalf of his wife, this conclusion would necessarily follow. Even if he did not so act, the doctrine would doubtless work well in practice, because the husband's interest in his wife's welfare would tend to bias his judgment as director; but nevertheless one may doubt whether so stringent a rule would be consistently adhered to by many courts."²⁸ In any event, if an officer of a corporation sells corporate property to his wife, the sale is voidable where it was practically a purchase for and on behalf of her husband, as where it became a part of the community estate of herself and her husband in a state where community estates are recognized.²⁹

§ 2363. — Contracts where officers and third persons are jointly interested. If a third person joins with a corporate officer in dealing with the corporation, with knowledge that he is such officer, the contract may be set aside as to him as well as the corporate officer.³⁰ This is upon the theory that where a stranger participates with the officer of a corporation in the commission of an act of manifest bad faith or breach of duty to it, he, equally with the officer, commits a wrong and ought not to be allowed to derive profit from it.³¹

§ 2364. Application of general rules to particular transactions—In general. The rules already laid down as to the validity of dealings between corporations and their officers are generally applied with full force to particular contracts or transactions, although some-

²⁵ *Montgomery Traction Co. v. Harmon*, 140 Ala. 505, 520, 37 So. 371.

²⁶ See § 2360, *supra*.

²⁷ *Voorhees v. Nixon*, 72 N. J. Eq. 791, 66 Atl. 192. See also *J. W. Butler Paper Co. v. Robbins*, 151 Ill. 588, 38 N. E. 153, *rev'g* 37 Ill. App. 96.

²⁸ 2 *Machen, Corporations*, § 1583.

²⁹ *Nueces Valley Irrigation Co. v. Davis*, 103 Tex. 243, 126 S. W. 4.

³⁰ *Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456, 509, 77 Am. Dec. 311.

³¹ *Attalla Iron Ore Co. v. Virginia Iron, Coal & Coke Co.*, 111 Tenn. 527, 537, 77 S. W. 774.

times the courts fail to distinguish between cases where the officer deals with himself as the corporate representative, in whole or in part, and those cases where he deals with other officers as the representatives of the corporation. The most common application of the general rules is where an officer purchases from³² or sells to³³ the corporation, or where the officer loans money to the corporation.³⁴ Other miscellaneous cases applying the rule are also noticed in this connection.

§ 2365. — Purchase of corporate property by director or other officer. The old rule which prevailed in some jurisdictions was that a director or other managing officer of a corporation, for the reason that he holds a fiduciary relation as trustee, could not purchase the trust property, all or in part, or directly or indirectly, and that, if he did, the sale was voidable at the mere pleasure of the corporation or its shareholders, notwithstanding the officer may have paid a full price and gained no advantage.³⁵ And in Wisconsin, in 1877, a purchase by a director was differentiated from a purchase by the superintendent of the corporation on the ground that the one was a trustee within the rule that trustees cannot purchase any interest in the trust property, while the other was a mere agent within the rule that an agent is disqualified to purchase property of his principal only where his agency is so connected with the sale as to make it his duty to obtain the best terms for his principal on such sale, although equity regards with great jealousy any purchase by an agent from his principal.³⁶ Moreover, it was held that so long as a contract of sale of real property of a corporation to a stranger remains executory, a director cannot purchase of such stranger, provided he could not have purchased directly from the corporation.³⁷ All this is not the law of the present day, however, except in a very few jurisdictions, as will now be noticed, unless the purchasing officer acts as the selling agent for the corporation.

Whether a purchase of corporate property—it being assumed that

³² See § 2365, *infra*.

³³ See § 2366, *infra*.

³⁴ See § 2368, *infra*.

³⁵ *Reilly v. Oglebay*, 25 W. Va. 36, 42. See also *Smith v. Lansing*, 22 N. Y. 520, holding, however, that financial officer of bank was not disqualified from purchasing for his own benefit property pledged to it for a

debt, where sold for a price sufficient to discharge the lien.

³⁶ *Cook v. Berlin Woolen Mill Co.*, 43 Wis. 433.

Purchases by agents from their principals in general, see 1 *Mechem, Agency* (2nd Ed.), §§ 1198-1204.

³⁷ *Cook v. Berlin Woolen Mill Co.*, 43 Wis. 433.

the board of directors has power to sell the property—³⁸ by a director or other corporate officer, from the corporation, is valid, depends upon the rules laid down in the preceding sections of this subdivision.³⁹ Ordinarily such a purchase is not void as distinguished from voidable,⁴⁰ and will be upheld providing it is fair and made in good faith,⁴¹ but not otherwise.⁴²

The law is clearly stated by Justice Cole in an early Iowa case as follows: "There is no showing of any actual fraud on the part of Elijah Buell, in his purchase of the property from the board of directors. His position, as one of the board, was that of a trustee or guardian of the rights and interests of the stockholders in the corporation, and his purchase, while occupying that relation, cannot be regarded in a more unfavorable light than a purchase by a trustee of the property of his cestui que trust. The rule is well settled that a purchase of property by a trustee of his cestui que trust is not void in equity, but only voidable at the election of the cestui que trust. A court of equity will scrutinize such a transaction closely, and will not only set it aside for fraud, but will do so upon a very slight showing of advantage or of bad faith. But when it is clear that the cestui que trust intended that the trustee should buy, and there is no fraud, no concealment, and no advantage taken by the trustee of information acquired by him as such, the purchase will be upheld and enforced."⁴³

³⁸ Power of board to sell all or part of property, see §§ 1971, 1998, vol. 3.

³⁹ See § 2332 et seq., supra.

⁴⁰ *Arkansas*. *Town of Searcy v. Yarnell*, 47 Ark. 269, 1 S. W. 319.

Indiana. *Hill v. Niabet*, 100 Ind. 341.

Kansas. *Webb v. Rockefeller*, 66 Kan. 160, 71 Pac. 283.

Nebraska. *Miller v. Brown*, 1 Neb. (Unoff.) 754, 95 N. W. 797.

New Jersey. *Barry v. Moeller*, 68 N. J. Eq. 483, 59 Atl. 97.

Pennsylvania. *In re Ashhurst's Appeal*, 60 Pa. St. 290.

⁴¹ *Union Trust Co. of Maryland v. Carter*, 139 Fed. 717, 731; *Little Rock & F. S. R. Co. v. Page*, 35 Ark. 304; *Tenison v. Patton*, 95 Tex. 284, 67 S. W. 92, rev'g (Tex. Civ. App.), 64 S. W. 810; *Cook v. Berlin Woolen Mill Co.*, 43 Wis. 433.

The president of a company may

purchase treasury stock from the company. *Dusenberry v. Sagamore Development Co.*, 164 N. Y. App. Div. 573, 150 N. Y. Supp. 229.

Where a corporation holds an option to purchase land, but is unable to raise the money to make the purchase, an assignment of such option to a director is valid. *Hannerty v. Standard Theatre Co.*, 109 Mo. 297, 19 S. W. 82.

⁴² *Crescent City Brewing Co. v. Flanner*, 44 La. 22, 10 So. 384.

At any event, there is a presumption of fraud where a director purchases land from his corporation at one-tenth of its real value, so as to place the burden upon him of showing that the transaction was fair. *Woodroof v. Howes*, 88 Cal. 184, 26 Pac. 111.

⁴³ *Buell v. Buckingham & Co.*, 16

If the sale is actually, or in effect, made by the officer to himself, as where he wholly or partially represents the corporation and also is the purchaser either as an individual or as a member of a firm or the like, the sale is voidable at the option of the corporation merely because of the relationship of the parties and without regard to whether the sale is a fair or an unfair one,⁴⁴ according to the general rule already stated.⁴⁵ Thus, the president of a corporation has no authority to sell its goods to himself,⁴⁶ nor can he sell its future output to himself so as to cut off a prior vendor's lien of which he as president was bound to take notice.⁴⁷ So the president of a corporation cannot purchase notes belonging to the corporation from the corporation as represented by himself and indorse them to himself.⁴⁸

On the other hand, if the purchasing officer does not represent the corporation in making the sale, then, according to the weight of authority,⁴⁹ the sale is voidable only if unfair or the officer has acted in bad faith.⁵⁰ There is a class of cases already noticed,⁵¹ however, which hold that such a purchase is voidable at the option of the corporation although there is perfect good faith and the consideration is adequate;⁵² but the great majority of the cases deny this doctrine

Iowa 284, 85 Am. Dec. 516, but which states the rule that an interested director (in this case the purchaser) could be counted to make up a quorum, which is contrary to the general rule as already noticed in § 2354, *supra*.

⁴⁴ If a director or other officer purchases for himself, and he also acts as the representative of the corporation in making the sale, then it is voidable by the corporation or minority stockholders without regard to fairness or good faith. *Stanley v. Luse*, 36 Ore. 25, 58 Pac. 75.

⁴⁵ See §§ 2338-2342, *supra*.

⁴⁶ *In re Schoenfield*, 190 Fed. 53; *Bowdon Lime Works v. Moss*, 14 Ala. App. 433, 70 So. 292.

⁴⁷ *Frellsen v. Strader Cypress Co.*, 110 La. 877, 34 So. 857.

⁴⁸ *Pacific Vinegar & Pickle Works v. Smith*, 145 Cal. 352, 104 Am. St. Rep. 42, 78 Pac. 550.

⁴⁹ See § 2347, *supra*.

⁵⁰ "While Carter, as a director, in one sense occupied a fiduciary relation

to the stockholders, he was not a trustee in the technical meaning of that word, and he was not prohibited from purchasing the property of the Clinchfield Corporation, as a trustee is from purchasing at a sale made by him. As a director he was not prohibited by the law from purchasing the property of the Clinchfield Corporation, if the sale to him was authorized by the other six directors of that company, and the transaction was fair, made in good faith, and for an adequate consideration. A court will closely scrutinize such a sale and the burden of proving good faith and adequate compensation will be placed on the party purchasing under such circumstances." *Union Trust Co. of Maryland v. Carter*, 139 Fed. 717, 731.

⁵¹ See § 2346, *supra*.

⁵² In such a case, it was said by the Supreme Court of Colorado that "it is clear that the purchase of the stock in question cannot be upheld, even though the defendants were able

and hold that something more than the mere relationship of the parties must be shown in order to set aside the sale, where the corporation is represented in the deal by other officers.⁵³ Moreover, a purchase by a director from a trustee, whose selection he did not influence or control, who was chosen by creditors and stockholders to hold corporate property in trust to sell to pay debts, is valid, since the relation between a director and such a trustee is not one in which confidence is given and reposed, between them.⁵⁴

If the corporation is insolvent, it is generally held that an officer thereof cannot purchase all or a part of the corporate property and thereby secure a preference over other creditors.⁵⁵

The remedy, where the sale is voidable, has been said to be to proceed to set aside the sale, or to compel an accounting of profits, or to collect the difference between the price actually paid and the real value of the property at the time of the purchase.⁵⁶

In Ohio, a statute providing that "all capital stock, bonds, notes, or other securities of a company, purchased of a company by a director thereof, either directly or indirectly, for less than the par value thereof, shall be null and void," has been construed as not broad enough to include securities issued by other companies even though guaranteed by the corporation holding them and attempting to sell them at a discount to one of its directors.⁵⁷

§ 2366. — Sales by directors or other officers to corporation. Ordinarily a director or other corporate officer may sell his property to the corporation if the sale is open and fair.⁵⁸ In any event, "a

to show that the transaction was entirely free from fraud, was entered into in good faith by all concerned, and was in fact for the interest of the bank." *Morgan v. King*, 27 Colo. 539, 63 Pac. 416. But see *Crymble v. Mulvaney*, 21 Colo. 203, 40 Pac. 499.

In *Miller v. Brown* (Neb.), 95 N. W. 797, a textbook statement to this effect is quoted but in that case the sale was unfair and the purchasing director was the active instigator of the sale on behalf of the corporation.

The case of *Barnes v. Lynch*, 9 Okla. 156, 59 Pac. 995, sometimes cited in support of this rule, was an agreement between the officers of a corporation to divide the assets of the

corporation among themselves, and hence is within the principle governing cases where the officer acts as the representative of both sides, as already noticed, rather than within this class of cases.

⁵³ See § 2347, *supra*.

⁵⁴ *Kessler & Co. v. Ensley Co.*, 141 Fed. 130, 162, *aff'd* 148 Fed. 1019 (mem. dec.).

⁵⁵ *Infra*, chapter on Insolvency.

⁵⁶ *Millsaps v. Chapman*, 76 Miss. 942, 71 Am. St. Rep. 547, 26 So. 369.

⁵⁷ *Cincinnati, H. & D. R. Co. v. Kleybolte*, 80 Ohio St. 311, 88 N. E. 879.

⁵⁸ *Figge v. Bergenthal*, 130 Wis. 594, 110 N. W. 798. 109 N. W. 581

A majority of the directors of a

director is not disabled from selling his own property to his corporation, provided there are enough directors present who have no personal interest in the property and the sale is open, fair and honest."⁵⁹

Further analyzing the question it would seem that if the selling officer or officers also act as the representatives of the corporation then the sale is voidable at the option of the corporation or its stockholders without regard to its fairness or the good faith of the officers,⁶⁰ according to the general rule laid down in a preceding section,⁶¹ although this rule seems to have been disregarded at times.⁶² In any event, such a sale may be set aside where unfair or where the selling officer or officers have acted in bad faith.⁶³ If the officer buys from himself, i. e., if he represents both the buyer and the seller, the cor-

coal company may sell coal to a railroad company in which they hold a majority of the stock, where the price is a fair one and the best obtainable. *Hill v. Gould*, 129 Mo. 106, 30 S. W. 181. But it would seem that such a sale ought to be set aside on application, merely because of the relationship of the parties, according to the rules stated in §§ 2340, 2363.

⁵⁹ *Howland v. Corn*, 232 Fed. 35, 44.

⁶⁰ If a majority of the directors, during the time of their being in office, purchased property in their own name and afterwards sell it to the corporation as represented by themselves at a price much greater than the original price and for a sum much greater than its value, the case comes within the rule that where officers act for themselves on one side of the transaction and for the corporation on the other side, the corporation may repudiate the sale merely because of such relationship, or it may charge the profits made by the officers with an implied trust for its benefit. *Parker v. Nickerson*, 112 Mass. 195, purchase of steamboats.

If the managers of a corporation purchase real estate while acting as such, but in their own name, in order to resell it to themselves as managers of the company, for a profit, the profit belongs to the corporation. *Higgins*

v. Lansingh, 154 Ill. 301, 376, 40 N. E. 362.

⁶¹ See §§ 2340-2342, *supra*.

⁶² A sale by a director, who was a majority stockholder, to the corporation acting through its manager—the husband of the seller—is valid where open and fair. *Figge v. Bergenthal*, 130 Wis. 594, 110 N. W. 798, 109 N. W. 581.

⁶³ Purchase by directors, for the corporation, of property in which they are personally interested, for a sum largely in excess of its market value, is voidable at the instance of the corporation or nonconsenting stockholders. *Klein v. Independent Brewing Ass'n*, 231 Ill. 594, 83 N. E. 434.

Where persons purchase land and afterwards become directors of a corporation, the fact that the property was bought with a view to reselling it to a corporation to be organized for the purpose, and that that purpose was ultimately carried into effect, does not give to the corporation a right to the benefit of the purchase; but where the directors who own all the stock sell the land to the corporation at a price largely in excess of the value of the property, without making a full disclosure of at least the price at which the property was bought by the directors, and where the original capital stock of a thousand dollars, al-

poration may rescind the sale if it can restore the property, or, if it cannot restore the property, it is liable to pay not the price agreed upon but only a reasonable price.⁶⁴ So a purchase by directors and a resale by them to the corporation as represented by themselves, at a big profit, has been held invalid even where such directors owned all the stock, where the company issued stock in payment for the property, since the public is interested.⁶⁵

What is meant by the statement that the selling officer must act in good faith and the sale must be fair? This is correctly answered, it is believed by a Kansas decision where, in determining the validity of a sale of a roadbed to a railroad company by a director thereof, it was said that "the sale must be a fair, open one in all respects; the price paid by Tiernan [the selling director] and his associates must have been disclosed to the directors of the company, and the whole transaction must not only be for the evident interests of the company, but it must have been conducted in all its stages in the utmost good faith on the part of the directors, and with a complete knowledge of the time when, the circumstances under which, and the exact amount paid by Tiernan at the date of his purchase, to be relieved of that suspicion with which courts of justice universally regard a transaction in which the seller and the buyer are represented by one and the same person."⁶⁶ It is submitted, however, that the rule stated applies where the corporation is represented by other officers than the selling officers rather than, as stated, when the selling officers also represent the purchasing corporation, since in the latter case the sale may be set aside without reference to its fairness or the good faith of the officers.⁶⁷ There is no objection to a sale of property by a director or other officer to the corporation, at a price in excess of what the officer paid for it, where the price paid by the corporation is a fair one, and there is no secrecy, and the officer was not acting for the company, nor under duty so to do, in making the original purchase.⁶⁸

though in the hands of the directors who knew the facts, was to be at once increased to nearly four million and a majority of it issued to third persons having no knowledge of the sale, the corporation may have the sale set aside. *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 188 Mass. 315, 108 Am. St. Rep. 479, 74 N. E. 653.

⁶⁴ *Parker v. Nickerson*, 137 Mass. 487, 497.

⁶⁵ *Redmond v. Dickerson*, 9 N. J. Eq. 507, 515, 59 Am. Dec. 418.

⁶⁶ *St. Louis, Ft. S. & W. R. Co. v. Tiernan*, 37 Kan. 606, 632, 15 Pac. 544. See also *Emma Silver Min. Co. v. Park*, 14 Blatchf. 411, Fed. Cas. No. 4,467.

⁶⁷ See § 2342, *supra*.

⁶⁸ *Bennett v. Havelock Elec. Light & Power Co.*, 20 Ont. Wkly. Rep. 578.

Can a corporate officer buy property and then resell it to his company at a profit? In regard to this question it was held in Massachusetts that if a corporate officer buys property in his name at a time when he had corporate funds in his hands with which to buy the property, and it was his duty to buy it for the company,⁶⁹ or, it seems, if the officer originally bought the property for the purpose of selling it to the corporation,⁷⁰ he is to be treated as an agent of the corporation and a trustee for the profits which are the difference between what he paid for the property and what he sold it to the company for, less the necessary intervening expenses;⁷¹ but if the officer originally bought the property not for the purpose of selling it to the company, nor at a time when it was his duty to buy it for the company, the officer may sell it to the company for more than he paid for it plus expenses.⁷² In any event, if a corporation purchases land from one of its officers, it cannot, upon rescinding the sale, compel him to pay for improvements put on the property by the corporation.⁷³ The question of secret profits has already been considered.⁷⁴

If a corporation purchases the stock of its director at a time when it had no authority to do so because it was insolvent, the director, being chargeable with knowledge of the insolvency, cannot recover on a note given for the price of the stock, even as against one who indorsed it before delivery.⁷⁵

§ 2367. — Leases by or to directors or other officers. The rules already stated as to the validity of contracts in general between a corporation and its officers apply equally well to leases by or to directors or other officers where the corporation is the other party to the lease. For instance, the general rules have been applied by holding that a lease made by a corporation through an officer thereof on the one side, with himself as an individual as the lessor, is not void, but may be ratified by the corporation.⁷⁶ So a corporation may lease property from its president, in a proper case.⁷⁷ The lease of corporate property to persons who are directors of the corporation, says the Massachusetts court, "is a suspicious circumstance, which

⁶⁹ *Parker v. Nickerson*, 137 Mass. 487, 497.

⁷⁰ *Parker v. Nickerson*, 137 Mass. 487, 497.

⁷¹ *Parker v. Nickerson*, 137 Mass. 487, 497.

⁷² *Parker v. Nickerson*, 137 Mass. 487, 497. See also § 2318, *supra*.

⁷³ *Paine v. Irwin*, 16 Hun (N. Y.) 390.

⁷⁴ See §§ 2303-2324, *supra*.

⁷⁵ *Burke v. Smith*, 111 Md. 624, 75

Atl. 114.

⁷⁶ *Louisville, N. A. & C. R. Co. v. Carson*, 151 Ill. 444, 38 N. E. 140.

⁷⁷ *Metzger v. Knox*, 77 N. Y. Misc. 271, 136 N. Y. Supp. 681, *aff'd* 153 N. Y. App. Div. 911, 137 N. Y. Supp. 1129.

calls for careful scrutiny, but of itself, alone, it does not necessarily render the transaction void. * * * Such a transaction may be made in good faith for the best interests of the corporation. It may be avoided or may be ratified by the corporation."⁷⁸ It has been held that if a lease is made by the board of directors to a minority of the board, it is voidable and not void, notwithstanding the latter used their position to advance their personal interests.⁷⁹ In any event, a contract by a director to lease property to the corporation is binding upon him.⁸⁰

§ 2368. — **Loans to corporation.** Directors or other officers may loan money to the corporation, where they act in good faith,⁸¹ although they are not in duty bound to do so,⁸² and may also take and

⁷⁸ *Nye v. Storer*, 168 Mass. 53, 55, 46 N. E. 402.

⁷⁹ *Farwell v. Babcock*, 27 Tex. Civ. App. 162, 65 S. W. 509.

⁸⁰ *Veeder v. Horstmann*, 85 N. Y. App. Div. 154, 83 N. Y. Supp. 99.

⁸¹ *United States*. *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328; *Gould v. Little Rock, M. R. & T. Ry. Co.*, 52 Fed. 680.

California. *Sutter St. R. Co. v. Baum*, 66 Cal. 44, 4 Pac. 916; *Santa Cruz R. Co. v. Spreckles*, 65 Cal. 193, 3 Pac. 661, 802.

Colorado. *Gumaer v. Cripple Creek Tunnel, Transportation & Mining Co.*, 40 Colo. 1, 122 Am. St. Rep. 1024, 13 Ann. Cas. 781, 90 Pac. 81.

Illinois. *Illinois Steel Co. v. O'Donnell*, 156 Ill. 624, 31 L. R. A. 265, 47 Am. St. Rep. 245, 41 N. E. 185; *Off v. Jack*, 104 Ill. App. 655, aff'd 204 Ill. 79, 68 N. E. 427; *Hudlun v. Blakeslee*, 70 Ill. App. 664.

Kentucky. *Star Mills v. Bailey*, 140 Ky. 194, 140 Am. St. Rep. 370, 130 S. W. 1077.

Massachusetts. *Saltmarsh v. Spaulding*, 147 Mass. 224, 17 N. E. 316.

Michigan. *St. Johns Nat. Bank v. Steel*, 135 Mich. 165, 97 N. W. 704.

Missouri. *Heidbreder v. Superior Ice & Cold Storage Co.*, 184 Mo. 446, 456, 83 S. W. 466.

Virginia. *Addison v. Lewis*, 75 Va. 701.

Directors may loan money to the corporation upon the pledge of securities, in order to preserve its credit and to tide it over difficulties. A loan by directors to aid the company is valid and enforceable where made after a general conference of persons interested in the company, "in an honest belief and expectation that the company, as a going concern, might be tided over its embarrassments, as it had been represented to be possible by an investigating committee, and without any personal advantage taken." *Converse v. Sharpe*, 161 N. Y. 571, 56 N. E. 69, aff'g 37 N. Y. App. Div. 399, 55 N. Y. Supp. 1080.

A loan by directors to the corporation is in any event not void. *Schnittger v. Old Home Consol. Min. Co.*, 144 Cal. 603, 78 Pac. 9.

"Where a director has made a loan or advance of money to the corporation, his rights are very much the same, under general doctrines of equity, whether the contract be affirmed or avoided: in either case his money must be returned with interest." 2 *Machen, Corporations*, § 1596.

⁸² *Teller v. Tonopah & G. R. R.*, 155 Fed. 482.

enforce security therefor.⁸³ The fact that the loan is made by a corporate officer is unimportant except that it imposes the necessity of a closer scrutiny, and requires that his conduct appear to have been for the company's interest and aboveboard.⁸⁴ In the leading case on this subject, the Supreme Court of the United States has held that "it cannot be maintained that any rule forbids one director among several from loaning money to the corporation when the money is needed, and the transaction is open, and otherwise free from blame. No adjudged case has gone so far as this. Such a doctrine, while it would afford little protection to the corporation against fraud or oppression, would deprive it of the aid of those most interested in giving aid judiciously, and best qualified to judge of the necessity of that aid, and of the extent to which it may safely be given."⁸⁵ In fact, at the present time, the only question which presents itself, ordinarily, is whether the lender of money to his company can obtain a preference for his claim over other creditors by reason of his being on the inside and having knowledge of the prevailing conditions—a matter already considered in this chapter.⁸⁶

Where the president of a corporation loans his money to the company, and the loan is free from actual fraud, it has been held that the company cannot escape liability for the loan which it has received and used, on the ground that the loan was made for the company by the president from himself and without any action of the board of directors.⁸⁷ However, it would seem, and it has been so held, that loans by corporate officers to the corporation come within the rule that if the officers also represent the corporation in a transaction, it is voidable at the instance of the corporation or stockholders although entered into in good faith and it is fair and just.⁸⁸

The better and safer practice, it would seem, is for the officer who has money to lend to do so in his own name and not cover up the transaction by making the loan in the name of a third person. Thus, in a federal case, where a board of directors authorized the president of the corporation to borrow a certain sum and execute a mortgage

⁸³ See § 2326, *supra*.

⁸⁴ *Converse v. Sharpe*, 161 N. Y. 571, 56 N. E. 69, *aff'd* 37 N. Y. App. Div. 399, 55 N. Y. Supp. 1080. To same effect *Williams v. Jones*, 23 Mo. App. 132.

"He is held to a higher degree of good faith than a creditor who has no interest in the corporation. This is about the only difference." Os-

borne's *Adm'x v. Monks*, 14 Ky. L. Rep. 606, 21 S. W. 101.

⁸⁵ *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 589, 23 L. Ed. 328.

⁸⁶ See § 2326, *supra*.

⁸⁷ *Bossert v. Geis*, 57 Ind. App. 384, 107 N. E. 95.

⁸⁸ *Bingham v. Bell & Zoller Coal Co.*, 175 Ill. App. 469, 477.

as security, and he borrowed it from himself and another director, paying a twenty per cent. commission for the loan, but the names of the lenders were not disclosed to the other directors, it was held that the lending officers should have disclosed to the board that they themselves had decided to advance the money, and that because of failure so to do the corporation had a right to rescind the agreement to pay the commission for the loan and to have the mortgage cancelled, upon repayment of the amount loaned.⁸⁹ In California, however, it is held that it was not a fraud for directors to fail to disclose the fact to co-directors that they were the real parties who were loaning money to the corporation or that the person in whose name the transaction was had was merely a figurehead.⁹⁰

Of course, the loan must be a fair one and made in good faith.⁹¹ Thus, an officer loaning money to his corporation cannot charge compound interest, where such interest is forbidden unless based on an express agreement based on a good consideration.⁹²

Of course if a corporate officer loans money to the corporation under an agreement that it should become payable when the surplus of the company should exceed a certain sum, he cannot recover where the existence of such surplus is not shown.⁹³

§ 2369. — Payment by officer of valid outstanding claims against the corporation. Where a director or other corporate officer pays valid existing debts of the corporation, he is ordinarily entitled to reimbursement.⁹⁴ Thus, where the manager of a company has been

⁸⁹ *Bensiek v. Thomas*, 66 Fed. 104.

⁹⁰ "It was no violation of their duty as trustee to loan the money in the name of another rather than in their own, unless it could be shown that thereby the corporation sustained some detriment, or they obtained some undue advantage over the corporation." *Schnittger v. Old Home Consol. Min. Co.*, 144 Cal. 603, 78 Pac. 9.

⁹¹ Cannot be enforced where entered into in bad faith to protect debts of the lending directors and where terms of the loan were oppressive. *Bingham v. Bell & Zoller Coal Co.*, 175 Ill. App. 469.

⁹² *Tilton v. Gans*, 90 N. Y. Misc. 84, 152 N. Y. Supp. 981, aff'd 168 N. Y. App. Div. 908, 910, 152 N. Y. Supp. 1146.

⁹³ *Koster v. Lafayette Trust Co.*, 147 N. Y. App. Div. 63, 131 N. Y. Supp. 799.

⁹⁴ *Savage v. Madelia Farmers' Warehouse Co.*, 98 Minn. 343, 108 N. W. 296.

If the manager of a company spends his own money in good faith for the benefit of the corporation, he may recover the amount so expended from the company. *Atlantic City & Suburban Gas & Fuel Co. v. Johnson*, 81 N. J. Eq. 351, 514, 88 Atl. 163.

Directors expending money in saving property to the corporation are entitled to be reimbursed for their expenditures. *Coombs v. Barker*, 31 Mont. 526, 79 Pac. 1.

A solvent corporation may assign a note to its president to reimburse

accustomed for years to pay debts of the company from his own pocket and thereafter reimburse himself from the corporate funds, and the directors never objected thereto although they knew about it, he may recover back moneys advanced by him, as against the contention that the payments were voluntary and hence cannot be recovered.⁹⁵

§ 2370. — Loans by corporation to officers. Except where expressly forbidden by statute or where the loan is in excess of the limit fixed by statute as applicable to loans to officers, as is often the case in connection with banks,⁹⁶ a director or other corporate officer may borrow money from the corporation,⁹⁷ without any necessary imputation of fraud,⁹⁸ provided there is no breach of trust in making the loan.⁹⁹ However, if corporate officers become borrowers from the corporation, their transactions for their own benefit are closely scrutinized.¹ Where a director of a building association borrows money from the company, he cannot set up as a defense to a recovery of the loan a secret parol agreement between himself and the other directors whereby the loan had been repaid by his stock in the association having been fully paid up.²

In many jurisdictions there are statutes expressly prohibiting the directors or other managing officers of particular corporations, such as savings banks, banks generally, insurance companies, etc., from

him for money advanced for the corporation. *Blake v. Ray*, 110 Ky. 705, 23 Ky. L. Rep. 84, 62 S. W. 531.

⁹⁵ *In re Gouverneur Pub. Co.*, 168 Fed. 113.

If a general manager pays out money from time to time for corporate debts, with the knowledge of the directors, he may recover such payments as against the objection that the payments were voluntary ones. *Sutton v. Farmers' Union Warehouse Co.*, 11 Ga. App. 338, 75 S. E. 336.

⁹⁶ *Pemigewasset Bank v. Rogers*, 18 N. H. 255.

In Minnesota, statute prohibits trust companies from loaning their funds to any director or officer. *Shearer v. Barnes*, 118 Minn. 179, 136 N. W. 861.

⁹⁷ *Garrison Canning Co. v. Stanley*, 133 Iowa 51, 110 N. W. 171. See also

Bluehill Academy v. Ellis, 32 Me. 260.

Where one who is the president and director of a bank borrows money from the bank under a contract to pay to it a usurious rate of interest on the loan, he will not be permitted thereafter to take advantage of the provision for the illegal rate of interest to escape payment of any interest whatsoever, as the statute provides in ordinary cases. *Gund v. Ballard*, 73 Neb. 547, 103 N. W. 309.

⁹⁸ *Garrison Canning Co. v. Stanley*, 133 Iowa 57, 110 N. W. 171.

⁹⁹ *North Carolina R. Co. v. Wilson*, 81 N. C. 223.

¹ *In re Conyngham's Appeal*, 57 Pa. St. 474.

² *Pangborn v. Citizens' Bldg. Ass'n of Plainfield*, 35 N. J. Eq. 341.

borrowing any of the funds or deposits of the corporation, directly or indirectly, and imposing a penalty for violation of the statute, or making its violation a misdemeanor. A statute prohibiting a director of a corporation from borrowing any of its deposits or funds is intended for the protection of the stockholders and depositors or creditors, and does not preclude the corporation from suing a director to recover money loaned to him in violation of the statute, or from enforcing securities taken by it in the transaction.³

§ 2371. — Compromise of claims. The fact that a majority of the directors are also creditors makes a compromise and settlement by the board of such claims against the company, voidable at the option of the company, although the settlement was for the best interests of the corporation at the time.⁴

§ 2372. — Cancellation of contracts. It has been held that the president of a company cannot cancel a corporate contract where his own private interest would be advanced thereby at the expense of the corporation, where not expressly authorized to do so by the board of directors with full knowledge of the facts.⁵

§ 2373. — Issuance of stock to directors or other officers. The rules as to dealings between the directors or managing officers of a corporation, and the corporation itself, apply equally well to the issuance of stock to themselves.⁶

§ 2374. — Voting compensation to themselves as directors. This is fully considered in another chapter.⁷

³ *Brittan v. Oakland Bank of Savings*, 124 Cal. 282, 71 Am. St. Rep. 58, 57 Pac. 84; *Savings Bank of San Diego County v. Burns*, 104 Cal. 473, 38 Pac. 102; *Lester v. Howard Bank*, 33 Md. 558, 3 Am. Rep. 211; *Bowditch v. New England Mut. Life Ins. Co.*, 141 Mass. 292, 55 Am. Rep. 474, 4 N. E. 798.

⁴ *Higgins v. Lansingh*, 154 Ill. 301, 363-369, 40 N. E. 362. To same effect, *Leonhardt v. Citizens' Bank of Ulysses*, 56 Neb. 38, 76 N. W. 452.

⁵ *Wallace v. Oceanic Packing Co.*, 25 Wash. 143, 64 Pac. 938.

⁶ Where the rights of creditors are not involved, officers of a corporation

organized for the manufacture of a patented article of purely speculative value, who in good faith and with the assent of the other stockholders give their time, skill and means in attempting to develop the business, and place it on a firm financial footing, in consideration of a transfer to them of a portion of unissued stock, which has no present marketable value, are not liable to the corporation for the par value of the stock. *Divine v. Universal Sew. Mach. Motor Attachment Co.* (Tenn. Ch. App.), 38 S. W. 93.

⁷ *Infra*, chapter on Compensation of Officers.

§ 2375. — Actions by directors or other officers against corporation. As will be fully noticed in a subsequent chapter in this volume,⁸ a director or other corporate officer is not precluded from bringing an action against his corporation merely because he is a director or other officer thereof, although in a sense he then represents both sides to some extent.⁹

§ 2376. Transactions between corporations having one or more common directors or other officers—In general. Having considered the effect of contracts and other transactions between a corporation on the one side and an officer thereof on the other side, it is now necessary to notice another and narrower phase of the question where the dealing is between two corporations having the same officers wholly or in part. In case of interlocking officers, at least in the case of one or more common directors, the situation that arises is a contract between the same persons, in whole or in part, but representing different corporations, which closely resembles the case where a director or other officer acts for himself individually as the party of the one part and acts for the corporation as the party of the other part. Such a dealing may be one where (1) all or a majority of the directors are common to both corporations, or (2) some but only a minority of the directors are common to both corporations, or (3) where one or more officers other than directors are common to both corporations. Now the courts state the law somewhat differently in regard to the effect of common, or, as often called, "interlocking," officers. One statement of the rule is as follows: "The directors and agents of two companies are disqualified from representing both companies in a transaction where the interests of the two companies are opposed."¹⁰ This is not strictly true. The true rule is that such transactions are voidable but not void, and the only room for conflict of opinion is as to whether the corporation or its stockholders may set aside or defeat the transaction (1) merely because of the common officers without regard to whether the transaction is fair or unfair or entered into in good faith or bad faith, or whether the transaction is voidable

⁸ *Infra*, chapter on Actions Against Corporations.

⁹ *Hutchinson v. Philadelphia & G. S. S. Co.*, 216 Fed. 795; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30, 89.

¹⁰ *Martin v. D. B. Martin Co.*, — Del. Ch. —, 88 Atl. 612.

Directors have no implied authority to bind the corporation by making a contract with another corporation whom they represent. *McLeod v. Lincoln Medical College of Cotner University*, 69 Neb. 550, 557, 98 N. W. 672, rev'g on rehearing 96 N. W. 265.

(2) only where unfairness or bad faith, or both, are shown. This will depend, or at least ought to depend, to some extent, on whether the common officers really represent both corporations or whether one of the corporations is represented by other officers. Another statement of the rule, apparently contradictory but not so in fact, is that the mere fact that the managing officers of two corporations are the same does not prevent the two corporations from dealing with each other.¹¹

The rules which govern all these cases so stated are as follows:

1. Such contracts or transactions are voidable rather than void, without regard to the number of interlocking officers, or who they are, or what part they take in the contract or transaction.¹² Hence, they may be ratified by the stockholders or by officers in a proper case.¹³ They are voidable rather than void although the same persons constitute a majority of the directorate of each contracting company.¹⁴ So the fact the majority of the directors of one corporation

¹¹ "The fact that some of the stockholders in one company had also stock in each of other companies, and the fact that the general managers and officers of one company were also general managers and officers of another company, did not make these companies the same corporation, nor the acts of one the acts of the other." *Ft. Smith Light & Traction Co. v. Kelley*, 94 Ark. 461, 127 S. W. 975.

¹² *United States*. *Coe v. East & W. R. Co. of Alabama*, 52 Fed. 531; *Jesup v. Illinois Cent. R. Co.*, 43 Fed. 483.

California. *Manning v. App. Consol. Gold Min. Co.*, 171 Cal. 610, 154 Pac. 301; *San Diego, O. T. & P. B. R. Co. v. Pacific Beach Co.*, 112 Cal. 53, 33 L. R. A. 788, 44 Pac. 333.

Georgia. *Mayor, etc., City of Griffin v. Inman, Swann & Co.*, 57 Ga. 370.

Iowa. *Beidenkopf v. Des Moines Life Ins. Co.*, 160 Iowa 629, 46 L. R. A. (N. S.) 290, 142 N. W. 434.

Missouri. *Manufacturers' Sav. Bank v. O'Reilly*, 97 Mo. 38, 10 S. W. 865; *Kitchen v. K. C. & N. Ry. Co.*, 69 Mo. 224; *Alexander v. Williams*, 14 Mo. App. 13.

New York. *Continental Ins. Co. v.*

New York & H. R. Co., 103 App. Div. 282, 93 N. Y. Supp. 27, *aff'd* 187 N. Y. 225, 79 N. E. 1026.

Washington. *Roberts v. Washington Nat. Bank*, 11 Wash. 550, 40 Pac. 225.

Dealings between two corporations are not void because the person negotiating the buying and selling was the general manager or other agent of both companies. *Aldine Mfg. Co. v. Phillips*, 129 Mich. 240, 88 N. W. 632, 8 Det. L. N. 933.

In Georgia, it is provided by statute that "a contract otherwise fair is not rendered void by the fact that the contracting parties consist of corporations having the same persons or officers in each." *Civ. Code Ga.* § 2221.

¹³ *Coe v. East & W. R. Co. of Alabama*, 52 Fed. 531, 543; *Manning v. App. Consol. Gold Min. Co.*, 171 Cal. 610, 154 Pac. 301; *Sausalito Bay Land Co. v. Sausalito Improvement Co.*, 166 Cal. 302, 136 Pac. 57; *Continental Ins. Co. v. New York & H. R. Co.*, 187 N. Y. 225, 79 N. E. 1026, *aff'g* 103 N. Y. App. Div. 282, 93 N. Y. Supp. 27.

¹⁴ *Sausalito Bay Land Co. v. Sau-*

are also directors of the other party to a contract does not make the contract void but it may be ratified by the stockholders.¹⁵

2. The contract or transaction is always voidable if shown to be unfair or entered into in bad faith, to the damage of the complaining party, although there is no actual fraud such as would be required to invalidate the transaction if there was no fiduciary relationship of the parties.

3. The contract or transaction may always be set aside on account of actual fraud, unless the complaining party is barred by laches or conduct. In other words, if there is such fraud as would require the setting aside of a transaction between two corporations having no common officers or agents, then of course the right to set aside is not lessened because of the common officers.

In addition, according to the better view, although the contrary is sometimes held, the following rules govern:

1. If the contract or other transaction is entered into by the same person as the acting officer of both corporations, or if the contract is between two boards of directors, a majority or all of whom are common to both boards, then the better rule is that the contract or other transaction is voidable merely at the option of either party, notwithstanding it is perfectly fair to both and the best of good faith has prevailed on the part of all.¹⁶

2. The contract or other transaction is not voidable at the option of either party, where fair and entered into in good faith, if the common officers are a minority of the board of directors or the contract was entered into on at least one side by officers not common to both corporations.

It has been stated that "it is impossible to reconcile the cases upon the law of common directors."¹⁷ This is true, at least to some extent, although many of the decisions which appear at first to be conflicting are capable of reconciliation when properly construed.

However, identity of officers does not make one corporation liable for acts done by its officers in their discharge of duties towards the other company, although they act in that respect by reason of information derived in the discharge of similar duties as officers of such company.¹⁸

salito Improvement Co., 166 Cal. 302, 136 Pac. 57.

¹⁵ Continental Ins. Co. v. New York & H. R. Co., 187 N. Y. 225, 79 N. E. 1026.

¹⁶ See § 2377, *infra*.

¹⁷ Geddes v. Anaconda Copper Min. Co., 222 Fed. 129, 133.

¹⁸ Holder v. Cannon Mfg. Co., 138 N. C. 308, 50 S. E. 681, *rev'g* on rehearing 135 N. C. 392, 47 S. E. 481.

Whether notice to an officer of a corporation is notice to another corporation of which he is also an officer has been noticed in a preceding subdivision.¹⁹

§ 2377. — Where common officer or officers act for both corporations. "It is the settled law of this state," says the Alabama Supreme Court, "that if the same persons, as the directors of two different companies, represent both companies in a transaction in which their interests are opposed, such transaction may be avoided by either company, or at the instance of a stockholder in either company, without regard to the question of advantage or detriment to either company. * * * This doctrine is founded upon that rigorous rule of morality, to be found, perhaps, in every enlightened system of jurisprudence, which recognizes one of the commonest of the infirmities of human nature, and sternly forbids the unequal conflict between duty and self-interest."²⁰ The Alabama rule is followed in Nebraska²¹ and New Hampshire.²² So in Tennessee the rule is that where officials of one company contract with another company of which they are also officers, the corporation may obtain an annulment of the contract, if seasonably challenged "without regard to whether it is favorable or unfavorable" to it.²³

On the other hand, the fact that all or a majority of the directors, or that one or more common officers other than directors, act for both corporations in regard to the transaction involved, is held in other jurisdictions not to make the transaction voidable merely because of the common officers representing both parties, but to make it voidable only where it is unfair or entered into in bad faith. Thus, in

¹⁹ See §§ 2211-2260, *supra*.

²⁰ *Alabama Fidelity Mortgage & Bond Co. v. Dubberly*, — Ala. —, 73 So. 911.

Same rule laid down in *O'Conner Min. & Mfg. Co. v. Coosa Furnace Co.*, 95 Ala. 614, 36 Am. St. Rep. 251, 10 So. 290, and approved in *Sausalito Bay Land Co. v. Sausalito Improvement Co.*, 166 Cal. 302, 136 Pac. 57, as stating the "correct doctrine."

"Value of the rule of equity, to which we have adverted, lies to a great extent in its stubbornness and inflexibility. Its rigidity gives it one of its chief uses as a preventive or discouraging influence, because it

weakens the temptation to dishonesty or unfair dealing on the part of trustees, by vitiating, without attempt at discrimination, all transactions in which they assume the dual character of principal and representative." *Munson v. Syracuse, G. & C. R. Co.*, 103 N. Y. 58, 74, 8 N. E. 355, 358.

²¹ *Fitzgerald v. Fitzgerald & Mal-lory Const. Co.*, 44 Neb. 463, 62 N. W. 899.

²² *Pearson v. Concord R. Corporation*, 62 N. H. 537, 13 Am. St. Rep. 590.

²³ *Attalla Iron Ore Co. v. Virginia Iron, Coal & Coke Co.*, 111 Tenn. 527, 537, 77 S. W. 774.

Michigan, it is held that the fact that an officer of two corporations who acts for both in making a sale was a stockholder in both corporations does not make the contract void, but merely requires him to show that he has acted with clean hands.²⁴

In California, the rule is stated as follows: "Where two corporations, through their boards of directors, make a contract with each other, the directors who are common to both are not within the rigid rule of the cases which hold that one who acts in a fiduciary capacity cannot deal with himself in his individual capacity, and that any contract thus made will be declared void, without any examination into its fairness, or the benefits derived from it to the cestui que trust. Two corporations have the right, within the scope of their chartered powers, to deal with each other; and this right is certainly not destroyed or paralyzed by the fact that some, or a majority, of the directors are common to both. Of course, if such directors should wrongfully and wilfully use their powers to the prejudice of one of the corporations, their action, if not acquiesced in, and if contested at proper time, could be avoided, as in any other case of actual fraud."²⁵ So it is held in the federal courts that the mere fact that the sale of property of one corporation to a new corporation, the majority of whose governing officers are the same, will not per se vitiate the sale. The question "is always one of good faith and fairness, except in cases where public policy intervenes."²⁶

"The rule which is supported, both by reason and the weight of authority," said Justice Haight in a federal case, "is that the presence of directors on both sides of a transaction does not give a dissenting stockholder an arbitrary right to avoid the transaction, but does give him the right to subject it to the scrutiny of the court, and casts upon the corporation or directors concerned the burden of showing that the transaction is fair and absolutely free from fraud."²⁷ And in Pennsylvania, the rule is that the fact that the

²⁴ "When the transactions are open, honest, and fair, and known to the officials of both companies, they will be sustained." *Aldine Mfg. Co. v. Phillips*, 129 Mich. 240, 88 N. W. 632, 8 Det. L. N. 933. To same effect, *Michigan Slate Co. v. Iron Range & H. B. R. Co.*, 101 Mich. 14, 59 N. W. 646.

²⁵ *San Diego, O. T. & P. B. R. Co. v. Pacific Beach Co.*, 112 Cal. 53, 33 L. R. A. 788, 44 Pac. 333, following

Pauly v. Pauly, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29. But see the California decision cited in note 20, *supra*, approving the Alabama rule, which approval was, however, merely dictum.

²⁶ *Marks v. Merrill Paper Co.*, 203 Fed. 16, modifying 188 Fed. 850.

²⁷ *Marcy v. Guanajuato Development Co.*, 228 Fed. 150, 151.

Same rule was adopted in *Davidson v. Mexican Nat. R. Co.*, 59 Fed. 653,

boards of directors of two corporations contracting with each other are identical, does not make the contract subject to attack, where it is not unfair.²⁸ So in Missouri it is held that a sale of property by one corporation to another having the same directors cannot be complained of by a stockholder where the sale was for full value and in no way fraudulent.²⁹ So in Maryland the rule is that contracts between two corporations having more or less common officers are valid unless shown to be unfair.³⁰ The majority rule is approved in New York in some cases although the governing rule in that state is a matter of doubt.³¹ In fact, this rule is the one laid down by the courts of most of the states.³²

663, but a contrary rule seems to have been applied in *Bill v. Western U. Tel. Co.*, 16 Fed. 14, in case of a lease where a majority of the directors of the lessor were also directors of the lessee.

²⁸ *South Side Trust Co. of Pittsburgh v. Washington Tin Plate Co.*, 252 Pa. 237, 97 Atl. 450; *Mercantile Library Hall Co. v. Pittsburgh Library Ass'n*, 25 Pittsb. Leg. J. (N. S.) 345.

²⁹ *Cummings v. Parker*, 250 Mo. 427, 157 S. W. 629; *Manufacturers' Sav. Bank v. O'Reilly*, 97 Mo. 38, 10 S. W. 865. To same effect, *Kitchen v. St. Louis, K. C. & N. Ry. Co.*, 69 Mo. 224. Compare *Ward v. Davidson*, 89 Mo. 445, 1 S. W. 846.

³⁰ *Pennsylvania R. Co. v. Minis*, 120 Md. 461, 496, 87 Atl. 1062; *Booth v. Robinson*, 55 Md. 419. See also *Shaw v. Davis*, 78 Md. 308, 23 L. R. A. 294, 28 Atl. 619; *Davis v. United States Elec. Power & Light Co.*, 77 Md. 35, 25 Atl. 982.

³¹ See *Burden v. Burden*, 159 N. Y. 287, 54 N. E. 17, aff'g 8 N. Y. App. Div. 160, 40 N. Y. Supp. 499; *Genesee Valley & W. R. Co. v. Retsof Min. Co.*, 15 N. Y. Misc. 187, 36 N. Y. Supp. 896, explaining *Wallace v. Long Island R. Co.*, 12 Hun (N. Y.) 460. Compare *Hart v. Ogdensburg & L. C. R. Co.*, 89 Hun (N. Y.) 316, 35 N. Y. Supp. 566, holding that minority stockhold-

er cannot attack contract on such ground; *Cole v. Millerton Iron Co.*, 59 Hun (N. Y.) 217, 13 N. Y. Supp. 851; *Barr v. New York, L. E. & W. R. Co.*, 52 Hun (N. Y.) 555, 5 N. Y. Supp. 623.

³² *United States*. See *Leavenworth County Com'rs v. Chicago, R. I. & P. R. Co.*, 134 U. S. 688, 707, 33 L. Ed. 1064.

Arizona. "Corporations having the same directors may make contracts with each other, and when entirely honest and fair, the courts will enforce them." *Gould Copper Min. Co. v. Walker*, 17 Ariz. 332, 152 Pac. 853.

Colorado. *St. Joe & M. F. Consol. Min. Co. v. First Nat. Bank*, 10 Colo. App. 339, 50 Pac. 1055.

Georgia. *Mayor, etc., City of Griffin v. Inman, Swann & Co.*, 57 Ga. 370, *semble*.

Indiana. See *Evansville Public Hall Co. v. Bank of Commerce*, 144 Ind. 34, 42 N. E. 1097.

Kansas. *Salina Nat. Bank v. Prescott*, 60 Kan. 690, 57 Pac. 121, rev'g 9 Kan. App. 886, 53 Pac. 769.

Louisiana. *Leathers v. Janney*, 41 La. Ann. 1120, 6 L. R. A. 661.

Tennessee. *New Memphis Gaslight Co. Cases*, 105 Tenn. 268, 80 Am. St. Rep. 880, 60 S. W. 206.

West Virginia. See *Sweeny v. Grape Sugar Refining Co.*, 30 W. Va. 443, 454, 8 Am. St. Rep. 88, 4 S. E. 431.

In still other jurisdictions, the question is incidentally discussed without formulating any definite rule.³³ Even in those states, such as New Jersey, where a contract is voidable at the option of the corporation, exercised within a reasonable time, if made between a corporation and one or more of its officers, without regard to the fairness of the contract or the good faith of the officers adversely interested,³⁴ such rule is generally not applied to transactions between corporations where the only vice is the identity of one or more members of the respective boards of directors, or the identity of one or more other officers.³⁵

In a New York case, the president of a woolen company in which he was the principal stockholder, contracted with a gas company of which he was a director and chairman of the executive committee, whereby the first-named company obtained great benefits at the expense of the latter company. The lower court held that inasmuch as the president did not vote on the contract and took no part in reference thereto, the gas company was not entitled to a rescission. Upon appeal, however, the Appellate Division of the Supreme Court said that it was apparent that the president, through his influence as a member of the executive committee of the gas company, procured or permitted the contract to be entered into; that it was his duty as a member of the executive committee to see to it that the best possible contract was negotiated on behalf of the gas company, or, at least that a contract which was fair and equitable was so negotiated and approved; that as president of the woolen company in which he was the principal stockholder he was practically dealing in his own behalf; that it was immaterial that the officer represented the gas company silently and did not openly advocate or vote for the adoption of the contract, since his negotiation of the contract implied and carried with it the force and effect of his approval; and that the contract was voidable at the election of the gas company without regard to whether there was good or bad faith on the part of the officer.³⁶

§ 2378. — Where unfair or fraudulent. If unfair or entered into in bad faith, transactions between corporations having common

³³ Metropolitan Telephone & Telegraph Co. v. Domestic Telegraph & Telephone Co., 44 N. J. Eq. 568, 573, 14 Atl. 907.

³⁴ See § 2346, *supra*.

³⁵ Marcy v. Guanajuato Development Co., 228 Fed. 150, 151, where the court seems to hold that the mere

fact of common directors does not give them "any personal beneficial interest in any of the transactions complained of."

³⁶ Globe Woolen Co. v. Utica Gas & Electric Co., 151 N. Y. App. Div. 184, 136 N. Y. Supp. 24, rev'g 75 N. Y. Misc. 539, 136 N. Y. Supp. 16.

officers, wholly or in part, are always voidable by the injured corporation or its stockholders,³⁷ provided there has been no valid ratification or the right to urge the invalidity is not barred by laches.³⁸ Inadequacy of price is unfairness within this rule.³⁹

Where one corporation purchases a majority of the stock of another corporation, in order to prevent competition, the rights of minority stockholders of the latter must not be infringed upon by the purchasing corporation—the two companies being thereafter controlled by the same officers—by contracts between the two corporations through the same officers.⁴⁰

§ 2379. — Where common directors are a minority and their votes not necessary to creation of contract. A contract made between two corporations by their boards of directors is not voidable at the election of one of the parties thereto merely because a minority of its board of directors are also directors of the other company, where there is a quorum of wholly disinterested officers who vote in favor of the contract.⁴¹ In other words, the mere fact that both corporations have a director in common, or a number of directors less than a majority, does not affect an otherwise fair contract.⁴² On the other hand, it is immaterial that the common directors were not a majority of either board, so far as the rule that transactions between corporations having common directors will be closely scrutinized and may be set aside unless fair, is concerned.⁴³

³⁷ "The extent to which the courts will go in refusing to enforce contracts of this kind, as shown by the adjudicated cases, depends in a great measure upon the facts of each particular case. No inflexible rule has been established." *City Nat. Bank v. Merchants' & Planters' Nat. Bank* (Tex. Civ. App.), 105 S. W. 338.

Managing officials of one corporation cannot enter into a secret agreement with a third person to form a new corporation, with the intent of binding the old corporation with a contract highly beneficial to the new corporation, which was not for the best interests of the old company. *Attalla Iron Ore Co. v. Virginia Iron, Coal & Coke Co.*, 111 Tenn. 527, 77 S. W. 774.

If bad faith is present, the officers

may be held personally liable or the deal may be set aside. See *Brinekerhoff v. Holland Trust Co.*, 171 Fed. 781.

³⁸ See §§ 2394-2402, *infra*.

³⁹ "Inadequacy of price is unfairness, and condemns without further inquiry in an attempt to determine whether due to corruption or honest, but mistaken, judgment unconsciously swayed by adverse interest." *Geddes v. Anaconda Copper Min. Co.*, 222 Fed. 129, 133.

⁴⁰ *Cannon v. Brush Elec. Co.*, 96 Md. 446, 94 Am. St. Rep. 584, 54 Atl. 121.

⁴¹ *United States Rolling Stock Co. v. Atlantic & G. W. R. Co.*, 34 Ohio St. 450, 32 Am. Rep. 380.

⁴² *Hiles v. C. A. Hiles & Co.*, 120 Ill. App. 617, 627.

⁴³ "That the common directors

The by-laws of the United States Steel Corporation provide that "inasmuch as the directors of this company are men of large and diversified interests, and are likely to be connected with other corporations with which from time to time this company must have business dealings," no contract with another company shall be affected by the fact that directors of the steel company shall be directors or officers or interested in, the other company, if there are present at the directors' meeting of the steel company passing on such deals "a quorum of directors not so interested."⁴⁴

§ 2380. — Application of rules to mere agents or officers other than directors. Questions often arise where an officer of a corporation other than a director or a mere agent, contracts with another corporation, of which he is also an officer other than a director, or a mere agent, as to the validity and effect of the contract.⁴⁵ The fact that the same person was the president of both the mortgagor and mortgagee corporations does not necessarily invalidate the mortgage.⁴⁶ If one person is treasurer of a company depositing money, and also of the company with whom the money is deposited, "the rights, duties and liabilities of each company are just the same as if a different individual had acted as treasurer of the respective companies."⁴⁷ Of course the fact that the same person is the president of two corporations does not invalidate dealings between the two corporations in which he acted with full authority from the directors and stockholders of each corporation.⁴⁸

In Mississippi it has been held that an insurance policy issued by an agent of the company to a corporation in which he was a director is not binding upon the insurance company.⁴⁹

were not a majority of either board is a difference in degree, but not in principle. They may have dominated the board. In both cases is divided duty, conflicting interest, possible impaired judgment of unknown effect, difficulty of proof, and danger to stockholders." *Geddes v. Anaconda Copper Min. Co.*, 222 Fed. 129, 133.

⁴⁴ See *Fletcher's Corporation Forms*, 687.

⁴⁵ Rights where same person was secretary of four corporations, and he drew a check on one, in favor of another, and deposited it to the credit of a third corporation, and then checked it out to pay his individual

debt, see *Glendale Inv. Ass'n v. Harvey Land Co.*, 114 Wis. 408, 90 N. W. 456.

Sale by president of building association to trust company of which he was president, see *Brinckerhoff v. Roosevelt*, 131 Fed. 955, aff'd 143 Fed. 478.

⁴⁶ *Roy & Co. v. Scott, Hartley & Co.*, 11 Wash. 399, 39 Pac. 679.

⁴⁷ *Elk Brewing Co. v. Neubert*, 213 Pa. 171, 62 Atl. 782.

⁴⁸ *Leathers v. Janney*, 41 La. Ann. 1120, 6 L. R. A. 661, 6 So. 884.

⁴⁹ *Greenwood Ice & Coal Co. v. Georgia Home Ins. Co.*, 72 Miss. 46, 17 So. 83.

If the manager of a gas company turns over to himself as manager of a competing gas company, its gas well, but without authority, the second company cannot claim to hold adversely, within the rule that if the corporation was in adverse possession under a claim of title that question must first be determined by an action of ejectment before an action would lie for the gas taken.⁵⁰ Where the same person acts as agent of two corporations standing in the relation of debtor and creditor, he cannot, without the consent of the debtor company, assign its note to secure a debt owed to a stranger by the creditor company in such a way as to prevent it from using its set-offs against the creditor corporation as a defense to a suit on a note.⁵¹

§ 2381. — Where common officer (not director) necessarily takes no part in the transaction. The fact that a contract is between two banks, and that the president of one is the vice president of the other, does not make the contract voidable at the option of one corporation where the concurrence of such common officer was not necessary to the authoritative consummation of the contract and, although he participated in making the contract, another officer who was at least an equal factor with the common officer in making the contract, had power to make the contract alone.⁵²

§ 2382. — Necessity that interests be adverse to bring rule into operation. The underlying rule that an agent cannot serve two masters without acquainting both of all the facts attending the particular transaction applies only where the interests of the two masters, the corporations, are in fact adverse.⁵³ Ordinarily, however, it would seem that the interests of two corporations who are the opposing parties to a contract between them will be deemed adverse so far as the contract is concerned.

§ 2383. — Security for debts. A director of one corporation may vote or otherwise seek in a legitimate way security for an honest debt due from that corporation to another of which he happens to be an officer.⁵⁴

⁵⁰ McCullough v. Ford Natural Gas Co., 213 Pa. 110, 62 Atl. 521.

⁵¹ Guthrie v. Huntington Chair Co., 71 W. Va. 383, 76 S. E. 795.

⁵² City Nat. Bank v. Merchants' & Planters' Nat. Bank (Tex. Civ. App.), 105 S. W. 338.

⁵³ Render v. Arkansas Valley Trus. Co., 196 Fed. 1, 4.

⁵⁴ Rawlings v. New Memphis Gas-light Co., 105 Tenn. 268, 285, 80 Am. St. Rep. 880, 60 S. W. 206, pledge of bonds. See also § 2326, *supra*.

§ 2384. — Right to sue. The fact that two corporations have directors or other officers in common does not of itself prevent one from maintaining an action against the other, and a judgment rendered in such an action is valid if free from fraudulent conduct on the part of the officers who procured the judgment.⁵⁵

§ 2385. — Who are "common" directors. This question, of course, does not ordinarily arise. In one case, however, the rule was attempted to be applied where boards of directors of two companies were appointed by a holding company of the majority of the stock of both companies, but it was held that such fact did not make applicable the rules relating to common directors, since "the fact that their boards may be, and undoubtedly are, appointed by this holding company, does not subject the government of the two companies to a common control. The complainant's argument implies that the directors of the holding company will appoint 'dummies' as directors of each of the two original companies, so that in fact the directors of the holding company will be the directors of both of the other companies. The proofs, however, utterly fail to establish any such situation."⁵⁶

§ 2386. — Rights of corporations as dependent on for whom officer is really acting. In a case in North Dakota, it appeared that the treasurer of an elevator company, who was also cashier of a bank in which the elevator company deposited money, was authorized to draw checks for the latter company, and that he misappropriated bank funds, and, for the purpose of covering up the defalcation drew checks of the elevator company payable to the bank and charged them against the elevator company on the books of the bank. It was held that if he had no intention to transfer funds from one corporation to the other, but acted merely for the purpose of temporarily concealing his defalcation, the checks created no liability in favor of the bank against the elevator company.⁵⁷

§ 2387. — Who may attack. It has been stated in New York that "the right, however, to avoid a contract made by common directors

⁵⁵ *G. W. Jones Lumber Co. v. Wisconsin Lumber Co.*, 125 Ark. 65, 187 S. W. 1068.

⁵⁶ *Pierce v. Old Dominion Copper Mining & Smelting Co.*, 67 N. J. Eq. 399, 58 Atl. 319.

⁵⁷ *Emerado Farmers' Elevator Co.*

v. Farmers' Bank of Emerado, 20 N. D. 270, 29 L. R. A. (N. S.) 567, 127 N. W. 522, also making different holdings according to possible inferences which might be drawn from the evidence.

is in the corporation, not in minority stockholders."⁵⁸ This statement, however, is too broad, and all that is meant apparently is that if the question is one relating to the internal management of the corporation and there is no bad faith or unfairness, or if the act has been ratified in good faith at a stockholders' meeting by a majority of the stockholders, a minority stockholder cannot interfere. So in another New York case it is said that while it is well settled that executory contracts entered into by corporations having common directors are voidable at the instance of either corporation, yet "this right is vested in the corporation, and not in the individual stockholder," unless fraud is shown;⁵⁹ but all that is meant by that decision, it is submitted, is that a minority stockholder, as such, cannot enjoin corporate contracts unless they are fraudulent, i. e., cannot interfere with the management of the corporation, where the acts are not ultra vires, except in case of fraud. It is held in New York that where the directors are all wrongdoers, a stockholder may sue to restrain the officers of the company, and to compel a restoration and an accounting, where the officers have given the use of all the corporate property to a rival of which they are also the officers, without the consent of the stockholders.⁶⁰ However, if it be held that a majority of the stockholders may affirm dealings of corporations having common directors, then a minority stockholder cannot attack such a deal although the corporation might have power to do so,⁶¹ provided there is no actual wrongdoing, such as a conversion of corporate assets.⁶²

§ 2388. — **Presumptions.** It has been held that no presumption of illegality or unfairness arises merely from the fact of interlocking officers.⁶³ On the other hand, it has been held that if officers of both contracting corporations are practically identical, there is a rebuttable presumption that the contract is fraudulent.⁶⁴ And it has been

⁵⁸ *Continental Ins. Co. v. New York & H. R. Co.*, 187 N. Y. 225, 79 N. E. 1026, aff'g 103 N. Y. App. Div. 282, 93 N. Y. Supp. 27.

⁵⁹ *Burden v. Burden*, 159 N. Y. 287, 54 N. E. 17.

⁶⁰ *Boaz v. Sterlingworth Ry. Supply Co.*, 68 N. Y. App. Div. 1, 73 N. Y. Supp. 1039.

⁶¹ *Hart v. Ogdensburg & L. C. R. Co.*, 89 Hun (N. Y.) 316, 35 N. Y. Supp. 566.

⁶² See § 2397, *infra*.

⁶³ *Reclamation Dist. No. 70 v. Birks*, 159 Cal. 233, 113 Pac. 170.

"But such common directors owe the same fidelity to both corporations, and there is no presumption that they will deal unfairly with either." *San Diego, O. T. & P. B. R. Co. v. Pacific Beach Co.*, 112 Cal. 53, 33 L. R. A. 788, 44 Pac. 333.

⁶⁴ *Barrie v. United Rys. Co. of St. Louis*, 125 Mo. App. 96, 102 S. W. 1078.

held that if a person is an officer of two corporations involved in a transaction, "no man can serve two masters, and when he is in the service of two nominal masters whose interests conflict, he is presumed to have acted for that one who is found to be the real master."⁶⁵

§ 2389. — Burden of proof. The burden of showing a sale by one corporation to another, where they have some common directors, to be fair, is on the officers.⁶⁶ "Upon principle, contracts between corporations having a common director should be regarded very much as are contracts between individual directors and their corporations. Such contracts are not prohibited; nor are they *prima facie* void or fraudulent, but they are voidable, and it is a safe rule of conduct which imposes upon those who would sustain them the duty of showing clearly and satisfactorily that they are entirely fair and free from wrong. * * * My conclusion is that the burden is cast upon the defendants to satisfy the court by evidence from those who were in the best position to know all the facts and circumstances, that the whole transaction was fair and absolutely free from oppression or wrong."⁶⁷

§ 2390. — Suggestion as to methods of procedure in case of common officers. The proper method, when there are interlocking officers who are more or less interested as stockholders in both corporations, if they are a majority of the respective boards of directors, is to appoint a disinterested committee from each board of directors to agree upon a contract and then to submit such agreement to the stockholders.⁶⁸

§ 2391. — Injunction against contemplated contracts. In any event, a single nonassenting stockholder cannot obtain an injunction against contemplated contracts between his own company and another company merely because of interlocking officers, especially before any definite contracts have been attempted to be made—the fairness of the contemplated contracts being in no way questioned.⁶⁹

Whether a single stockholder may have a contract between his cor-

⁶⁵ *Brown v. Pennsylvania Canal & H. R. Co.*, 187 N. Y. 225, 79 N. E. Co., 229 Fed. 444, 453. 1026.

⁶⁶ *Geddes v. Anaconda Copper Min.* Co., 222 Fed. 129, 133.

⁶⁷ *Geddes v. Anaconda Copper Min.* Co., 197 Fed. 860, 864, 865.

⁶⁸ *Continental Ins. Co. v. New York*

⁶⁹ *Pierce v. Old Dominion Copper Mining & Smelting Co.*, 67 N. J. Eq. 399, 58 Atl. 319. See also *Robotham v. Prudential Ins. Co. of America*, 64 N. J. Eq. 673, 709, 53 Atl. 842.

poration and another corporation enjoined merely because of the presence of one or more common directors has been considered, but not fully decided, in New Jersey, and it was held that, in case of interlocking directors, "where all the directors of a corporation have a direct valuable interest in the action which they propose to take, in which interest their stockholders do not participate, these stockholders may compel them, before they will be allowed to carry out their scheme, to prove before the court that it is advantageous to the corporation"; and in that case Vice Chancellor Stevenson discusses at some length, without actually deciding, the question whether a minority stockholder may enjoin corporate acts because of common directors, and in the course of his remarks stated that "on the one hand it may be urged with great force that a minority stockholder has a right to repose upon impartial, unbiased action on the part of the directors, who are his trustees, and that he ought not to be obliged, where directors have been acting on both sides of a transaction, or are proposing so to act, to come into court with proofs of actual injury to himself or to the corporation. On the other hand, theoretical rules have to give way to the practical necessities of business. Business eventually is not extended, and great departments of human activity are not developed by means which are fraudulent. The use of such means in the end is suicidal. In these days the relations of corporations to each other are exceedingly complex. Common directors abound and common directors are better than 'dummies.' Whether a transaction between two corporations has been accomplished or remains executory, I incline strongly to believe that the safe rule in most cases in the end will be found to be that the presence of a director or directors on both sides of the transaction under investigation does not give the dissenting stockholder an arbitrary right to an injunction, but may give him a most ample right to subject the transaction to the security [scrutiny] of the court, and may cast upon the corporations or directors concerned the burden of disclosing and justifying the transaction."⁷⁰

§ 2392. Who may attack dealings between interested officers and corporation—In general. If the transaction is voidable, it may ordinarily be set aside at the option of the corporation, or of its stockholders in a proper case; and the motives of the corporation in repudiating such a contract are immaterial so far as the other party to

⁷⁰ *Robotham v. Prudential Ins. Co., Mining & Smelting Co.*, 67 N. J. Eq. 64 N. J. Eq. 673, 709, 53 Atl. 842, 399, 429, 58 Atl. 319.
approved in *Pierce v. Old Dominion*

the contract is concerned.⁷¹ Creditors or other third persons cannot attack the transaction on this ground.⁷² A purchase of the bonds of a corporation by its own directors cannot be attacked by purchasers of the corporate property whose conveyance recognizes the validity of the bond issue.⁷³ The maker of a note cannot set up the defense, when sued by an indorsee, that the transfer by the payee was by a corporation to some of its officers and hence voidable.⁷⁴

The president of a corporation, even though owning a majority of the stock, cannot escape liability under his personal contract by himself assigning it to the company and then accepting the assignment in behalf of the company.⁷⁵

§ 2393. — Other party to contract. If the contract between a corporation and one of its officers "proves to be a profitable one for the corporation, the corporation may hold the contracting officer to its performance. He cannot escape responsibility, though the corporation may."⁷⁶ Directors and other officers of a corporation who deal with the corporation are presumed to know the extent of the powers of their co-officers with whom they deal, and hence they cannot rely upon any holding out by the company as creating apparent authority.⁷⁷

§ 2394. Ratification or authorization of dealings with interested officer—General rule. The general rule is that a contract or other transaction between a corporation and its directors or other officers, is merely voidable at the option of the corporation, and not absolutely void.⁷⁸ It follows that in those jurisdictions, where it so held, the transaction, if within the powers of the corporation, may be consented to, ratified or acquiesced in by the stockholders, or by the board of

⁷¹ Goodell v. Verdugo Canon Water Co., 138 Cal. 308, 71 Pac. 354. Compare § 2387, supra.

⁷² Lackenbach v. Finn, 26 Cal. App. 482, 147 Pac. 471; Crymble v. Mulvane, 21 Colo. 203, 40 Pac. 499; Marsters v. Umpqua Oil Co., 49 Ore. 374, 12 L. R. A. (N. S.) 825, 90 Pac. 151.

⁷³ Medford v. Myrick, — Tex. Civ. App. —, 147 S. W. 876.

⁷⁴ Klein v. Funk, 82 Minn. 3, 84 N. W. 460.

⁷⁵ Woodruff v. Shimer, 174 Fed. 584.

⁷⁶ Union Pac. Ry. Co. v. Credit Mobilier, 135 Mass. 367, 376.

But where one authorized to sell property as agent for another sells it to a corporation wherein he is a stockholder and of which he is president, the sale may be set aside by the party for whom he is acting. Such party may, however, ratify the sale. Whitley v. James, 121 Ga. 521, 49 S. E. 600.

⁷⁷ Baines v. Coos Bay Nav. Co., 45 Ore. 307, 77 Pac. 400.

⁷⁸ See § 2333, supra.

directors, if it could be authorized by them. If it is consented to or ratified, with full knowledge of the facts, it is finally and absolutely binding, and neither the corporation nor individual stockholders nor strangers can afterwards sue to set it aside, or otherwise attack its validity.⁷⁹ "It is not accurate to say, in such a case," it was re-

79 United States. Illinois Pneumatic Gas Co. v. Berry, 113 U. S. 322, 28 L. Ed. 1003; Omaha Hotel Co. v. Wade, 97 U. S. 13, 24 L. Ed. 917; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328; Barr v. Pittsburgh Plate-Glass Co., 57 Fed. 86.

Alabama. O'Conner Min. & Mfg. Co. v. Coosa Furnace Co., 95 Ala. 614, 36 Am. St. Rep. 251, 10 So. 290.

Arkansas. Town of Searcy v. Yarnell, 47 Ark. 269, 1 S. W. 319; Little Rock & Ft. S. Ry. Co. v. Page, 35 Ark. 304.

California. San Diego, O. T. & P. Beach R. Co. v. Pacific Beach Co., 112 Cal. 53, 33 L. R. A. 788, 44 Pac. 333; Fudickar v. East Riverside Irrigation Dist., 109 Cal. 29, 41 Pac. 1024.

Colorado. Mackey v. Burns, 16 Colo. App. 6, 64 Pac. 485.

Illinois. Louisville, N. A. & C. Ry. Co. v. Carson, 151 Ill. 444, 38 N. E. 140.

Iowa. Stetson v. Northern Inv. Co., 104 Iowa 393, 73 N. W. 869.

Massachusetts. Nye v. Storer, 168 Mass. 53, 46 N. E. 402; Warren v. Para Rubber Shoe Co., 166 Mass. 97, 44 N. E. 112.

Minnesota. Africa v. Duluth News Tribune Co., 82 Minn. 283, 83 Am. St. Rep. 424, 84 N. W. 1019; Battelle v. Northwestern Cement & Concrete Pavement Co., 37 Minn. 89, 33 N. W. 327.

New Hampshire. Mt. Washington Hotel Co. v. Marsh, 63 N. H. 230.

New Jersey. Stewart v. Lehigh Valley R. Co., 38 N. J. L. 505; Merri-man v. National Zinc Corporation, 82 N. J. Eq. 493, 89 Atl. 764.

New York. Barr v. New York, L.

E. & W. R. Co., 125 N. Y. 263, 26 N. E. 145; Welch v. Importers' & Traders' Nat. Bank, 122 N. Y. 177, 25 N. E. 269; Risley v. Indianapolis, B. & W. R. Co., 62 N. Y. 240; Hoyle v. Plattsburgh & M. R. Co., 54 N. Y. 314, 13 Am. Rep. 595; Mayer v. Metropolitan Traction Co., 165 App. Div. 497, 150 N. Y. Supp. 1026; Hirsch v. Jones, 115 App. Div. 156, 100 N. Y. Supp. 687; First Nat. Bank of Binghamton v. Commercial Travelers' Home Ass'n of America, 108 App. Div. 78, 95 N. Y. Supp. 454, aff'd 185 N. Y. 575, 78 N. E. 1103; Tilton v. Gans, 90 Misc. 84, 152 N. Y. Supp. 981, aff'd 168 App. Div. 908, 910, 152 N. Y. Supp. 1146; Strobel v. Brownell, 16 Misc. 657, 40 N. Y. Supp. 702.

Ohio. United States Rolling Stock Co. v. Atlantic & G. W. R. Co., 34 Ohio St. 450, 32 Am. Rep. 380.

Texas. Davis v. Nueces Valley Irrigation Co., 103 Tex. 243, 126 S. W. 4, rev'g on other grounds (Tex. Civ. App.), 116 S. W. 633.

West Virginia. Griffith v. Blackwater Broom & Lumber Co., 55 W. Va. 604, 69 L. R. A. 124, 48 S. E. 442.

England. Foss v. Harbottle, 2 Hare 461.

Rule applied to agreement between manager and president of a corporation where they owned all the stock and there were no creditors, for payment to the former for unusual services performed by him outside of his duties as manager. Given v. Gans, 91 N. Y. App. Div. 37, 86 N. Y. Supp. 450, aff'd without opinion in 181 N. Y. 538, 73 N. E. 1124.

marked in a Massachusetts case, "that the contract becomes valid by reason of the ratification by the corporation. No ratification is necessary. The contract stands, unless avoided or repudiated."⁸⁰ The corporation is estopped to attack the transaction where it has been ratified.⁸¹

This is also true of contracts and other transactions between two corporations having directors or other officers in common. They are generally not absolutely void, but, at the most, merely voidable, and may be rendered binding by ratification or acquiescence on the part of the stockholders.⁸²

If the deal is expressly prohibited by statute, it cannot be ratified by stockholders.⁸³ Thus, loans to officers or stockholders, where prohibited by statute, cannot be ratified.⁸⁴

§ 2395. — Prior authorization at stockholders' meeting. In any event, contracts between a corporation and one or more of its officers are valid if duly authorized at a stockholders' meeting, with actual

⁸⁰ *Union Pac. Ry. Co. v. Credit Mobilier*, 135 Mass. 367, 377.

⁸¹ *C. S. Goss & Co. v. Goss*, 147 N. Y. App. Div. 698, 132 N. Y. Supp. 76.

⁸² *United States. Coe v. East & W. R. Co. of Alabama*, 52 Fed. 531; *Augusta, T. & G. R. Co. v. Kittel*, 52 Fed. 63.

California. *San Diego, O. T. & P. Beach R. Co. v. Pacific Beach Co.*, 112 Cal. 53, 33 L. R. A. 788, 44 Pac. 333; *Pauly v. Pauly*, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29.

Georgia. *Griffin v. Inman*, 57 Ga. 370.

Louisiana. *Leathers v. Janney*, 41 La. Ann. 1120, 6 L. R. A. 661, 6 So. 884.

Maryland. *Shaw v. Davis*, 78 Md. 308, 23 L. R. A. 294, 28 Atl. 619; *Davis v. United States Elec. Power & Light Co.*, 77 Md. 35, 25 Atl. 982; *Booth v. Robinson*, 55 Md. 419.

Michigan. *Michigan Slate Co. v. Iron Range & H. B. R. Co.*, 101 Mich. 14, 59 N. W. 646.

Missouri. *Hill v. Gould*, 129 Mo. 106, 30 S. W. 181; *Manufacturers' Sav. Bank v. O'Reilly*, 97 Mo. 38, 10

S. W. 865; *Alexander v. Williams*, 14 Mo. App. 13.

Nebraska. *Fitzgerald v. Fitzgerald & Mallory Const. Co.*, 44 Neb. 463, 62 N. W. 899.

New York. *Hart v. Ogdensburg & L. C. R. Co.*, 89 Hun 316, 35 N. Y. Supp. 566; *Wallace v. Long Island R. Co.*, 12 Hun 460; *Langan v. Francklyn*, 29 Abb. N. Cas. 102, 20 N. Y. Supp. 404.

Ohio. *United States Rolling Stock Co. v. Atlantic & G. W. R. Co.*, 34 Ohio St. 450, 32 Am. Rep. 390; *Goodin v. Cincinnati & W. Canal Co.*, 18 Ohio St. 169, 98 Am. Dec. 95.

Washington. *Roberts v. Washington Nat. Bank*, 11 Wash. 550, 40 Pac. 225.

Compare *Knabe v. Ternet*, 16 La. Ann. 13; *Greenwood Ice & Coal Co. v. Georgia Home Ins. Co.*, 72 Miss. 46, 17 So. 83; *Cole v. Millerton Iron Co.*, 59 Hun (N. Y.) 217, 13 N. Y. Supp. 851.

⁸³ *Murray v. Smith*, 166 N. Y. App. Div. 528, 152 N. Y. Supp. 102. See also § 2178, *supra*.

⁸⁴ *Murray v. Smith*, 166 N. Y. App. Div. 528, 152 N. Y. Supp. 102.

or constructive notice of the interest of the officers as adverse parties to the contract.⁸⁵

§ 2396. — Power of board of directors to ratify. The board of directors may ratify a transaction if they could have authorized it, but not otherwise.⁸⁶ When they do undertake to ratify, a majority must be disinterested.⁸⁷ The board of directors, where not composing all the stockholders, cannot, it seems, ratify a sale made by less than a quorum of disinterested directors to co-directors.⁸⁸ Ratification of a secret conveyance of corporate property by an officer to himself must be at a meeting of directors duly called, notice of the purpose of the corporate meeting having been given, and upon a majority vote of the directors.⁸⁹

§ 2397. — Ratification by majority of stockholders as binding on minority stockholders. In a subsequent chapter, in connection with the statement of the law as to powers of a majority of the stockholders, and the corresponding rights of minority stockholders,⁹⁰ the well-settled rule is stated that the majority of the stockholders must act in good faith, in order to bind the minority stockholders. Furthermore, a majority of the stockholders cannot ratify acts of corporate officers, so as to cut off the rights of minority stockholders, where such acts are a fraud or abuse of the trust confided to the officers.⁹¹

Ordinarily, it is for the corporation—the stockholders collectively

⁸⁵ United States Steel Corporation v. Hodge, 64 N. J. Eq. 807, 60 L. R. A. 742, 54 Atl. 1.

The stockholders are chargeable with the knowledge as to such interest that they could have acquired by proper inquiry. United States Steel Corporation v. Hodge, 64 N. J. Eq. 807, 60 L. R. A. 742, 54 Atl. 1.

⁸⁶ Minor v. Mechanics' Bank of Alexandria, 1 Pet. (U. S.) 46, 7 L. Ed. 47; Gumaer v. Cripple Creek Tunnel, Transportation & Mining Co., 40 Colo. 1, 122 Am. St. Rep. 1024, 13 Ann. Cas. 781, 90 Pac. 81; Bank of Washington v. Barrington, 2 Pen. & W. (Pa.) 27.

A corporation is not estopped to recover secret profits made by its treasurer or secretary in corporate transactions by the fact that the directors knew of his course, and assented to

it. Moore v. Waco Bldg. Ass'n, 19 Tex. Civ. App. 68, 45 S. W. 974.

⁸⁷ A resolution of the board of directors or trustees of a corporation, carried by the casting vote of the president, ratifying an unauthorized act of the president, in a matter in which he was personally interested, is void. Chamberlain v. Pacific Wool-Growing Co., 54 Cal. 103. See also § 2188, supra.

⁸⁸ Nueces Valley Irrigation Co. v. Davis (Tex. Civ. App.), 116 S. W. 633, rev'd on other grounds 103 Tex. 243, 126 S. W. 4.

⁸⁹ First Nat. Bank of Omaha v. East Omaha Box Co. (Neb.), 90 N. W. 223.

⁹⁰ *Infra*, chapter on Stockholders.

⁹¹ Brewer v. Boston Theater, 104 Mass. 378, 395.

—to ratify or disaffirm the transaction, and individual stockholders cannot object.⁹² The transaction may be ratified by a majority of the stockholders at a meeting of the stockholders,⁹³ or by all the stockholders independent of any meeting.⁹⁴ Of course, ratification or acquiescence by a majority of the stockholders cannot bind a dissenting stockholder where the transaction is a fraud upon his rights, or beyond the powers of the corporation, and cannot prevent the dissenting stockholder from suing in a proper case to set the transaction aside, and obtain redress for the benefit of the corporation,⁹⁵ according to the general rule more fully stated in a succeeding chapter.⁹⁶ But where the transaction is of such a character that it might lawfully have been authorized by the majority, it may lawfully be ratified or acquiesced in by them, and their ratification or acquiescence will bar an action by a dissenting minority to set it aside.⁹⁷

⁹² *Urner v. Sollenberger*, 89 Md. 316, 43 Atl. 810; *Nye v. Storer*, 168 Mass. 53, 46 N. E. 402; *McAleer v. McMurray*, 58 Pa. St. 126; *Foss v. Harbottle*, 2 Hare 461.

In an action by a corporation or its trustee on a subscription for stock, it is no defense that it is sought to collect the subscription for the payment of money due under a voidable contract between the company and its directors, since the right to disaffirm the contract can only be exercised by the stockholders collectively. *Urner v. Sollenberger*, 89 Md. 316, 43 Atl. 810.

⁹³ *San Diego, O. T. & P. B. R. Co. v. Pacific Beach Co.*, 112 Cal. 53, 33 L. R. A. 788, 44 Pac. 333; *Endicott v. Marvel*, 81 N. J. Eq. 378, 87 Atl. 230.

⁹⁴ *Endicott v. Marvel*, 81 N. J. Eq. 378, 87 Atl. 230.

⁹⁵ *United States. Meeker v. Winthrop Iron Co.*, 17 Fed. 48.

Alabama. Memphis & C. R. Co. v. Woods, 88 Ala. 630, 7 L. R. A. 605, 16 Am. St. Rep. 81, 7 So. 108.

Illinois. Chicago Hansom Cab Co. v. Yerkes, 141 Ill. 320, 33 Am. St. Rep. 315, 30 N. E. 667.

Louisiana. Knabe v. Ternot, 16 La. Ann. 13.

Massachusetts. Peabody v. Flint, 6 Allen 52.

New Hampshire. Pearson v. Concord R. Corporation, 62 N. H. 537, 13 Am. St. Rep. 590.

Rhode Island. Hazard v. Durant, 11 R. I. 195.

England. Mason v. Harris, 11 Ch. Div. 97; *Atwool v. Merryweather*, L. R. 5 Eq. Cas. 464, note.

“Even if a majority of the stockholders consented to ratify an illegal use of its funds, their assent would not bind a protesting minority, or prevent them from obtaining appropriate equitable relief.” *Von Arnim v. American Tube Works*, 188 Mass. 515, 518, 74 N. E. 680.

⁹⁶ *Infra*, chapter on Stockholders.

⁹⁷ *United States. Foster v. Bear Valley Irrigation Co.*, 65 Fed. 836.

Maryland. Urner v. Sollenberger, 89 Md. 316, 43 Atl. 810; *Shaw v. Davis*, 78 Md. 308, 23 L. R. A. 294.

Massachusetts. Nye v. Storer, 168 Mass. 53, 46 N. E. 402.

New York. Hart v. Ogdensburg & L. C. R. Co., 89 Hun 316, 35 N. Y. Supp. 566; *Wallace v. Long Island R. Co.*, 12 Hun 460.

England. Foss v. Harbottle, 2 Hare 461.

It has been held that the board of directors and a majority of the stockholders may ratify a sale of corporate property to an officer of the corporation although such sale was accomplished by actual fraud of such officers.⁹⁸

Ratification by a majority of the stockholders "is conclusive upon the parties unless the action of the majority of the stockholders was dictated by fraud or was procured by concealment and in ignorance of the true state of the facts."⁹⁹ "Where the directors of a corporation enter into a contract with the corporation, which contract is voidable at the instance of an innocent stockholder, and it is made to appear that the conduct of the directors in negotiating such contract was actuated by fraudulent motives and the contract is unfair, unjust and oppressive, a ratification of such contract by a majority of the stockholders will not preclude a court of equity from setting aside the same at the instance of any innocent minority stockholder."¹

Whether dealings between a corporation and its officers have been ratified by the corporation through its stockholders depends upon the general rules governing ratification as set forth in a preceding subdivision of this chapter.²

§ 2398. — Right of interested officers to vote as stockholders. The better rule is that if the corporate officers adversely interested to the corporation own a majority of the stock, they cannot, as stockholders, ratify a contract with themselves so as to bind a minority stockholder.³

§ 2399. — What constitutes ratification. As already stated in a preceding subdivision, ratification of acts in general of corporate officers may be express or implied, and if implied it may be evidenced by mere acquiescence, acceptance of benefits, affirmative acts recognizing the validity of the act, etc.⁴ As in case of other acts, there

⁹⁸ *Kessler & Co. v. Ensley Co.*, 129 Fed. 397, 400, where question is discussed at length.

⁹⁹ *Continental Ins. Co. v. New York & H. R. Co.*, 187 N. Y. 225, 238, 79 N. E. 1026.

¹ *Bingham v. Bell & Zoller Coal Co.*, 175 Ill. App. 469, 481.

² See § 2190, *supra*.

³ *Booth v. Land Filling & Improvement Co.*, 68 N. J. Eq. 536, 59 Atl. 767.

See also § 2187, *supra*.

Dealings by a majority of the directors with themselves cannot be ratified by a stockholders' meeting at which a majority of the votes cast in favor of the ratification were cast by or under the control of the directors alleged to be guilty of the wrongdoing. *Klein v. Independent Brewing Ass'n*, 231 Ill. 594, 83 N. E. 434. *Contra*, see *Green v. Felton*, 42 Ind. App. 675, 84 N. E. 166.

⁴ See § 2193 et seq., *supra*.

ordinarily can be no effective ratification, unless with knowledge of the facts.⁵ Ratification is to be implied if the corporation accepts or retains the benefit of the transaction (assuming, of course, that it can do otherwise), with knowledge of the facts; and it may be implied from acquiescence.⁶ Thus, where an officer leased certain ground belonging to the corporation to a company in which he was the principal stockholder, but the lessor company, with knowledge thereof, permitted the lessee to make extensive improvements on the land, and also retained the royalties provided for in the lease, it could not thereafter attack it as one made by an officer for his own benefit.⁷ So the renewal of indebtedness by a new board of directors entirely disconnected with the other corporation which was a party to the transaction is a ratification of indebtedness incurred when the parties were represented by common directors in part.⁸ But if the corporation, by the terms of a contract, was to receive no benefit whatever from a contract made in its name by its directors who were adversely interested, acquiescence in the expenditure of money thereunder by the other party to the contract does not estop the corporation from seeking to enjoin its performance.⁹

What constitutes ratification, who may ratify, and other general rules relating to ratification not only of voidable dealings between corporate officers and the corporation or in relation to corporate property, but also of other unauthorized acts or contracts of corporate officers, is considered at length in a preceding subdivision.¹⁰

§ 2400. — Effect of ratification. If ratified, the transaction cannot be impeached by creditors unless it is actually in fraud of creditors.¹¹

§ 2401. Laches as precluding attack on transaction—In general. It is well settled that the corporation and the stockholders may and will lose the right to have the contract or transaction set aside by laches in exercising their option to disaffirm it.¹² Whether the delay

⁵ See § 2182 et seq., *supra*.

⁶ *Foster v. Bear Valley Irrigation Co.*, 65 Fed. 836; *Stetson v. Northern Inv. Co.*, 104 Iowa 393, 73 N. W. 869.

⁷ *Providence Mining & Milling Co. v. Nicholson*, 178 Fed. 29.

⁸ *Gould Copper Mining Co. v. Walker*, 17 Ariz. 332, 152 Pac. 853.

⁹ *Goodell v. Verdugo Canon Water Co.*, 138 Cal. 308, 71 Pac. 354.

¹⁰ See §§ 2177-2210, *supra*.

¹¹ *Sanford Fork & Tool Co. v. Howe, Brown & Co.*, 157 U. S. 312, 39 L. Ed. 713.

¹² *United States v. Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328; *Streight v. Junk*, 59 Fed. 321; *Jesup v. Illinois Cent. R. Co.*, 43 Fed. 483; *Squair v. Lookout Mountain Co.*, 42 Fed. 729.

in electing to set the transaction aside constitutes laches, so as to bar the right to relief, will depend upon the circumstances, and not merely upon the length of time which has elapsed. It was said by Mr. Justice Miller in a leading case in the Supreme Court of the United States, in which a director had purchased property of a corporation at a sale under a deed of trust: "The doctrine is well settled that the option to avoid such a sale must be exercised within a reasonable time. This has never been held to be any determined number of days or years as applied to every case, like the statute of limitations, but must be decided in each case upon all the elements of it which affect that question. These are generally the presence or absence of the parties at the place of the transaction, their knowledge or ignorance of the sale and of the facts which render it voidable, the permanent or fluctuating character of the subject-matter of the transaction as affecting its value, and the actual rise or fall of the property in value during the period within which this option might have been exercised."¹³ The delay is not fatal unless so long as to amount to an unreasonable time under all the circumstances,¹⁴ and there is no laches

Alabama. O'Conner Min. & Mfg. Co. v. Coosa Furnace Co., 95 Ala. 614, 36 Am. St. Rep. 251, 10 So. 290.

Illinois. Higgins v. Lansingh, 154 Ill. 301, 40 N. E. 362.

Iowa. Stetson v. Northern Inv. Co., 104 Iowa 393, 73 N. W. 869.

Kentucky. Osborne's Adm'r v. Monks, 14 Ky. L. Rep. 606, 21 S. W. 101.

Louisiana. Raymond v. Palmer, 41 La. Ann. 425, 17 Am. St. Rep. 398, 6 So. 692; Hancock v. Holbrook, 40 La. Ann. 53, 3 So. 351.

Massachusetts. Warren v. Para Rubber Shoe Co., 166 Mass. 97, 44 N. E. 112; Snow v. Boston Blank Book Mfg. Co., 158 Mass. 325, 33 N. E. 588; Dunphy v. Traveller Newspaper Ass'n, 146 Mass. 495, 16 N. E. 426.

Michigan. Keeney v. Converse, 99 Mich. 316, 58 N. W. 325.

Missouri. Burgess v. St. Louis County R. Co., 99 Mo. 496, 12 S. W. 1050.

Montana. Coombs v. Barker, 31 Mont. 526, 79 Pac. 1.

Nebraska. Horbach v. Marsh, 38 Neb. 22, 55 N. W. 286.

Ohio. United States Rolling Stock Co. v. Atlantic & G. W. R. Co., 34 Ohio St. 450, 32 Am. Rep. 380.

Tennessee. Cullen v. Coal Creek Min. & Mfg. Co. (Tenn. Ch. App.), 42 S. W. 693.

Compare Davis & Co. v. Gemmell, 70 Md. 356, 17 Atl. 259; Fitzgerald v. Fitzgerald & Mallory Const. Co., 41 Neb. 374, 59 N. W. 838.

In order that a corporation may avoid a contract entered into by the directors in behalf of the corporation with a concern in which the directors have a personal interest, it must act within a reasonable time after discovery of the interest of the directors adverse to that of the corporation. Hodge v. United States Steel Corporation (N. J. Err. & App.), 54 Atl. 1.

¹³ Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328.

¹⁴ Mallory v. Mallory Wheeler Co., 61 Conn. 131, 23 Atl. 708.

where the complaining party had no actual or constructive knowledge of the unfairness or bad faith connected with the transaction, until shortly before the action was commenced or the defense interposed.¹⁵ The option to set aside the contract must be exercised within a "reasonable time after those in whom the power of avoidance, or repudiation, is lodged, acquired a knowledge of the existence and terms of the contract, or should, in the ordinary course of business, have acquired such knowledge."¹⁶

Laches may also bar the right of a corporation or its stockholders to maintain a suit to compel directors to account for secret profits.¹⁷

A delay of twenty months in attacking a sale to a director has been held not fatal,¹⁸ as has a delay of nine months in attacking a deposit of funds in a bank.¹⁹ On the other hand, twenty years has been held a bar.²⁰

Ratification by acquiescence is practically the same thing as laches, and reference should be made to the law relating thereto.²¹

If an action is brought by a stockholder to set aside a sale by the corporation to an officer, the limitation applicable is not the one applicable to fraud in general, but is the provision limiting the time for actions based on the existence of a trust.²²

§ 2402. — Laches and estoppel of individual stockholders. Individual stockholders may be estopped to attack a contract or other transaction on behalf of the corporation on the ground that directors or other officers were personally interested. If they participated or consented, or if they have ratified the transaction with knowledge of the facts, they are clearly estopped.²³ Stockholders will not be

¹⁵ *Morgan v. King*, 27 Colo. 539, 63 Pac. 416; *Hicks v. Steel*, 126 Mich. 408, 85 N. W. 1121.

As a defense to an action by a stockholder to set aside a contract between the corporation and a third party, however, the laches of the directors who caused the corporation to enter into the contract, they having a personal interest therein, cannot of course be set up. *Goodell v. Verdugo Canon Water Co.*, 138 Cal. 308, 71 Pac. 354.

¹⁶ *City Nat. Bank v. Merchants' & Planters' Nat. Bank* (Tex. Civ. App.), 105 S. W. 338.

¹⁷ *Warren v. Para Rubber Shoe Co.*, 166 Mass. 97, 44 N. E. 112; *Keeney*

v. Converse, 99 Mich. 316, 58 N. W. 325; *Cullen v. Coal Creek Min. & Mfg. Co.* (Tenn. Ch. App.), 42 S. W. 693.

¹⁸ *Wing v. Dillingham*, 239 Fed. 54.

¹⁹ *City Nat. Bank v. Merchants' & Planters' Nat. Bank* (Tex. Civ. App.), 105 S. W. 338.

²⁰ *Jesup v. Illinois Cent. R. Co.*, 43 Fed. 483.

²¹ See § 2394 et seq., supra.

²² *Morgan v. King*, 27 Colo. 539, 63 Pac. 416.

²³ *Ten Eyck v. Pontiac, O. & P. A. R. Co.*, 74 Mich. 226, 3 L. R. A. 378, 16 Am. St. Rep. 633, 41 N. W. 905.

Stockholders who are parties to whatever agreement other stockholders and officers have with the cor-

heard to complain of their own acts as directors.²⁴ The right of individual stockholders to complain may also be barred by laches;²⁵ but it has been held that inasmuch as less than all the stockholders can ratify such a contract only in a stockholders' meeting, "any presumption of ratification by the corporation arising from mere lapse of time becomes impotent when it affirmatively appears that no stockholders' meeting has ever been apprised of the transaction."²⁶ Laches in suing to set aside transfers of property to corporate officers often depends upon whether the stockholder who sues is chargeable with knowledge of the transfer. As to this matter, it is generally held in this country that means of knowledge plainly within the reach of stockholders by the exercise of the slightest diligence is, in legal effect, the equivalent of knowledge. However, as well stated by Justice Jones in a federal decision, there is "no presumption of law that an absent stockholder, on an issue of laches between him and his fiduciary, either knew or did not know what was done at a regular or adjourned meeting of stockholders, which he did not attend, or as to the disposition the managers of his corporation have made of parts of corporate property in the conduct of its business. Such issues are to be solved as inferences of fact, in view of the comparative magnitude or insignificance of the transactions complained of, the openness and publicity attending it, the volume and nature of the business of the corporation, the extent of the territory in which its operations are carried on, the place where the transaction occurred, the value of the

poration, and secure a like agreement for themselves, are estopped to question the validity of the contract with the others because made with a corporation by its officers. *Clark v. Pittsburgh Natural Gas Co.*, 184 Pa. 188, 39 Atl. 86.

²⁴ *Ten Eyck v. Pontiac, O. & P. A. R. Co.*, 74 Mich. 226, 3 L. R. A. 378, 16 Am. St. Rep. 633, 41 N. W. 905.

²⁵ *United States*. *Streight v. Junk*, 59 Fed. 321; *Jesup v. Illinois Cent. R. Co.*, 43 Fed. 483; *Squair v. Lookout Mountain Co.*, 42 Fed. 729.

Illinois. *Higgins v. Lansingh*, 154 Ill. 301, 40 N. E. 362.

Kentucky. *Osborne's Adm'r v. Monks*, 14 Ky. L. Rep. 606, 21 S. W. 101.

Louisiana. *Hancock v. Holbrook*, 40 La. Ann. 53, 3 So. 351.

Massachusetts. *Warren v. Para Rubber Shoe Co.*, 166 Mass. 97, 44 N. E. 112; *Snow v. Boston Blank Book Mfg. Co.*, 158 Mass. 325, 33 N. E. 588; *Dunphy v. Traveller Newspaper Ass'n*, 146 Mass. 495, 16 N. E. 426.

Michigan. *Keeney v. Converse*, 99 Mich. 316, 58 N. W. 325.

Nebraska. *Horbach v. Marsh*, 37 Neb. 22, 55 N. W. 286.

Tennessee. *Cullen v. Coal Creek Min. & Mfg. Co.* (Tenn. Ch. App.), 42 S. W. 693.

A stockholder is not chargeable with laches unless he knew or ought to have known of the fraud. *Morgan v. King*, 27 Colo. 539, 63 Pac. 416.

²⁶ *Endicott v. Marvel*, 81 N. J. Eq. 378, 87 Atl. 230.

stockholder's interest in the corporation, his presence or absence from its home, the nature of his own pursuits, and all the surrounding circumstances which throw light upon the question."²⁷ The lapse of three years has been held in a particular case such laches as to prevent a stockholder from seeking to set aside a foreclosure sale of corporate property on the ground that the purchaser was a director or trustee of the corporation.²⁸ Four years' delay in suing to set aside a sale to a director, during which time great improvements were made, bars the suit where knowledge of all the facts was accessible to the stockholders, and the value of the property had greatly increased by reason of the acts of the purchaser.²⁹

In connection with this subject, reference should be made to a succeeding volume wherein the question of laches as precluding stockholders' suits in general is considered at length.³⁰

§ 2403. Return of consideration or payment for benefits received, as condition precedent to the right to rescind. As a general rule, if a corporation repudiates or sues to set aside a contract, conveyance or other transaction between it and its directors or other officers, alone or with others, it is bound to return the consideration, if any, which it has received, if it can do so, just as in any other case of rescission. If it cannot return the consideration, whether it was in money, labor or services, and the contract is repudiated, it will, at the least, be liable to the extent of the money or other benefit which it has actually received and enjoyed.³¹ If the corporation becomes insolvent and

²⁷ *Kessler & Co. v. Ensley Co.*, 129 Fed. 397, 417.

²⁸ *Buchler v. Black*, 213 Fed. 880, 886.

²⁹ *Kessler & Co. v. Ensley Co.*, 141 Fed. 130, *aff'd* 148 Fed. 1019 (mem. dec.).

³⁰ *Infra*, chapter on Stockholders.

³¹ *Thomas v. Brownville, Ft. K. & P. R. Co.*, 109 U. S. 522, 27 L. Ed. 1018, *rev'g* 2 Fed. 877 (where a railroad company, which had received the benefit of work under a construction contract with a company in which some of its directors were interested, was liable on bonds issued to the construction company to the extent of such benefit). *Wing v. Dillingham*, 239 Fed. 54; *Wyman v. Bowman*, 127 Fed. 257, 272; *Pauly v. Pauly*, 107

Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29; *Burns v. National Mining, Tunnel & Land Co.*, 23 Colo. App. 545, 130 Pac. 1037; *Duncomb v. New York, H. & N. R. Co.*, 84 N. Y. 190.

Stockholders will not be permitted to stand back while an officer advances money and takes risk upon the successful outcome of the corporate enterprise, and after the enterprise has proved a success take the benefits thereof without reimbursing such officer for his outlays and expenses. *Bramblet v. Commonwealth Land & Lumber Co.*, 26 Ky. L. Rep. 1176, 83 S. W. 599.

But where the president of a corporation, by fraud, effected a sale of property by him to the corporation at an excessive price, it was held that

cannot place the officer in statu quo, neither it nor its subsequent creditors can attack the contract.³² And if a director or other officer of a corporation purchases its property at an execution or foreclosure sale, under circumstances entitling it to have the sale set aside, as explained in a former section,³³ it must at least offer to redeem.³⁴ On the other hand, a director who makes a contract with his corporation which he knows imposes a corporate liability in excess of the debt limit, cannot avail himself of the rule that a corporation cannot retain the benefit of an ultra vires contract and at the same time refuse to perform its part of the obligation imposed by its terms.³⁵

XXVI. GENERAL DUTIES AND LIABILITIES OF OFFICERS CONNECTED WITH
MANAGEMENT OF CORPORATION

A. General Considerations

§ 2404. **Scope of subdivision and method of treatment.** This subdivision treats of duties and liabilities, in general, of directors and other corporate officers to the corporation and stockholders, and also some more or less general matters relating to duties and liabilities which are applicable without regard to the party in whose favor the duty is owed or the liability accrues. The duties of officers have also been incidentally treated of in the two preceding subdivisions in connection with the law as to the nature of the office of directors and other corporate officers,³⁶ and the effect of contracts or other transactions between the corporation and one of its officers, or a party in whom the officer is interested, and of dealings by the officer with corporate property.³⁷ In subsequent subdivisions of this chapter, there is treated the liability of officers to third persons upon corporate contracts,³⁸ for torts where the injury is directly to the third person

he could not demand that the corporation place him in statu quo before it should be granted relief. *Gerry v. Bismarck Bank*, 19 Mont. 191, 47 Pac. 810.

Where through fraud of the officers the interest of a corporation in property held by it under conditional sale to it is lost, and one of the officers subsequently purchases the property from the vendor who retook it upon forfeiture, a receiver cannot recover the property without tendering the price paid therefor. *Kidder v. Wit-*

tlar-Corbin Machinery Co., 38 Wash. 179, 80 Pac. 301.

³² *Joseph v. Raff*, 82 N. Y. App. Div. 47, 81 N. Y. Supp. 546, *aff'd* without opinion 176 N. Y. 611, 68 N. E. 1118.

³³ See §§ 2291-2302, *supra*.

³⁴ *Harpending v. Munson*, 91 N. Y. 650.

³⁵ *Croninger v. Bethel Grove Camp Ground Ass'n*, 156 Ky. 356, 161 S. W. 230.

³⁶ See §§ 2261-2329, *supra*.

³⁷ See §§ 2330-2403, *supra*.

³⁸ See §§ 2519-2533, *infra*.

and not to the corporation itself,³⁹ for acts or omissions where the injury is to the corporation as an entirety as well as its creditors, and a creditor sues to recover his debt from the officers who are wrongdoers at common law,⁴⁰ for debts or otherwise where the right to sue is specially authorized by a statute or constitutional provision,⁴¹ and the remedies and procedure to enforce the liabilities of officers.⁴² So in other subdivisions the liability of officers to individual stockholders, not as representatives of the corporation but as individuals, is fully considered,⁴³ and also the criminal liability of officers.⁴⁴

In this subdivision it is proposed to take up for consideration, in order, the following matters: general considerations as to duties and liabilities,⁴⁵ the liability, in general, for breach of duty and what constitutes breach of duty,⁴⁶ the liability for unauthorized or ultra vires acts, including those prohibited by statute or charter and those against public policy or otherwise malum in se,⁴⁷ the liability for negligence and what constitutes negligence,⁴⁸ liability for fraud resulting in injury to the corporation⁴⁹ and the liability for conversion or misappropriation of corporate assets.⁵⁰

§ 2405. Duties and liabilities stated generally. Like agents in general, a director or other corporate officer must be loyal to his trust,⁵¹ use ordinary and reasonable care,⁵² must not exceed the powers of the corporation nor his powers as an officer,⁵³ and must otherwise act in good faith, and is liable for fraud⁵⁴ or misappropriation or conversion of corporate assets,⁵⁵ and generally is liable for negligence,⁵⁶ although there is some conflict where a creditor of the corporation seeks to hold officers for negligence.⁵⁷ That directors or other corporate officers are liable to the corporation for their miscon-

³⁹ See §§ 2534-2562, *infra*.

⁴⁰ See §§ 2569-2591, *infra*.

⁴¹ See §§ 2591-2669, *infra*.

⁴² See §§ 2670-2723, *infra*.

⁴³ See §§ 2534-2562, *infra*.

⁴⁴ See §§ 2724-2732, *infra*.

⁴⁵ See §§ 2404-2422, *infra*.

⁴⁶ See §§ 2423-2433, *infra*.

⁴⁷ See §§ 2434-2441, *infra*.

⁴⁸ See §§ 2442-2503, *infra*.

⁴⁹ See § 2504, *infra*.

⁵⁰ See §§ 2505-2518, *infra*.

⁵¹ See 1 Mechem, Agency (2nd Ed.), §§ 1188-1239 for rules governing agents in general, the application of which to directors and other corporate

officers has been stated in §§ 2261-2404, *supra*, of this work.

⁵² See 1 Mechem, Agency (2nd Ed.), §§ 1274-1326 for rules governing agents in general, and see §§ 2442-2503, *infra*, this work, as to negligence of corporate officers.

⁵³ See §§ 2423-2441, *infra*, and see also 1 Mechem, Agency (2nd Ed.), §§ 1240-1243, as to agents in general exceeding their authority.

⁵⁴ See §§ 2504, *infra*.

⁵⁵ See §§ 2505-2518, *infra*.

⁵⁶ See §§ 2442-2503, *infra*.

⁵⁷ See §§ 2574-2578, *infra*.

duct, to a large extent, if not practically the same extent as agents for an individual, in case of fraud, misappropriation of corporate property to their own use, culpable negligence, the doing of ultra vires acts, etc., is too well settled to admit of controversy.⁵³

58 United States. *Briggs v. Spaulding*, 141 U. S. 132, 35 L. Ed. 662; *Cooper v. Hill*, 94 Fed. 582; *Lawrence v. Stearns*, 79 Fed. 878; *Doe v. Northwestern Coal & Transportation Co.*, 78 Fed. 62; *Heath v. Erie Ry. Co.*, 8 Blatchf. 347, Fed. Cas. No. 6,306; *Mutual Building Fund & Dollar Sav. Bank v. Bossieux*, 4 Hughes 387, 3 Fed. 817; *Combination Trust Co. v. Weed*, 14 Phila. 422, Fed. Cas. No. 14,207a, 2 Fed. 24.

Alabama. *Perry v. Tuskaloosa Cotton-Seed Oil-Mill Co.*, 93 Ala. 364, 9 So. 217.

California. *Wickersham v. Crittenden*, 106 Cal. 329, 39 Pac. 603; *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508.

Illinois. *Green v. Hedenberg*, 159 Ill. 489, 50 Am. St. Rep. 178, 42 N. E. 851; *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530; *Delano v. Case*, 17 Ill. App. 531, aff'd 121 Ill. 247, 2 Am. St. Rep. 81, 12 N. E. 676.

Kentucky. *Savings Bank of Louisville's Assignee v. Caperton*, 87 Ky. 306, 12 Am. St. Rep. 488, 8 S. W. 885; *Gratz v. Redd*, 4 B. Mon. 178; *United Society of Shakers v. Underwood*, 9 Bush 609, 15 Am. Rep. 731; *Pendleton v. Bank of Kentucky*, 1 T. B. Mon. 171.

Louisiana. *Percy v. Millaudon*, 8 Mart. (N. S.) 68, 3 La. 568.

Maine. *In re Brockway Mfg. Co.*, 89 Me. 121, 56 Am. St. Rep. 401, 35 Atl. 1012; *Bank of Mutual Redemption v. Hill*, 56 Me. 385, 96 Am. Dec. 470.

Maryland. *Davis & Co. v. Gemmel*, 70 Md. 356, 17 Atl. 259.

Massachusetts. *Wineburgh v. United States Steam & Street Ry. Adv. Co.*, 173 Mass. 60, 73 Am. St. Rep. 261, 53 N. E. 145; *Blair v. Telegram News-*

paper Co., 172 Mass. 201, 51 N. E. 1080.

Michigan. *Commercial Bank of Bay City v. Chatfield*, 121 Mich. 641, 80 N. W. 712.

Minnesota. *Pencille v. State Farmers' Mut. Hail Ins. Co.*, 74 Minn. 67, 73 Am. St. Rep. 326, 76 N. W. 1026; *Horn Silver Min. Co. v. Ryan*, 42 Minn. 196, 44 N. W. 56.

Mississippi. *Wolfe v. Simmons*, 75 Miss. 539, 23 So. 586.

Missouri. *Union Nat. Bank v. Hill*, 148 Mo. 380, 71 Am. St. Rep. 615, 49 S. W. 1012.

New Jersey. *Baily v. Burgess*, 48 N. J. Eq. 411, 22 Atl. 733; *Wilkinson v. Bauerle*, 41 N. J. Eq. 635, 7 Atl. 514; *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775; *Citizens' Loan Ass'n of Newark v. Lyon*, 29 N. J. Eq. 110.

New York. *In re Utica Nat. Brewing Co.*, 154 N. Y. 268, 48 N. E. 521; *Mason v. Henry*, 152 N. Y. 529, 46 N. E. 837; *Bloom v. National United Ben. Savings & Loan Co.*, 152 N. Y. 114, 46 N. E. 166; *Metropolitan El. Ry. Co. v. Kneeland*, 120 N. Y. 134, 8 L. R. A. 253, 17 Am. St. Rep. 619, 24 N. E. 381; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Hun v. Cary*, 82 N. Y. 65, 37 Am. Rep. 546; *Seventeenth Ward Bank v. Smith*, 51 App. Div. 259, 64 N. Y. Supp. 888; *Dykman v. Keeney*, 21 App. Div. 114, 47 N. Y. Supp. 352, 154 N. Y. 483, 48 N. E. 894; *Sayles v. White*, 18 App. Div. 590, 46 N. Y. Supp. 194; *Scharf v. Warren-Scharf Asphalt Paving Co.*, 15 App. Div. 480, 44 N. Y. Supp. 491; *Sayles v. Central Nat. Bank of Rome*, 18 Misc. 155, 41 N. Y. Supp. 1063; *Watkins v. Watkins & Turner Lumber Co.*, 17 Misc. 227,

§ 2406. Liability of officers other than directors as compared with that of directors. In most cases, it may be said, it is immaterial, so far as liability is concerned, whether the person sought to be held liable is a director, the president, the vice president, a general manager, the cashier, the secretary, the treasurer or other officer. The great majority of the cases which have been decided by the courts relate to the liabilities of directors rather than the liabilities of other officers. Occasionally, however, an officer other than a director is sued for misconduct in office. To a great extent the rules governing the liability are the same without regard to whether the officer sued is a director or some other officer such as the president, vice president, secretary, treasurer, general manager, cashier or the like. At the same time, the duties of active officers of a corporation who devote all, or the greater portion, of their time to the business of the corporation, and who receive a salary as such officers, are more extensive than those of a director who does not give the corporation his daily attendance and who receives either no compensation or a more or less nominal sum for attending directors' meetings; and it follows that the liabilities of officers other than directors, for mismanagement, may be, and often are, more extensive than those of directors. Where the fact is that the officer whose liability is in question is one other than a director, and that fact is deemed important, the nature of the office has been indicated in stating the law in the following pages of this subdivision.

If the person sought to be held liable is a mere agent and not a

40 N. Y. Supp. 1042; *Ilion Bank v. Carver*, 31 Barb. 230; *Austin v. Daniels*, 4 Den. 299; *Robinson v. Smith*, 3 Paige 222, 24 Am. Dec. 212; *Franklin Fire Ins. Co. v. Jenkins*, 3 Wend. 130.

Pennsylvania. *Bank of Washington v. Barrington*, 2 Pen. & W. 27.

Rhode Island. *Hodges v. New England Screw Co.*, 1 R. I. 312, 53 Am. Dec. 624.

Tennessee. *Vance v. Phoenix Ins. Co.*, 4 Lea 385; *Moses v. Ocoee Bank*, 1 Lea 392; *Shea v. Mabry*, 1 Lea 319.

Texas. *Screwmen's Benev. Ass'n v. Smith*, 70 Tex. 168, 7 S. W. 793.

Utah. *Warren v. Robison*, 19 Utah 289, 75 Am. St. Rep. 734, 57 Pac. 287.

Vermont. *First Nat. Bank of Bran-*

don v. Brigg's Estate, 70 Vt. 599, 41 Atl. 586.

Virginia. *Marshall v. Farmers' & Mechanics' Sav. Bank of Alexander*, 85 Va. 676, 2 L. R. A. 534, 17 Am. St. Rep. 84, 8 S. E. 586.

West Virginia. *Kyle v. Wagner*, 45 W. Va. 349, 32 S. E. 213.

Wisconsin. *Cunningham v. Wechselberg*, 105 Wis. 359, 81 N. W. 414; *North Hudson Mut. Building & Loan Ass'n v. Childs*, 82 Wis. 460, 33 Am. St. Rep. 57, 52 N. W. 600.

England. *Flitcroft's Case*, 21 Ch. Div. 519; *Joint Stock Discount Co. v. Brown*, L. R. 8 Eq. 381; *Cullerne v. London & Suburban General Permanent Bldg. Society*, 25 Q. B. Div. 485.

corporate officer, then of course the rules applicable to principal and agent govern, without regard to the fact that he is the agent of a corporation rather than of an individual or firm or other body not a corporation, and hence reference should be made to standard works on the law of agency in reference to such matters.⁵⁹ Incidentally, it is well to note that when a director is specially engaged as an agent, his liability is to be measured as a mere agent rather than as a director in so far as acts or omissions in connection with such agency are concerned.

Generally the president is also a director. As the chief executive officer of the corporation his liability is ordinarily more extensive than that of a mere director.⁶⁰ When a director, his liability of course is as extensive as that of any other director, and hence whenever a director would be held liable the president may be held liable as director. On the other hand, the president may be held liable in some cases where an ordinary director would be held not liable.

The liability of a general manager of a corporation is greater than that of a president who is merely a president and not by title or in effect a general manager. So a director may be especially employed as manager of the corporation, and in such case the time and attention required on his part cannot be judged by the standard applicable in ordinary cases.⁶¹

The powers of a cashier of a bank are broad, as already stated,⁶² and his duties and liabilities are correspondingly great. However, he is governed by the same general rules applicable to other executive officers, so far as his duties and liabilities are concerned. Much of the law as applied to cashiers is stated hereafter in this chapter. But for greater detail as to his duties and liabilities, reference should be made to standard textbooks on the law of banking.

§ 2407. Liability as dependent upon injury to corporation. To render the officers of a corporation liable to it in an action for fraudulent or wrongful acts or negligence, it is necessary, of course, to show damage to the corporation as the direct result of such acts or negligence.⁶³ So, ordinarily a stockholder cannot sue where the alleged

⁵⁹ See 1 Mechem, Agency (2nd Ed.), §§ 1184-1353.

⁶⁰ *Brown v. Farmers' & Merchants' Nat. Bank*, 88 Tex. 265, 33 L. R. A. 359, 31 S. W. 285, aff'g (Tex. Civ. App.), 31 S. W. 216, and see § 2444, *infra*.

⁶¹ *Johnson v. Stoughton Wagon Co.*, 118 Wis. 438, 95 N. W. 394.

⁶² See §§ 2137-2158, vol. 3.

⁶³ *Kentucky. Jones v. Johnson*, 86 Ky. 530, 6 S. W. 582.
Massachusetts. Marlborough Ass'n v. Peters, 179 Mass. 61, 60 N. E. 396.

wrongful acts have not been injurious to any one.⁶⁴ For example, although it is a breach of duty for the directors to vote an officer a salary to which he is not entitled, yet, if the salary is not paid, their act is *injuria absque damno*, and will not support an action by the corporation against them.⁶⁵ And the directors of a bank are not liable because of their negligence in not preventing its cashier from making loans to himself, unless it is shown that the bank sustained loss as a direct consequence of such negligence.⁶⁶ Where copartners transferred their business to a corporation created by themselves and issued part of the stock to themselves as fully paid up, and became the sole officers, the corporation cannot recover from such officers the difference between the actual value of the property turned in to the corporation and the face value of the stock received therefor, since the corporation has suffered no damages.⁶⁷ On the other hand, a corporation may maintain an action against its directors for fraudulently issuing and negotiating promissory notes in its name, which have reached the hands of bona fide purchasers for value, and have thereby become legal obligations of the corporation, although they have not yet been paid, and, in the absence of special circumstances diminishing the damages, it will be entitled to recover the face value of the notes.⁶⁸ Moreover, it is no defense to liability for misconduct causing a loss to the corporation that the corporation is still solvent nor that the stock of the company increased in value during the period of such misconduct.⁶⁹

A trustee in bankruptcy cannot recover from one time directors of the bankrupt corporation assets claimed to have been illegally paid out by them, where such acts did not cause the bankruptcy, and

Nebraska. *Yates v. Jones Nat. Bank*, 74 Neb. 734, 105 N. W. 287.

New York. *Metropolitan El. Ry. Co. v. Kneeland*, 120 N. Y. 134, 8 L. R. A. 253, 17 Am. St. Rep. 619, 24 N. E. 381; *Commercial Bank v. Ten Eyck*, 48 N. Y. 305, *aff'g* 50 Barb. 9; *Kavanaugh v. Gould*, 147 App. Div. 281, 131 N. Y. Supp. 1059.

Tennessee. *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448.

Wisconsin. *Lindemann v. Rusk*, 125 Wis. 210, 104 N. W. 119.

⁶⁴*Levin v. Mayer*, 86 N. Y. Misc. 116, 149 N. Y. Supp. 112; *Larwill v.*

Burke, 19 Ohio Cir. Ct. 449, 513, 10 Ohio Cir. Dec. 605.

⁶⁵*Metropolitan El. Ry. Co. v. Kneeland*, 120 N. Y. 134, 8 L. R. A. 253, 17 Am. St. Rep. 619, 24 N. E. 381.

⁶⁶*Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448.

⁶⁷*Hoffman Motor Truck Co. v. Erickson*, 124 Minn. 279, 144 N. W. 952.

⁶⁸*Metropolitan El. Ry. Co. v. Kneeland*, 120 N. Y. 134, 8 L. R. A. 253, 17 Am. St. Rep. 619, 24 N. E. 381.

⁶⁹*Jacobson v. Brooklyn Lumber Co.*, 184 N. Y. 152, 76 N. E. 1075.

where, at the time of such acts, there were no creditors, since there must be both a breach of duty and an injury to warrant a recovery.⁷⁰

§ 2408. Statutory liability as precluding common-law liability. Where a liability is imposed upon an officer or a director by a state statute, his common-law liability for misfeasance and negligence in the performance of his duties is not thereby excluded. Thus, where an officer of a corporation has wrongfully withdrawn or allowed to be withdrawn funds of the corporation, that a penalty for such wrongdoing is imposed by statute does not annul liability imposed by the common law.⁷¹ In a late case in a federal court it was contended, in an action brought by a receiver against officers of a national bank, that there is no common-law liability of a director of a national bank, but it was held that it was clear that there was a liability on their part "for failure to perform the duty imposed upon them by the general principles of the law, irrespective of the statute."⁷² This question of common-law liability of officers of national banks is further considered hereafter.⁷³

§ 2409. Persons liable—In general. The general rule is that persons are liable as corporate officers, either under a statute creating the liability or independent of statute, and without regard to who is seeking to enforce the alleged liability, only where they were officers at or during the time of the act or omission relied on as creating liability.⁷⁴ Whether one is in reality an officer, so as to be within the

⁷⁰ Gill v. Ash, 124 Md. 612, 93 Atl. 210, 212.

⁷¹ Great Western Min. & Mfg. Co. v. Harris' Estate, 111 Fed. 38, 42.

⁷² Williams v. Brady, 232 Fed. 740, 742.

⁷³ See § 2471, infra.

⁷⁴ California. Irvine v. McKeon, 23 Cal. 472.

Colorado. Austin v. Berlin, 13 Colo. 198, 22 Pac. 433.

Indiana. Schofield v. Henderson, 67 Ind. 258.

Maine. Bank of Mutual Redemption v. Hill, 56 Me. 385, 96 Am. Dec. 470.

New York. Boughton v. Otis, 21 N. Y. 261; Hoboken Beef Co. v. Hand, 104 App. Div. 390, 93 N. Y. Supp. 834; Chandler v. Hoag, 2 Hun 613, 63 N. Y. 624; Shaler & Hall Quarry Co. v.

Brewster, 10 Abb. Pr. 464; Shaler & Hall Quarry Co. v. Bliss, 34 Barb. 309, 27 N. Y. 297; Vincent v. Sands, 42 How. Pr. 231.

Under a statute making the directors of a corporation personally liable for their "official mismanagement," directors are liable only for mismanagement which occurred during the year for which they were elected, and during which they acted. They are not liable for renewals of worthless paper discounted by a previous board. Bank of Mutual Redemption v. Hill, 56 Me. 385, 96 Am. Dec. 470.

Those directors only are liable for debts created in excess of the capital stock who were directors at the time the excessive debts were contracted.

terms of the statute, depends largely upon the circumstances of the particular case.⁷⁵ Of course no duties arise nor liability accrues as a corporate officer until there is an implied or express acceptance of the office. Thus one who was elected a director but who was not present at the meeting when he was elected, and who never received any notice or information that he was elected and never acted as such and had nothing to do with the management of the corporation until after the act complained of, is not liable.⁷⁶ Likewise, directors cannot be held liable for the mismanagement of the directors of a preceding year.⁷⁷ Moreover, a director ought not to be held responsible for the conduct of the business of the corporation from the very day of his election if he has not been a director theretofore.⁷⁸ A reasonable time should be allowed to permit him to get acquainted with the business and condition of the corporation, and to act upon the knowledge acquired.⁷⁹ Ordinarily, nonresident directors are liable as well as resident directors.⁸⁰

§ 2410. — Where alleged officer has not been notified of election nor accepted the office. A director or other corporate officer is not liable for mismanagement, either to the corporation or stockholders or creditors or a receiver or the like, and without regard to whether the liability is created by statute or exists at common law, where he has not accepted the office either expressly or impliedly by acting as such officer.⁸¹ Thus, a person who has been held out as a director without his knowledge, and who has never accepted the office or acted as a director, cannot be held liable.⁸² In any event, there is no liability before the officer has any notice of his election, where he never

Irvine v. McKeon, 23 Cal. 472; *Schofield v. Henderson*, 67 Ind. 258.

A former director is not liable by reason of excessive debts created by his successors. *Schofield v. Henderson*, 67 Ind. 258.

⁷⁵ See *Edwards v. Armour Packing Co.*, 190 Ill. 467, 60 N. E. 807, aff'g 90 Ill. App. 333; *Millsaps v. Chapman*, 76 Miss. 942, 71 Am. St. Rep. 547, 26 So. 369.

⁷⁶ *Bank of Des Arc v. Moody*, 110 Ark. 39, 161 S. W. 134.

⁷⁷ *Bank of Mutual Redemption v. Hill*, 56 Me. 385, 96 Am. Dec. 470.

⁷⁸ *Rankin v. Cooper*, 149 Fed. 1010, 1018.

⁷⁹ This is well exemplified by the leading case of *Briggs v. Spaulding*, 141 U. S. 132, 35 L. Ed. 662.

⁸⁰ *Cameron v. First Nat. Bank*, — Tex. Civ. App. —, 194 S. W. 469, and see § 2467, *infra*.

⁸¹ One who has been elected a director, but who has never evinced his assent to the election, or in any manner acted as director, cannot be held liable. *Cameron v. Seaman*, 69 N. Y. 396, 25 Am. Rep. 212; *Osborne & Cheesman Co. v. Croome*, 14 Hun (N. Y.) 164.

⁸² *Hume v. Commercial Bank*, 9 Lea (Tenn.) 728.

acts as such officer.⁸³ So it is held that a director who informs the president that he will not be able to serve as a director any longer, where the president promised that he would not be re-elected, has been held not liable where he never knew of his re-election and did not act as director thereafter.⁸⁴

§ 2411. — Where holding of office has been terminated. In a preceding volume, the duration of the term of office, the mode and sufficiency of resignations, and the method of removing officers, has been fully stated.⁸⁵ It goes without saying that if the term of office of a corporate officer has been ended either by lapse of time, a valid resignation or by removal, and he does not hold over so as to be a de facto officer, he is not liable for acts or omissions after he has ceased to be an officer,⁸⁶ although, of course, his liability continues for acts or omissions while in office,⁸⁷ and he is liable for a default after expiration of his term of office, if he continued to act,⁸⁸ or where the statute provides that directors shall hold office until others are chosen and qualified in their stead, and it does not appear that any new directors were chosen.⁸⁹ But if the directors are the original directors and the

⁸³ *Woodman v. Butterfield*, — Me. —, 101 Atl. 25.

⁸⁴ *Zimmerman v. Western & S. Fire Ins. Co.*, 121 Ark. 408, Ann. Cas. 1917 D 513, 181 S. W. 283.

⁸⁵ See §§ 1799-1832, vol. 3.

⁸⁶ *Breitzke v. Bank of Grand Prairie*, 124 Ark. 495, 187 S. W. 660, liability for failure to file annual report; *Moran v. Vreeland*, 81 N. Y. Misc. 664, 143 N. Y. Supp. 522.

⁸⁷ *Nix v. Miller*, 26 Colo. 203, 57 Pac. 1084.

Directors who retire from office after default in filing a report, while they remain liable for debts contracted before their retirement, are not liable for those contracted afterwards. *Vincent v. Sands*, 42 How. Pr. (N. Y.) 231.

It is immaterial that defendants had ceased to be directors before the commencement of the action, where they were guilty of malfeasance while in office. *Boyd v. Mutual Fire Ass'n of Eau Claire*, 116 Wis. 155, 61 L. R.

A. 918, 96 Am. St. Rep. 948, 94 N. W. 171, 90 N. W. 1086.

⁸⁸ *Jenet v. Nims*, 7 Colo. App. 88, 43 Pac. 147; *Reed v. Keese*, 5 Jones & S. (N. Y.) 269; *Deming v. Puleston*, 3 Jones & S. (N. Y.) 309; *Barnard Mfg. Co. v. Ralston Milling Co.*, 93 Wash. 111, 160 Pac. 309.

A director is liable in case of failure to file a report after his term of office expires, but before his successor is elected, where a statute provides that every director shall continue to hold office until his successor has been elected. *Tysen v. Fritz*, 44 N. Y. App. Div. 562, 60 N. Y. Supp. 923.

⁸⁹ *Seebeck v. King*, 34 N. Y. Misc. 483, 70 N. Y. Supp. 322.

But it has been held that if the statute makes no provision as to holding over, then the expiration of the term of office presumptively terminates liability where no other facts are shown. *Bank of Metropolis v. Faber*, 38 N. Y. App. Div. 159, 56 N. Y. Supp. 542. But see § 1808, vol. 3.

articles of incorporation state that they shall serve up to and including a fixed date, the express limitation of the term leaves no room for presumption as to holding over.⁹⁰

A former director is not liable for a default occurring after he had resigned in good faith and ceased to act as a director, although his resignation may not have been formally accepted;⁹¹ but he must have ceased to act as a director after resigning.⁹² However, one who resigns as a director, and whose resignation is accepted, but who continues to act as an agent or manager of the corporation, cannot be held responsible, under a statute, to creditors, "as a director," for malfeasance in office, at least where he does not hold himself out, or permit himself to be held out, to the public, as a director.⁹³ A sale of his stock by a director, or his unaccepted resignation, does not terminate his liability, where he continues to act as director.⁹⁴

The resignation is effective although the creditors had no notice of the resignation.⁹⁵

The duties and liabilities of corporate directors or other officers cease when the corporation becomes insolvent or is dissolved or where by any other means the corporate affairs are taken out of the hands of such officer or otherwise cease; or where the officer has resigned or been removed,⁹⁶ subject to the exception that they are not thereby

⁹⁰ *Barnard Mfg. Co. v. Ralston Milling Co.*, 93 Wash. 111, 160 Pac. 309, approving *Philadelphia & R. C. & D. Co. v. Hotchkiss*, 82 N. Y. 471.

⁹¹ *Jackson v. Clifford*, 5 App. Cas. (D. C.) 312; *Wade v. Baker*, 81 N. Y. 622; *Van Amburgh v. Baker*, 81 N. Y. 46; *Bruce v. Platt*, 80 N. Y. 379; *Noble v. Euler*, 20 N. Y. App. Div. 548, 47 N. Y. Supp. 302; *Blake v. Wheeler*, 18 Hun (N. Y.) 496; *Chandler v. Hoag*, 2 Hun 613, 63 N. Y. 624; *Squires v. Brown*, 22 How. Pr. (N. Y.) 35.

A statute authorizing corporate officers to resign by delivering or mailing a written resignation, filing a duplicate with the county clerk, and publishing notice thereof, has been held not to prescribe an exclusive method for resigning, and that hence where a director delivered his resignation to the president of the company and thereafter refrained from acting

as director, he was not liable for subsequent acts or omissions of the board. *B. F. Goodrich Rubber Co. v. Helena Motor Car Co.*, 53 Mont. 526, 166 Pac. 454.

A director is not liable after resignation, although re-elected, where he does not accept the office nor continue to act as director. *Zimmerman v. Western & S. Fire Ins. Co.*, 121 Ark. 408, Ann. Cas. 1917 D 513, 181 S. W. 283.

⁹² *Western Nat. Bank v. Faber*, 29 N. Y. Misc. 467, 62 N. Y. Supp. 82.

Whether person, after resigning, continued to be a director, see *Brown v. Clow*, 158 Ind. 403, 62 N. E. 1006.

⁹³ *Brown v. Clow*, 158 Ind. 403, 62 N. E. 1006.

⁹⁴ *Benedum v. First Citizens' Bank*, 72 W. Va. 124, 78 S. E. 656.

⁹⁵ *Bruce v. Platt*, 80 N. Y. 379.

⁹⁶ Right to resign and validity of, see § 1809-1813, vol. 3.

exempted from liabilities already incurred and are chargeable with losses resulting after the termination of their holding of office from breaches of duty previously committed.⁹⁷ However, the duties of national bank directors are not terminated when an examiner is put in charge by the comptroller of the currency.⁹⁸

§ 2412. — Effect of illegality of election or ineligibility to become officer. If a person is elected and acts as a director or other officer, he cannot escape personal liability by showing that his election was illegal or that he was not eligible.⁹⁹ In other words, *de facto* officers are liable as well as *de jure* officers.¹

§ 2413. Consent or ratification as precluding liability. Of course, there is no liability on the part of corporate officers in regard to an act which all of the stockholders either gave their prior consent to or thereafter ratified, so far as the corporation and stockholders are concerned. However, the mere fact that the other directors ratify a fraud perpetrated by one of the directors will not relieve him from liability to the corporation.² And it is no defense where suit is brought by a receiver against directors for negligence, that the stockholders authorized or ratified the alleged wrongdoing, where the receiver represents the creditors of the corporation as well as the stockholders.³ The transactions of a board of directors which cannot be sustained against the will of a single stockholder, either with or without the sanction of the remaining stockholders, are acts which are either *ultra vires*, fraudulent or illegal.⁴ It follows that directors

Removal of officers, see §§ 1814-1824, vol. 3.

⁹⁷ This question usually arises in connection with liability of officers as created by statute. See § 2618, *infra*.

⁹⁸ *Robinson v. Hall*, 63 Fed. 222, 227.

⁹⁹ *Thayer v. New England Lithographic Steam Printing Co.*, 108 Mass. 523; *Easterly v. Barber*, 65 N. Y. 252; *Union Nat. Bank of Troy v. Scott*, 53 N. Y. App. Div. 65, 66 N. Y. Supp. 145; *St. George Vineyard Co. v. Fritz*, 48 N. Y. App. Div. 233, 62 N. Y. Supp. 775; *Halstead v. Dodge*, 19 Jones & S. (N. Y.) 169. Compare, however, *Craw v. Easterly*, 4 Lans. (N. Y.) 513.

Persons who act as directors, and

fail to file the annual report as required by law, cannot escape liability to creditors on the ground that they did not hold the number of shares required by statute to qualify them to be directors. *Donnelly v. Pancoast*, 15 N. Y. App. Div. 323, 44 N. Y. Supp. 104.

¹ *Daily v. Marshall*, 47 Mont. 377, 133 Pac. 681, and see §§ 1833-1852, vol. 3.

² *Williams v. Riley*, 34 N. J. Eq. 398.

³ *Coddington v. Canaday*, 157 Ind. 243, 61 N. E. 567.

⁴ *United States Steel Corporation v. Hodge*, 64 N. J. Eq. 807, 60 L. R. A. 742, 54 Atl. 1.

cannot give corporate property to themselves or others, even with the consent of a majority of the stockholders.⁵

The effect of ratification of ultra vires acts is considered hereafter.⁶

§ 2414. **Right to sue as precluded by laches or estoppel.** It is generally held that the right of stockholders to sue may be barred by laches;⁷ but it has been held in Alabama that laches is no defense, the court saying that "when called upon to account by the corporation, or by the shareholder when he is authorized to maintain suit in his own name, the unfaithful director cannot cover his mala fides with the plea of laches on account of mere delay in calling him to account."⁸ And in New York it is held that laches is no defense, where less than the statute of limitations, to an action by stockholders to recover from corporate officers damages from their misuse of the corporate assets, for the reason that the discretion of the court is not appealed to.⁹ In any event, there must be knowledge, actual or constructive, to warrant laches as a defense,¹⁰ and delay not prejudicial to the party setting up laches, or to any one else, is not fatal.¹¹ Thus, a delay of over two years after a receiver was appointed, in obtaining leave to sue officers for misconduct, is not fatal, where the status is in no way changed by the delay.¹² An officer cannot sue other officers of the same company for an accounting for mismanagement of which he had knowledge and acquiesced in until dissension arose because of other matters, on the theory that he does not come into equity with clean hands.¹³ Acquiescence of a creditor, with knowledge, in a conversion of property by corporate officers, may be shown in a suit by him to hold an officer individually liable for such conversion.¹⁴ Equity will disregard the fiction that a corporation is an entity distinct from one who owns substantially all its stock, where

⁵ *Endicott v. Marvel*, 81 N. J. Eq. 378, 87 Atl. 230, and see § 2507, *infra*.

⁶ See § 2441, *infra*, and § 2181, *supra*.

⁷ *Hughes Manufacturing & Lumber Co. v. Culver*, 126 Ark. 72, 189 S. W. 850.

Twelve years held fatal. *Kelly v. Dolan*, 233 Fed. 635, 640.

⁸ *Montgomery Light Co. v. Lahey*, 121 Ala. 131, 25 So. 1006.

⁹ *Pollitz v. Wabash R. Co.*, 207 N. Y. 113, 100 N. E. 721, modifying 150 N. Y. App. Div. 715, 135 N. Y. Supp. 789.

¹⁰ *Von Arnim v. American Tube Works*, 188 Mass. 515, 74 N. E. 680; *Wills v. Nehalem Coal Co.*, 52 Ore. 70, 96 Pac. 528.

¹¹ *Bergman v. Evans*, 92 Wash. 158, 158 Pac. 961.

¹² *Weslosky v. Quarterman*, 123 Ga. 312, 51 S. E. 426.

¹³ *Connors v. Connors Bros. Co.*, 110 Me. 428, 86 Atl. 843.

¹⁴ *Birdsell Mfg. Co. v. Oglevee*, 187 Ill. 149, 58 N. E. 231, *aff'g* 87 Ill. App. 351.

a corporation is suing an officer for an accounting in regard to a matter as to which the then majority stockholder is estopped.¹⁵

A stockholder may be precluded from suing by having expressly waived his right to object to the acts complained of,¹⁶ or by his consent thereto,¹⁷ or by having acquiesced therein;¹⁸ and an assignee of stock cannot sue in regard to transactions with the corporation done or assented to by his assignor.¹⁹

It has been held that stockholders cannot recover from a director who was a nonresident, for negligence in connection with the misconduct of the president of the bank, where his acts were a matter of general knowledge in the city where the stockholders resided.²⁰ However, it is not the duty of a stockholder to investigate the management of the corporation, nor to discover and correct the incapacity of its managing officers, and hence where a stockholder is not shown to have had knowledge of mismanagement, he cannot ordinarily be said to have acquiesced therein by his failure to protest.²¹ Moreover, it has been held that it is no defense to a suit in equity by stockholders to compel directors to pay back into the treasury certain dividends unlawfully paid out, that plaintiffs, or those from whom they purchased their stock, participated in the distribution of the illegal dividends, since in reality the suit is brought by the corporation and is maintained solely for its benefit.²²

¹⁵ *C. S. Goss & Co. v. Goss*, 147 N. Y. App. Div. 698, 132 N. Y. Supp. 76.

¹⁶ *Babcock v. Farwell*, 245 Ill. 14, 137 Am. St. Rep. 284, 19 Ann. Cas. 74, 91 N. E. 683, aff'g 146 Ill. App. 307.

¹⁷ *Fish v. Harrison*, — N. J. Ch. —, 100 Atl. 185.

¹⁸ *Illinois. Babcock v. Farwell*, 245 Ill. 14, 137 Am. St. Rep. 284, 19 Ann. Cas. 74, 91 N. E. 683; *Klein v. Independent Brewing Ass'n*, 231 Ill. 594, 83 N. E. 434.

¹⁹ *New Jersey. Fish v. Harrison*, — N. J. Ch. —, 100 Atl. 185.

²⁰ *New York. Murray v. Smith*, 166 N. Y. App. Div. 528, 152 N. Y. Supp. 102.

²¹ *Vermont. Davenport v. Crowell*, 79 Vt. 419, 65 Atl. 557, where act complained of was exchange of notes with another corporation.

²² *Wisconsin. Figge v. Bergenthal*,

130 Wis. 594, 110 N. W. 798, 109 N. W. 581.

¹⁹ *Babcock v. Farwell*, 245 Ill. 14, 137 Am. St. Rep. 284, 19 Ann. Cas. 74, 91 N. E. 683, aff'g 146 Ill. App. 307.

²⁰ *Wallach v. Billings*, 277 Ill. 218, 115 N. E. 382.

²¹ *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897.

²² *Appleton v. American Malting Co.*, 65 N. J. Eq. 375, 54 Atl. 454.

However, where recovery of dividends paid out was sought under a statute, by a stockholder, it was held that the use of the action to recover back such dividends, where the corporation was solvent, was highly penal, and that a recovery should not be allowed, since "it would be unjust and inequitable for the stockholders directly or indirectly to recover from the directors the very moneys which they have already re-

The estoppel of stockholders by participation, etc., and the effect of laches, as applied to stockholders' suits in general, are considered at length in a subsequent chapter.²³

Laches of stockholders as a bar to relief in attacking dealings between a corporation and an officer, or where the officer is adversely interested, or dealings of an officer with corporate property, has already been noticed.²⁴

§ 2415. Contracts inducing disregard of duties. Contracts with officers of corporations which tend to induce them to disregard their duties are illegal and void.²⁵ Thus, a contract by a director as to his official action in regard to the payment of dividends by the corporation, based on a consideration personal to himself, is against public policy and void.²⁶ So a contract whereby a corporate officer agrees to assist others to gain control of the company by buying in stock, is invalid on the ground that it conflicts with his duties as an officer.²⁷ So a promise to pay money to directors of a railroad company if they will locate the road on a specified route or establish a station at a point named, is void as against public policy, as tending to unduly influence the action of the directors.²⁸ So a contract, for a consideration, to resign as director, is illegal.²⁹ Moreover, an agreement by a director to keep another person permanently in place as an officer of the corporation, is void as against public policy, even though

ceived." *Siegmán v. Maloney*, 63 N. J. Eq. 422, 51 Atl. 1003.

²³ *Infra*, chapter on Stockholders.

²⁴ See §§ 2401, 2402, *supra*.

²⁵ *Illinois*. *Linder v. Carpenter*, 62 Ill. 309.

Indiana. *Gilchrist v. Hatch* (Ind. App.), 100 N. E. 473.

Michigan. *Scripps v. Sweeney*, 160 Mich. 148, 125 N. W. 72.

Minnesota. *Lum v. McEwen*, 56 Minn. 278, 57 N. W. 662.

Missouri. *Attaway v. Third Nat. Bank*, 93 Mo. 485, 5 S. W. 16.

New York. See *Drucklieb v. Sam H. Harris*, 209 N. Y. 211, 102 N. E. 599.

See §§ 1753, 1754, vol. 3, and § 2310 *supra*, and compare *Pungs v. American Brake-Beam Co.*, 200 Ill. 306, 65 N. E. 645, *aff'd* 102 Ill. App. 76, holding

contract not such a one as to come within rule.

A contract to buy of a director shares of its stock belonging to him, on condition that the cashier shall be made president of the bank, is void as against public policy. *Noel v. Drake*, 28 Kan. 265, 42 Am. Rep. 162.

²⁶ *Thomas v. Matthews*, 94 Ohio St. 32, L. R. A. 1917 A 1068, 113 N. E. 669.

²⁷ *Carlisle v. Smith*, 234 Fed. 759.

²⁸ *Peckham v. Lane*, 81 Kan. 489, 25 L. R. A. (N. S.) 967, 19 Ann. Cas. 369, 106 Pac. 464; *Berryman v. Trustees of Cincinnati Southern Ry.*, 77 Ky. 755; *McGriffin v. Coyle & Guss*, 160 Okla. 648, 6 L. R. A. (N. S.) 524, 86 Pac. 962, 85 Pac. 954; *Holladay v. Patterson*, 5 Ore. 177.

²⁹ *Forbes v. McDonald*, 54 Cal. 98.

there is no private gain to the director therefrom.³⁰ However, an officer or agent of a corporation cannot question the validity of his own contract for services on the theory that it induced him to disregard his duties as an officer of another corporation.³¹

If a corporate officer obtains a profit for himself, as a result of such a contract, the corporation may compel him to turn it over to the company.³²

§ 2416. Liabilities as joint or several. The liability of a tortfeasor is both joint and several. It follows that the liability of corporate officers for mismanagement is several as well as joint.³³ The liability is joint and several where two or more directors participate in the wrongful acts.³⁴ Where corporate officers were joint adventurers in the incorporation of a company and the manipulation of its capital stock, and joint tortfeasors in the fraud perpetrated in the marketing of such stock, they are jointly and severally liable.³⁵ But the liability for conversion of money, different sums having been converted by different directors, is not joint, so far as the money itself is concerned.³⁶

§ 2417. Contribution among officers—In general. There are more or less vague references in many opinions to the right to contribution without expressly deciding the question.³⁷ If the right of

³⁰ West v. Camden, 135 U. S. 507, 34 L. Ed. 254.

³¹ Pungs v. American Brake-Beam Co., 200 Ill. 306, 65 N. E. 645, aff'g 102 Ill. App. 76.

³² See §§ 2303-2324, supra.

³³ Cooper v. Hill, 94 Fed. 582; Mills v. Hendershot, 70 N. J. Eq. 258, 62 Atl. 542; Sigwald v. City Bank, 82 S. C. 382, 64 S. E. 398.

³⁴ Benedum v. First Citizens' Bank, 72 W. Va. 124, 78 S. E. 656.

³⁵ In re Kornit Mfg. Co., 192 Fed. 392, 398.

³⁶ Although directors may be held jointly liable for misfeasance where they have taken over corporate assets personally or have permitted them to be diverted to other stockholders, yet, nevertheless, as to sums received by them individually and separately as stockholders they cannot be held jointly liable. "If it had

all been received by the directors together," said the court, "and divided among themselves, all would probably have been liable together, and each for the whole, till all should be recovered; but each received his share separately, without connection with the others, from the avails of the sale of the bonds that his stock went with. Each may have been liable for the whole loss for neglect of personal duty in not preventing it, but not for the money itself." Great Western Min. & Mfg. Co. v. Harris' Estate, 111 Fed. 38, 44, rev'd on other grounds 128 Fed. 321.

³⁷ See Murphy v. Penniman, 105 Md. 452, 121 Am. St. Rep. 583, 66 Atl. 282; North Hudson Mut. Building & Loan Ass'n v. Childs, 82 Wis. 460, 33 Am. St. Rep. 57, 52 N. W. 600.

That director held liable for profits made by him and his co-directors, in

action is treated as *ex delicto*, then the directors are several and joint tortfeasors and have no right of contribution between themselves.³⁸ The rule that there can be no contribution between joint wrongdoers is generally applied to corporate directors and officers.³⁹ In England, however, the right to contribution seems to be conceded and the only question is whether it is equitable, in the particular case, to authorize a recovery by one director who has paid a judgment against him in favor of the corporation, against other directors.⁴⁰ In an early case in England it was held that directors actually participating in fraudulent transactions must reimburse less guilty colleagues who were liable to the company only because of negligence.⁴¹ But it was said by Lord Cottenham in another early English case that "where the liability arises from the wrongful act of the parties, each is liable for all the consequences, and there is no contribution between them."⁴²

On the other hand, if directors make or indorse a note, they have been held liable to contribution, in case of loss,⁴³ whether payment be made by one by compulsion or voluntarily,⁴⁴ and without regard to the amount of stock owned by each director.⁴⁵

In Maryland, it is held that directors against whom a decree is rendered for making loans in excess of the limit and for improper payment of dividends may "assert according to the ordinary course of procedure any right of contribution which they may have against other participants in the transactions out of which the liability en-

selling bonds of the company for their own private account, may "bring his co-directors before the court if he desires, and require them to contribute," is stated in *Widrig & Co. v. Newport St. Ry. Co.*, 82 Ky. 511, 515, 6 Ky. L. Rep. 760.

Contribution as between promoters, see *Lomita Land & Water Co. v. Robinson*, 154 Cal. 36, 18 L. R. A. (N. S.) 1106, 97 Pac. 10, and see generally §§ 132-166, vol. 1.

³⁸ *Ervin v. Oregon Ry. & Nav. Co.*, 20 Fed. 577, 582.

³⁹ *Gilbert v. Finch*, 173 N. Y. 455, 61 L. R. A. 807, 93 Am. St. Rep. 623, 66 N. E. 133. See also *Avery v. Central Bank of Kansas City*, 221 Mo. 71, 119 S. W. 1106, where, however, cashier of bank sought contri-

bution from a stockholder, but the rule stated above was applied.

For dicta to the contrary, however, see *Wallach v. Billings*, 195 Ill. App. 605, 617, *aff'd* 277 Ill. 218, 115 N. E. 382; *Murphy v. Penniman*, 105 Md. 452, 121 Am. St. Rep. 583, 66 Atl. 282.

⁴⁰ *Ramskill v. Edwards*, 31 Ch. Div. 100.

⁴¹ *Charitable Corporation v. Sutton*, 2 Atk. 400, 406.

⁴² *Attorney General v. Wilson*, 1 Craig & Phillips, 1, 28.

⁴³ *Middleton v. McCartee*, 2 Mackey (D. C.) 420; *Hall v. Gleason*, 158 Ky. 789, 166 S. W. 608.

⁴⁴ *Slaymaker v. Gundacker's Ex'rs*, 10 Serg. & R. (Pa.) 75.

⁴⁵ *Brooke v. Boyd*, 80 Wash. 213, Ann. Cas. 1916 B 359, 141 Pac. 357.

forced by the decree arose," and that "as contribution between defendants entitled thereto may be enforced in the same case in equity in which their common liability is established, the defendants * * * may, if entitled to contribution, have it decreed here as against each other in respect to losses, if any such be established, resulting from acts in which only they participated, but as to acts in which other directors also participated the safer plan for them would be to employ for that purpose a proceeding in which all of the participants in those acts are made parties."⁴⁶ It is to be noticed, however, that this was held in a case where a bill by a receiver was demurred to for the failure to make defendants all the directors who participated in any of the alleged negligent or unlawful acts complained of, and it appeared from the bill different directors were in office at various times when the various alleged improper acts occurred, and therefore the language of the opinion should, it is submitted, be limited to cases where some of the directors were liable for part of the losses but not liable for other losses.

§ 2418. — Where act illegal or forbidden by statute. If the director seeking contribution knew the act for which he was held liable, to be illegal, or if the circumstances were such as to render his ignorance inexcusable, then he is not entitled to contribution from his co-directors.⁴⁷ This rule was applied in Oklahoma where a corporation whose indebtedness was limited by statute to the amount of its capital stock, was incorporated with a subscribed capital stock of one hundred and fifty dollars, of which less than half was paid up, but contracted a debt for seven hundred dollars, and judgment was recovered against the director seeking contribution for such sum.⁴⁸ So, apparently on this theory, it was held in Nebraska that where directors of an insolvent corporation, with knowledge of the pendency of an action against it, divided among stockholders nearly all its available assets, and such act was expressly forbidden by statute, the treasurer, who was also a director, who paid out the money and against whom judgment was recovered for converting the corporate assets, could not obtain contribution from other directors.⁴⁹

§ 2419. — Where liability created by statute. If the liability is imposed by statute, and the statute is remedial in its nature rather

⁴⁶ Gaither v. Bauernschmidt, 108 Md. 1, 69 Atl. 425.

⁴⁷ Wilkinson v. Dodd, 40 N. J. Eq. 123, 138, 3 Atl. 360; Andrews v. Murray, 33 Barb. (N. Y.) 354. See also Cooley, Torts, 148, 149.

⁴⁸ Rogers v. Bonnett, 2 Okla. 553, 37 Pac. 1078.

⁴⁹ "On the other hand, if the action was taken in good faith, and with defendant's participation, and plaintiff need not be presumed to have

than penal, it is held that there is a right to contribution.⁵⁰ On the other hand, when the liability imposed upon the directors or other officers of a corporation is penal in its nature,⁵¹ an officer who has been sued and compelled to pay a debt cannot sue the other officers for contribution.⁵² The right to contribution, if it exists, is not affected by the form of action against the officer to enforce the statutory liability, as for instance whether it was in law or equity.⁵³

Under a statute making the officers of a corporation liable for debts contracted before the whole capital stock has been paid in, and also making the stockholders liable after the remedy against the officers has been exhausted, there is not a common duty or burden resting upon officers and stockholders alike, but the officers are primarily liable, and the liability of the stockholders is secondary. And therefore officers who have been compelled to pay corporate debts under the statute are not entitled to contribution from the stockholders. "The obligation of contribution is founded on the equitable principle that those who have united in taking upon themselves a common duty or burden ought to bear it equally. But in order to create this obligation it is essential that the duty or burden should be a common one; that is, that it should rest upon all alike. It is not sufficient that two or more persons are liable to pay the same debt. The liability must be the same in kind and degree; not separate and successive, but joint and co-ordinate, so that all stand in *aequali jure*, in regard to the performance of the obligation or payment of the debt for which they are respectively liable."⁵⁴

known it was wrong, there would be a right to contribution." *Sharp v. Call*, 69 Neb. 72, 96 N. W. 1004, 95 N. W. 16.

⁵⁰ *Woolverton v. Taylor*, 132 Ill. 197, 22 Am. St. Rep. 521, 23 N. E. 1007, rev'g 30 Ill. App. 70; *Nickerson v. Wheeler*, 118 Mass. 295 (applying rule where statute violated was one creating liability for failure to file annual certificates, and statute required joinder of all of directors, the execution having been levied on the property of one of the directors); *National Bank of Auburn v. Dillingham*, 147 N. Y. 603, 49 Am. St. Rep. 692, 42 N. E. 338.

⁵¹ See §§ 2594-2604, *infra*.

⁵² *Gregory v. German Bank of Denver*, 3 Colo. 332, 25 Am. Rep. 760; *Andrews v. Murray*, 33 Barb. (N. Y.) 354; *Rogers v. Bonnett*, 2 Okla. 553, 37 Pac. 1078; *Hill v. Frazier*, 22 Pa. St. 320.

In an early New York case this rule was applied where liability was created by statute, without any reference to whether the statute was penal or remedial. *Andrews v. Murray*, 33 Barb. (N. Y.) 354, statutory liability for failure to file annual report.

⁵³ *Coulombe v. Eastman*, 75 N. H. 531, 77 Atl. 936.

⁵⁴ *Stone v. Fenno*, 6 Allen (Mass.) 579.

§ 2420. Offer to do equity. Stockholders cannot come in and have a judgment against the corporation set aside, without offering to do equity by returning the money actually owed by the corporation.⁵⁵

§ 2421. Conclusiveness of judgment against corporation—Statutory liability. By the weight of authority, when a statute makes the directors of a corporation originally liable for corporate debts in case of certain defaults or misconduct, and an action is brought against a director by a creditor on his claim against the corporation, a judgment recovered against the corporation for the debt is not only not conclusive, but it is not even *prima facie* evidence of the debt.⁵⁶ However, even in New York where the cases generally support this rule, there is authority to the contrary where a judgment against the corporation was obtained before suing the officers.⁵⁷

In Massachusetts, however, a statute provides that in suits against corporations, in which it appears that one of the objects is to enforce an alleged liability of an officer thereof, such officer may be permitted, on petition, to defend the suit. In an action against a director, after a judgment against the corporation, he sought to show that the creditor who was suing had released the corporation and therefore there was no ground for the judgment, the recovery of which was, by statute, a condition precedent. Justice Braley, in delivering the opinion of the court, said that "the opportunity to contest the primary debt is not to be treated as a matter of common right, but a privilege, to be had, if at all, only upon complying with the terms of the statute which confers it."⁵⁸ In addition, the court held that the fact that the director was absent from the state from the inception to the ter-

⁵⁵ *Burns v. National Mining, Tunnel & Land Co.*, 23 Colo. App. 545, 130 Pac. 1037.

⁵⁶ *Chase v. Curtis*, 113 U. S. 452, 28 L. Ed. 1038; *Audenried v. East Coast Milling Co.*, 68 N. J. Eq. 450, 59 Atl. 577; *McMahon v. Macy*, 51 N. Y. 155; *Miller v. White*, 50 N. Y. 137; *Watson v. Godwin*, 62 Hun (N. Y.) 622, 17 N. Y. Supp. 51; *Torbett v. Godwin*, 62 Hun (N. Y.) 407, 17 N. Y. Supp. 46; *Kraft v. Coykendall*, 34 Hun (N. Y.) 285; *Esmond v. Bullard*, 16 Hun (N. Y.) 65; *Brand v. Godwin*, 15 Daly (N. Y.) 456. Compare, however, *Allen v. Clark*, 108 N. Y. 269, 15 N. E. 387, rev'g 43 Hun

(N. Y.) 377; *Squires v. Brown*, 22 How. Pr. (N. Y.) 35; *Cady v. Sanford*, 53 Vt. 632.

In *Tyng v. Clarke*, 9 Hun (N. Y.) 269, however, it was held that a judgment in favor of the corporation was admissible as a bar to a suit against an officer.

⁵⁷ *Cæsar v. Bernard*, 156 N. Y. App. Div. 724, 141 N. Y. Supp. 659, rev'g on other grounds 79 N. Y. Misc. 224, 139 N. Y. Supp. 974.

⁵⁸ *Old Colony Boot & Shoe Co. v. Parker-Sampson-Adams Co.*, 183 Mass. 557, 67 N. E. 870, reviewing Massachusetts decisions at length.

mination of the suit, and had no knowledge of it, and did not for this reason petition for leave to amend, was immaterial; and that the judgment could not be collaterally attacked whether the director be considered as a privy or a stranger to the judgment.⁵⁹ And in regard to the decisions in Massachusetts, it has been said, in that state, that "the decisions in relation to individual liability for corporate debts have been, in all aspects in which the question has been presented, uniform in sustaining the conclusiveness of the judgment against the corporation, as establishing the existence of the debt for which it is rendered."⁶⁰

§ 2422. — Common-law liability. Where directors are joined as codefendants in an action against a corporation, a judgment against the corporation has been held admissible in an action to hold them personally liable in the same matter, where the facts alleged in the original action tended to make them liable as trustees so as to impose on them the duty of controlling the suit.⁶¹ So where executive officers of a corporation had instigated an infringement of a trade-mark, and when the corporation was sued therefor had directed and controlled the defense, the decree, including the damages found, is conclusive against them when subsequently sued by the same person to recover the amount of the decree against them personally.⁶² In another connection, it was remarked that "the very fact that appellant recovered judgment against the corporation affords conclusive evidence that the trustees in contracting the debt did not exceed their authority."⁶³

B. Breach of Duty in General

§ 2423. Scope of subdivision. In this connection, attention is called to a few rules of law and illustrations thereof, relating to breaches of duty by corporate directors or other officers, where the breach of duty is such a general one that it is not subject to classification, at least not in its entirety, either as negligence, fraud, misappropriation, conversion or other specific branch of misconduct, as where it may be looked at from either one of two or more different viewpoints as to the nature of the tort.

⁵⁹ *Old Colony Boot & Shoe Co. v. Parker-Sampson-Adams Co.*, 183 Mass. 557, 67 N. E. 870.

⁶⁰ *Thayer v. New England Lithographic Steam Printing Co.*, 108 Mass. 523, 528, citing Massachusetts cases.

⁶¹ *McCollom v. Dallar*, — Tex. Civ. App. —, 176 S. W. 876.

⁶² *Saxlehner v. Eisner*, 140 Fed. 938, aff'd 147 Fed. 189.

⁶³ *American Radiator Co. v. Kinneer*, 56 Wash. 210, 35 L. R. A. (N. S.) 453, 105 Pac. 630.

§ 2424. **General illustrations of breach of duty.** It is the duty of directors to "act in good faith and unselfishly toward the corporation,"⁶⁴ and they cannot exercise the corporate powers for their private or personal advantage or gain.⁶⁵ This is elementary and the application of such rules has already been noticed at length in connection with the law as to dealings between corporations and their officers.⁶⁶ It follows that any act of an officer not done in good faith is a breach of duty, and where loss results to the corporation therefrom, it may ordinarily hold the officer liable for the loss; but an officer may act honestly with a third person, although to the apparent injury of the corporation, without necessarily incurring personal liability.⁶⁷ Thus, the directors have the right to pay corporate debts, although by so doing the corporation may be disabled from carrying on its business.⁶⁸ So if a large stockholder appoints his agent as a director to look after his corporate interests, his duties as director, of course, are paramount to those as agent of the stockholder.⁶⁹ If one takes over the management of a corporation under an option to purchase a controlling interest, he is not liable for a failure to make the business profitable, where there is no fraud or mismanagement.⁷⁰ An officer is not liable for breach of duty as such officer in a particular transaction where he acts therein not as agent for the corporation but as representing the other party to the transaction.⁷¹ Where the president of a corporation sold all its property, taking a bond and mortgage to secure the price, and thereafter he procured the passage of a resolution cancelling the mortgage so as to

⁶⁴ *Billings v. Shaw*, 209 N. Y. 265, 103 N. E. 142, *aff'g* 151 N. Y. App. Div. 888, 135 N. Y. Supp. 1100.

⁶⁵ *Pollitz v. Wabash R. Co.*, 207 N. Y. 113, 100 N. E. 721, modifying 150 N. Y. App. Div. 715, 135 N. Y. Supp. 789. See also § 2303 *et seq.*, *supra*.

⁶⁶ See §§ 2330-2403, *supra*.

⁶⁷ Where the officers of a corporation have induced a third person to contract with it by false representations as to its financial condition, etc., a director incurs no liability to the corporation by informing the third person of the falsity of the representations and thereby causing him to rescind. *Hale v. Mason*, 160 N. Y. 561, 55 N. E. 202, *aff'g* 22 N. Y. App. Div. 630, 48 N. Y. Supp. 1105.

It is not a breach of duty for the treasurer of a corporation to expose property of the corporation to be attached by one of its creditors. *The Literati v. Heald*, 141 Mass. 326, 5 N. E. 147.

⁶⁸ *Manufacturers' Sav. Bank v. Big Muddy Iron Co.*, 97 Mo. 38, 10 S. W. 865.

⁶⁹ *Singers-Bigger v. Young*, 166 Fed. 82.

⁷⁰ *Ring v. Brown*, 84 Neb. 589, 121 N. W. 965.

⁷¹ *Hicks v. Steel*, 142 Mich. 292, 4 L. R. A. (N. S.) 279, 105 N. W. 767. Compare *St. Johns Nat. Bank v. Steel*, 135 Mich. 165, 97 N. W. 704; *Hicks v. Steel*, 126 Mich. 408, 85 N. W. 1121.

enable the purchaser to dispose of the property, and the purchaser afterwards became insolvent so that the seller never realized anything from the sale, the president was held personally liable to stockholders of his corporation.⁷² The unexpired portion of the contract of a general manager of a company is not assignable; and corporate officers who permit the manager to assign it for a large sum are guilty of a breach of trust.⁷³

Where a director of a corporation owning a secret process, and holding in individual trust for the company a copy of the formula of its process, afterwards became president of another company and sought to use such process, he may be enjoined because of his breach of trust.⁷⁴

Watering the stock is not an actionable breach of trust on the part of directors where the stockholders are liable for the full unpaid price of the stock and the remedy against them has not yet been exhausted.⁷⁵

§ 2425. Favoring part of stockholders. It is the duty of a board of directors to manage the corporate affairs solely in the interest of the corporation, "quite regardless of the effect of its policies and management upon the fortunes of individual stockholders in the corporation."⁷⁶ Mismanagement by corporate officers by exercising their powers solely in behalf of the owners of one-half of the stock by whom they were elected is ground for an accounting.⁷⁷ If different persons claim the right to a majority of the stock, the directors should not side with either faction.⁷⁸ Corporate officers have no right to extend favors to certain stockholders as against other stockholders or the corporation.⁷⁹

§ 2426. Failure of directors to inform stockholders of material facts on transfer of property. Directors are not liable, where they lease property belonging to the corporation, pursuant to a vote of the stockholders, merely because of their failure to inform the stockholders of an offer to purchase the property, where it does not appear that

⁷² *Brinckerhoff v. Roosevelt*, 131 Fed. 955, aff'd 143 Fed. 478.

⁷³ *Moulton v. Field*, 179 Fed. 673, aff'g 166 Fed. 607.

⁷⁴ *Vulcan Detinning Co. v. American Can Co.*, 72 N. J. Eq. 387, 12 L. R. A. (N. S.) 102, 67 Atl. 339.

⁷⁵ *Wait v. McKee*, 95 Ark. 124, 128 S. W. 1028.

⁷⁶ *Henry L. Doherty & Co. v. Rice*, 186 Fed. 204, 218.

⁷⁷ *Green v. National Advertising & Amusement Co.*, — Minn. —, 162 N. W. 1056.

⁷⁸ *Henry L. Doherty & Co. v. Rice*, 186 Fed. 204, 218.

⁷⁹ *Davies v. Monroe Waterworks & Light Co.*, 107 La. 145, 31 So. 694; *Schmid v. Lancaster Ave. Theater Co.*, 244 Pa. 373, 91 Atl. 363.

the stockholders would have been affected by such knowledge or that the offer was a responsible one.⁸⁰

§ 2427. Breach of duty in failure to warn company of contemplated misappropriation of funds of subsidiary company. In a decision in New York, a director of a corporation which owned practically all the stock of a subsidiary company knew that the manager of the latter was about to misappropriate moneys of the subsidiary company. No one else knew of it, and he neglected to inform his company about it. By reason of the misappropriation, the value of the shares of the subsidiary company decreased. The parent company sued its director to recover its loss, and it was held that he was liable; that the suit was in effect a suit by a stockholder against its own agent; and that it was no defense that defendant might be also answerable for the same wrong to the subsidiary company and thus exposed to the risk of a double liability.⁸¹

§ 2428. Preference of creditors. It has been held that the preference of a corporate creditor by an insolvent corporation, where there is no fraud in the contracting of the debt or in the transfer of the company's assets in payment of it, does not create a liability on the part of the directors to answer to it as for a breach of trust.⁸²

§ 2429. Injury to good-will. A corporation may recover damages from its general manager for injuries to its business of manufacturing flour, where he wilfully manufactured inferior flour and sold it as and for one of the higher and finer grades of flour produced by the company, on the theory of an injury to the good-will of the company.⁸³

§ 2430. Enticing servants away. A corporation may recover damages from directors for enticing away its servants, on their selling out their interests in the company, although the enticement was not actually consummated until after they had sold their stock and ceased to be directors, where the plans in regard thereto were partially carried out while they were directors.⁸⁴

⁸⁰ Strunk v. Owen, 199 Pa. 73, 48 Atl. 888.

⁸¹ General Rubber Co. v. Benedict, 215 N. Y. 18, L. R. A. 1915 F 617, with note, 109 N. E. 96, aff'g 164 N. Y. App. Div. 332, 149 N. Y. Supp. 880. See also dissenting opinion of Justice Collins.

⁸² Kinter v. Connolly, 233 Pa. 5, 81 Atl. 905.

⁸³ Sessinghaus Milling Co. v. Hanebrink, 247 Mo. 212, Ann. Cas. 1914 B 875, 152 S. W. 354.

⁸⁴ Hooker, Corser & Mitchell Co. v. Hooker, 88 Vt. 335, 92 Atl. 443.

§ 2431. Failure to devote all of time to corporate business. Whether an officer must devote all of his time to corporate business depends upon the particular office he holds, the governing by-laws, etc.⁸⁵ If he is required to devote all his time to the business, then what constitutes a violation of such duty is governed by the law in regard thereto applicable to employees in general.

§ 2432. Liability for bad loans or investments—In general. In regard to agents of individuals or others, in general, the law is that an agent who has undertaken to make loans or investments is not a guarantor of them unless he has expressly agreed to be, but his duty is merely to exercise ordinary and reasonable care.⁸⁶ However, directors and other corporate officers are liable where they have either wilfully or negligently made bad loans or investments, resulting in loss to the corporation, provided the loan or investment was not a mere mistake in judgment.⁸⁷ In making loans, the managing officers must, it is clearly evident, "exercise diligence in investigating as to the value of the securities and safety of the loan, and ordinary care and prudence in acting on the facts known to them."⁸⁸ Furthermore, as stated by the late Justice Deemer of the Supreme Court of Iowa, it is the duty of a member of the investment committee to "advise his associates of any and every thing known to him affecting the financial condition and situation of proposed borrowers [from the bank], and this without being asked. He impliedly contracted to give this information."⁸⁹ Of course if directors of a bank make loans to persons known to be insolvent, the directors are liable to the bank for the loss;⁹⁰ and the same rule applies where the loan is made

⁸⁵ A general manager is not required to devote all his time to the corporate business. *Johnson v. Stoughton Wagon Co.*, 118 Wis. 438, 95 N. W. 394.

⁸⁶ See 1 Mechem, Agency (2nd Ed.), §§ 1295, 1296; 1 Clark & Skyles, Agency, § 402a.

⁸⁷ See *Greenfield Sav. Bank v. Abercrombie*, 211 Mass. 252, 39 L. R. A. (N. S.) 173, Ann. Cas. 1913 B 420, 97 N. E. 897; *Williams v. McKay*, 46 N. J. Eq. 25, 18 Atl. 824; *Warren v. Robison*, 19 Utah 289, 75 Am. St. Rep. 734, 57 Pac. 287.

Effect of mere mistakes in judgment, see § 2454, *infra*.

The court held not objectionable as a mere legal inference allegations in suit against directors for negligent loaning of corporate funds that the act was such as no prudent man would sanction or approve and that in giving their sanction the defendant directors were negligent. *Fisher v. Parr*, 92 Md. 245, 48 Atl. 621.

⁸⁸ *New Haven Trust Co. v. Doherty*, 75 Conn. 555, 96 Am. St. Rep. 239, 54 Atl. 209, applying rule to officers of insurance company.

⁸⁹ *Toledo Sav. Bank v. Johnston*, 94 Iowa 212, 221, 62 N. W. 748.

⁹⁰ *Stone v. Rottman*, 183 Mo. 552, 82 S. W. 76.

by the cashier at the request of the president, so as to make the latter liable.⁹¹ Thus, directors are liable to the corporation where they permit a co-director, known by them to be insolvent, to borrow a large sum from the company for his own personal use, on giving a worthless note due in three years without interest.⁹² So if the cashier of a bank loans money without security and without entering the loan in the books of the bank, and makes false reports as to the cash on hand in order to conceal the loan from the board of directors, he is liable to the bank for the loss resulting from the loan.⁹³ And the president of a bank who induces the cashier to loan money to a minor, by a promise of collateral liability, but which promise is invalid because oral, is liable to the bank for the loss from the loan.⁹⁴ In discounting paper, it seems that the cashier of a bank is not personally liable to the bank where he acted, in the particular instance, under the directions of the president of the bank.⁹⁵ Officers are not liable where they loan a third of the capital stock to a director who was the chief merchant of the town with a good business and financial standing.⁹⁶ Statutes in some states impose liability upon bank directors where they loan more than a certain per cent. of their capital to one person or to a stockholder or officer.⁹⁷

However, a bad loan may be ratified by failure of the corporation to object in any way to it for several years during which they had knowledge thereof.⁹⁸

Whether directors are liable for bad loans or investments made by other executive officers⁹⁹ depends upon matters hereinafter considered.¹

The question of personal liability for loans forbidden by statute or the charter is considered hereafter.²

⁹¹ *First Nat. Bank of Sturgis v. Reed*, 36 Mich. 263.

⁹² *Cream City Mirror Plate Co. v. Coggeshall*, 142 Wis. 651, 135 Am. St. Rep. 1091, 126 N. W. 44.

⁹³ *San Joaquin Valley Bank v. Bours*, 65 Cal. 247, 3 Pac. 864.

⁹⁴ *Brown v. Farmers' & Merchants' Nat. Bank*, 88 Tex. 265, 33 L. R. A. 359, 31 S. W. 285, aff'g (Tex. Civ. App.), 31 S. W. 216.

⁹⁵ *Pryse v. Farmers' Bank*, 17 Ky. L. Rep. 1056, 33 S. W. 532.

⁹⁶ *Wheeler v. Aiken County Loan & Savings Bank*, 75 Fed. 781.

⁹⁷ *Wickliffe v. Turner*, 154 Ky. 571,

157 S. W. 1125, where liability imposed in favor not only of creditors but also in favor of stockholders.

⁹⁸ *First Nat. Bank v. Goddis*, 31 Wash. 596, 72 Pac. 460.

⁹⁹ See *Bailey v. O'Neal*, 92 Ark. 327, 135 Am. St. Rep. 185, 122 S. W. 503; *Stone v. Rottman*, 183 Mo. 573, 82 S. W. 76; *Kavanaugh v. Commonwealth Trust Co. of New York*, 64 N. Y. Misc. 303, 118 N. Y. Supp. 758; *Warren v. Robison*, 25 Utah 205, 70 Pac. 989.

¹ See §§ 2472-2503, *infra*.

² See § 2435, *infra*.

§ 2433. — **Payment of overdrafts.** Permitting an overdraft is equivalent to the making of a loan.³ It has been held that it is a violation of duty on the part of the cashier to pay overdrafts;⁴ but the better rule seems to be that it is not negligence per se, in the absence of a by-law or order of a superior officer, for a cashier to pay the overdraft of a responsible customer.⁵ If an officer permitting an overdraft has no authority to permit an account to be overdrawn, he is liable to the bank for loss resulting from an overdraft.⁶ Whether overdrafts, under all circumstances, constitute a fraud, is doubtful, but it has been held that if a bank officer, without authority, permits an account to be overdrawn, the payment in excess of the deposits is "a fraud in law on the part of the officer paying or authorizing payment."⁷ Officers of a bank who permit large overdrafts by a corporation known to be financially embarrassed are liable to the bank for the amounts so lost, at least where they concealed the overdrafts.⁸ The propriety of allowing particular overdrafts, it has been held, "is one that addresses itself to the business judgment and discretion of the officers having that matter in charge. If they act prudently and honestly, they will not be held responsible for losses that occur from it. On the other hand, if they allow the funds of the bank to be so appropriated by a customer or customers who are known to be insolvent, or whose assets or business would not justify a prudent person similarly situated to extend them such credit, they will be liable to the bank as for a neglect of their duty, where loss results from it."⁹

It seems that one who is both a director and vice president of a

³ *Oakland Bank of Savings v. Wilcox*, 60 Cal. 126, 140.

The president of a bank was held liable for a loss resulting from permitting his insolvent son to overdraw his account without submitting the matter to the directors or advisory committee, contrary to the rules of the bank with respect to such matters. *Western Bank v. Coldewey's Ex'r*, 26 Ky. L. Rep. 1247, 83 S. W. 629.

⁴ *Bank of St. Mary's v. Calder*, 3 Strob. (S. C.) 403.

⁵ *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448.

Payment of overdraft of responsible customer, by cashier, with the

knowledge and assent of the president—the two being the only officials authorized to make loans—does not make the cashier liable for a loss therefrom, at least where it is not shown that the customer is insolvent. *Cope v. Westbay*, 188 Mo. 638, 87 S. W. 504.

⁶ *Oakland Bank of Savings v. Wilcox*, 60 Cal. 126, 140.

⁷ *Oakland Bank of Savings v. Wilcox*, 60 Cal. 126, 140.

⁸ *Citizens' Nat. Bank v. Blizzard*, — W. Va. —, 93 S. E. 338.

⁹ *Western Bank of Louisville, Kentucky v. Coldewey's Ex'r*, 120 Ky. 776, 786, 83 S. W. 629. See also *First Nat. Bank v. Reese*, 25 Ky. L. Rep. 778, 76 S. W. 384.

bank is chargeable with knowledge that the account of one with whom he deals is overdrawn at said bank.¹⁰

C. Acts Ultra Vires or Illegal or Beyond Authority of Particular Officer

§ 2434. General rules. Whether a director or other corporate officer be considered as an agent or as a trustee, he is liable to the corporation or its stockholders as representing the corporation, where he acts outside the scope of his authority to the injury of the corporation.¹¹ If considered as a trustee, there is applicable the general rule governing trustees to that effect.¹² If considered as an agent, then the general rule applicable to all agents is that "it is the duty of the agent, in all of his acts and contracts, to keep within the limits of his authority, and he must, in general, indemnify his principal against the consequences of not doing so."¹³ It must be noted, however, that where

¹⁰ *German Sav. Bank v. Wulfekuhler*, 19 Kan. 60.

¹¹ *United States. Cooper v. Hill*, 94 Fed. 582, 587; *Cockrill v. Cooper*, 86 Fed. 7, 12.

Massachusetts. Greenfield Sav. Bank v. Abercrombie, 211 Mass. 252, 39 L. R. A. (N. S.) 173, Ann. Cas. 1913 B 420, 97 N. E. 897.

Montana. McConnell v. Combination Mining & Milling Co., 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194, aff'd 31 Mont. 263, 79 Pac. 248.

New Jersey. Williams v. McDonald, 42 N. J. Eq. 392, 7 Atl. 866, rev'g on other grounds 37 N. J. Eq. 409.

New York. Austin v. Daniels, 4 Den. 299.

Oklahoma. City Nat. Bank of Mangum v. Crow, 27 Okla. 107, Ann. Cas. 1912 B 647, 111 Pac. 210.

England. London Trust Co., Ltd. v. Mackenzie, 68 L. T. Rep. 380.

A general manager is liable to the corporation for damages resulting from his ultra vires acts. *Fergus Falls Woolen Mills Co. v. Boyum*, 136 Minn. 411, 162 N. W. 516.

There need not be any proof of loss. *Murray v. Smith*, 166 N. Y. App. Div. 528, 152 N. Y. Supp. 102.

Liability of director for ultra vires acts of co-director, see §§ 2493-2500, *infra*.

Statutes imposing liability are often merely declaratory of the common law, as illustrated by the National Bank Act imposing liability for excessive loans. *Cockrill v. Cooper*, 86 Fed. 7, 12.

¹² If a trustee "exceeds his authority, or disobeys the rules prescribed to him, he acts at his peril, and undertakes responsibility for the consequences." *Pennington v. Seal*, 49 Miss. 518, 524.

"Good faith is a defense only where a trustee, acting within the limits of his powers with proper prudence and diligence, commits mere mistakes or errors of judgment, but is not a defense where a trustee disregards the limits placed upon his power by law or by the trust instrument." *Gibney v. Allen*, 156 Mich. 301, 311, 120 N. W. 811.

¹³ Rule as applied to agents in general, see 1 Mechem, *Agency* (2nd Ed.), § 1240.

Directors and officers of corporations, it is held, "are agents of the corporation for which they act, and

the question arises between the corporation and the officer, the agent can rely only upon his actual authority, while if a third person seeks to hold the officer liable, the authority of the officer is measured by his apparent rather than his actual authority.¹⁴

Sometimes this acting beyond his authority by a director or other corporate officer is considered by the courts merely from the viewpoint of liability for negligence or liability for misappropriation or conversion of corporate assets, or some other specific form of liability, in which case the rule is stated hereafter in this chapter under the appropriate subdivision.

For the purposes of this subdivision, it is not necessary to distinguish between (1) acts which are strictly *ultra vires* because beyond the powers of the corporation, and (2) acts which are either expressly forbidden by statute or charter or by-law, on the part of the corporation itself, and (3) acts which a statute or the charter or a by-law provides shall be done in a particular way, and (4) acts which although not beyond the powers of the corporation are outside the scope of the powers of the particular officer exercising them. In all the cases enumerated, the acts of the officer are unauthorized and the same general rules apply to each class of acts.

§ 2435. Illustrations of general rules. This rule has been applied to many different unauthorized acts. For instance, ordinarily a bank or other company may recover from officers the amount lost by a loan made by such officers in violation of a statute or the charter.¹⁵ So

for their unauthorized transactions they may be liable to their principal just as the agent of an individual may be liable for the damage caused to his principal by his unauthorized acts." *Holmes, Booth & Haydens v. Willard*, 125 N. Y. 75, 11 L. R. A. 170, 25 N. E. 1083.

¹⁴ For rules governing apparent authority, see §§ 1917-1925, vol. 3.

¹⁵ *Citizens' Building, Loan & Savings Ass'n v. Coriell*, 34 N. J. Eq. 383, 398; *Seventeenth Ward Bank v. Smith*, 51 N. Y. App. Div. 259, 64 N. Y. Supp. 888. But see *Bramlette v. Joseph*, 111 Miss. 379, 71 So. 643, holding that the fact that a statute forbids banks to loan more than a certain sum to any one person, where there is no penalty attached, does not

make directors personally liable for making such a loan.

But in *Williams v. McDonald*, 37 N. J. Eq. 409, it was held that a director was not liable for making a loan of a greater amount than the law allowed to be loaned on the security taken, where he clearly acted in good faith.

In the absence of participation or negligence on their part, directors or other officers of a bank are not personally liable for losses resulting from a loan to an officer in violation of a statute prohibiting a director or other officer of a bank from borrowing from it, and making it a criminal offense to do so, for the statute affects only the officer borrowing. *Wheeler v. Aiken County Loan & Savings Bank*, 75 Fed. 781.

the rule has been applied to payments by the manager of an amusement company to silence complaints as to conducting its business on Sunday, since not only ultra vires but also bad in morals.¹⁶ And the rule that when directors intentionally act ultra vires of the corporation, they are liable for the losses it sustains in consequence, has been applied to the publication of a libel.¹⁷ So where directors of a bank owning a mine for sale, on being unable to sell it, expended large sums in prospecting for ore in the mine, such act was ultra vires, and rendered the directors personally liable to the corporation for the amount so expended.¹⁸ A fortiori, money may be recovered as a misappropriation by the secretary, where expended in improving a mining claim not belonging to the corporation.¹⁹ Likewise, directors of a bank are personally liable, where they engage in or knowingly permit speculation in stocks with the funds of the bank, for losses sustained.²⁰ And where the officers of a New Jersey corporation caused a dentistry business to be conducted in Pennsylvania under the corporate name without charter right and in violation of the laws of the latter state, they became personally liable for negligent treatment of a patient by an employee, the patient believing herself to be receiving treatment from duly licensed dentists.²¹ Engaging in an ultra vires business, in which the corporate assets are wasted or lost, makes the directors personally liable.²² So where one, as president of a corporation excavating on its own land, agreed with an adjoining owner to excavate in a particular way, but thereafter, without authority from the company, changed the method of doing the work, he exceeds his authority and is personally liable for any injuries resulting from acts done in excess of his authority.²³ So where the treasurer of a bank transferred a mortgage held by himself to the bank, and paid himself for it, he is liable for a loss sustained by the bank on such mortgage where the mortgaged property was not worth double the mortgage as required by the bank's charter, and where the investment was not submitted to the finance committee for approval as required by the by-laws.²⁴ But it has been held that a director of a bank is not personally liable, on the theory that in discounting paper he induced

¹⁶ *Both v. Robertson*, 64 N. Y. Misc. 343, 118 N. Y. Supp. 351.

¹⁷ *Hill v. Murphy*, 212 Mass. 1, 40 L. R. A. (N. S.) 1102, Ann. Cas. 1913 C 374, 98 N. E. 781.

¹⁸ *Cooper v. Hill*, 94 Fed. 582, 586.

¹⁹ *Kleinschmidt v. American Min. Co.*, 49 Mont. 7, 139 Pac. 785.

²⁰ *McKinnon v. Morse*, 177 Fed. 576.

²¹ *Mandeville v. Courtright*, 142 Fed. 97, 6 L. R. A. (N. S.) 1003.

²² *Dietrich v. Rothenberger*, 25 Ky. L. Rep. 338, 75 S. W. 271.

²³ *Malone v. Pierce*, 231 Pa. 534, 80 Atl. 979.

²⁴ *Williams v. Riley*, 34 N. J. Eq. 398.

or permitted the bank to extend credit in excess of the legal limit fixed by statute, where, in the discount transaction, he acted as the representative of his father who held the paper, and not as director.²⁵

§ 2436. Reasonable care as immaterial. If the liability of a corporate officer is based on the alleged fact that he has acted beyond his powers or beyond the powers of the corporation, or in violation of a statute or the charter or by-laws, the test of reasonable care which applies when he acts within his powers has nothing to do with the question of liability except in so far as such care bears on whether he should have known that the acts in question were ultra vires or expressly forbidden or beyond his powers. If he knowingly exceed his authority or the authority of the corporation, he is liable without regard to exercise of reasonable care. In a Missouri case, directors of a bank had loaned to one person more than one-fourth of the capital, in violation of a statute which, however, imposed no penalty for its violation. It was contended that no liability existed "for the reason that the acts prohibited are not such as would make them liable at common law, and no penalty is fixed for the violation of the statute, and the acts charged were not charged to have been done negligently, fraudulently, or corruptly." It was held sufficient that there was a violation of the statute, with loss to the bank, without regard to any negligence, on the theory that every violation of law is a breach of duty and that directors are liable to the company for all losses occasioned by any flagrant breach of their duty.²⁶

§ 2437. Materiality of fact that act is forbidden by statute or charter. If acts are expressly prohibited by the charter or a statute, but liability for violation thereof is not imposed on corporate officers by the charter or statute, the doing of such an act does not make the officers personally liable merely because the act is a violation of the charter or a statute. So far as liability of directors to the corporation is concerned, it has been said that the liability "for damages caused by unauthorized acts rests upon the common law rule which renders every agent liable who violates his authority to the damage of his principal. A statutory prohibition is material under these circumstances merely as indicating an express restriction placed upon the powers delegated to the directors when the corporation was formed."²⁷ Moreover, an officer of a corporation is not liable to the corporation

²⁵ Hicks v. Steel, 142 Mich. 292, 4 L. R. A. (N. S.) 279, 105 N. W. 767. ²⁶ Thompson v. Greeley, 107 Mo. 577, 17 S. W. 962.

²⁷ 1 Morawetz, Corporations, § 556.

for damages merely because he violates a statute, but it must be shown that he was acting as agent of the corporation in so doing.²⁸

§ 2438. Effect of ignorance or mistake—In general. The directors or other officers of a corporation can never escape liability for mismanagement by setting up that they were ignorant of a provision of the company's charter or by-laws. In other words, ignorance of the provisions of the charter or of the by-laws cannot be set up as a defense by officers sought to be held personally liable for acting beyond the powers, or in violation of the provisions.²⁹ Justice Sanborn states that officers "are bound to know they are charged by the law with the knowledge of the extent and limitations of the powers of the corporations for which they act, and of their own authority as the agents of these corporations."³⁰ Absolute ignorance, however, is to be distinguished from a mere mistake. The rule laid down in an early case in 1850 was that if the doing of an ultra vires act, or of an act forbidden by charter or statute, was the result of mistake as to their powers, and the mistake was such as a man of ordinary prudence might fall into, they are not liable.³¹ Thus, if there is an honest mistake due to the obscurity or ambiguity of provisions of the charter or by-laws or statute, the officers are not liable.³² However, it is no defense that the charter provisions were obscure or ambiguous, where the officers do not show that they ever read the charter nor sought legal advice as to its contents.³³

²⁸ *Hicks v. Steel*, 142 Mich. 292, 4 L. R. A. (N. S.) 279, 105 N. W. 767.

²⁹ *Percy v. Millaudon*, 8 Mont. N. S. (La.) 68; *In re Spering's Appeal*, 71 Pa. St. 11, 10 Am. Rep. 684; *Hodges v. New England Screw Co.*, 1 R. I. 312, 53 Am. Dec. 624; *Marshall v. Farmers' & Mechanics' Sav. Bank of Alexander*, 85 Va. 676, 2 L. R. A. 534, 17 Am. St. Rep. 84, 8 S. E. 586.

That directors are ignorant of the existence of the by-laws of a bank does not afford excuse for loss which results from their failure to comply therewith. *Campbell v. Watson*, 62 N. J. Eq. 396, 50 Atl. 120.

³⁰ *Cooper v. Hill*, 94 Fed. 582, 587.

³¹ *Hodges v. New England Screw Co.*, 1 R. I. 312, 346, 53 Am. Dec. 624. See also *In re Watts' Appeal*, 78 Pa. St. 370, 393.

The rule is that directors or other corporate officers are not personally liable for a violation of the charter, where the violation results from a mistake as to their powers, provided they act in good faith and for the benefit of the corporation, and the mistake does not proceed from a want of ordinary care and prudence. *Williams v. McDonald*, 37 N. J. Eq. 409, 413.

³² *Scott v. Depeyster*, 1 Edw. Ch. (N. Y.) 513.

A mistake of law, in such a case in investing corporate funds in a manner not authorized by the charter, does not make the officers so investing liable for the loss occasioned thereby. *Scott v. Depeyster*, 1 Edw. Ch. (N. Y.) 513.

³³ *Williams v. McKay*, 46 N. J. Eq. 25, 18 Atl. 824.

It has been indicated that more care is required of directors to ascertain the extent of their powers than in the exercise of such powers.³⁴

§ 2439. — Effect of acting without advice of counsel. If directors feel any doubt as to the law in regard to their duties, they may be guilty of negligence if they fail to obtain competent legal advice, for the reason "that they would, under like circumstances, seek such advice in the management of their private affairs."³⁵ But since a mistake of law will not, of itself, create liability, directors or other corporate officers are not necessarily guilty of negligence merely because they act without advice of counsel.³⁶

§ 2440. — Advice of counsel as a defense. Where the question of ultra vires is in doubt, "the cases go far," as said by Justice Thomson in a recent federal decision, "to hold that the advice of counsel is a protection to the trustee or director who has sought such advice and honestly acted under it."³⁷ But while advice of counsel is sometimes deemed a defense,³⁸ it is not always a defense.³⁹ In regard to this matter, it has been said that "it is true that where the power of a trustee in dealing with a trust fund is doubtful, requiring some legal knowledge for the correct understanding of its limits, courts have held that the trustee might be entitled to some protection when acting under the advice of counsel. But the general principle is otherwise, and advice of counsel cannot avail where the terms of the trust are plain and explicit [citing cases]. Indeed, it is difficult to imagine an instance of any kind where one charged with a specific duty can negligently violate that duty with impunity by simply obtaining from some attorney advice which is obviously repugnant to the plain facts of the case."⁴⁰

§ 2441. Effect of consent or ratification. If all the stockholders assent, either expressly or impliedly, to the ultra vires or other unauthorized act, neither the corporation nor the stockholders can sue

³⁴ *In re Liverpool Household Stores Ass'n*, 62 L. T. (N. S.) 873, 59 L. J. Ch. (N. S.) 616.

³⁵ *Vance v. Phoenix Ins. Co.*, 4 Lea (Tenn.) 385, 391.

³⁶ *Vance v. Phoenix Ins. Co.*, 4 Lea (Tenn.) 385, 391.

³⁷ *Bailey v. Babcock*, 241 Fed. 501, 514.

³⁸ *In re Spring's Appeal*, 71 Pa. 11, 25, 10 Am. Rep. 684.

³⁹ *Pierson v. Cronk*, 26 Abb. N. Cas. (N. Y.) 25, 13 N. Y. Supp. 845; *In re Faure Elec. Accumulator Co.*, L. R. 40 Ch. Div. 141.

⁴⁰ *New Haven Trust Co. v. Doherty*, 75 Conn. 555, 96 Am. St. Rep. 239, 54 Atl. 209.

the officers for acts done by them in pursuance of the ultra vires or other unauthorized scheme, in order to recover damages the corporation has suffered. In short, a corporation cannot hold directors or other officers personally liable for losses resulting from their acts, either in excess of their own authority or in excess of the authority of the corporation, where acquiesced in by all the stockholders.⁴¹ So a stockholder who consents to or acquiesces in an act by an officer of the corporation, in excess of his powers or of those of the corporation, is himself estopped to rely on such act to hold the officer personally liable.⁴² However, the act of stockholders at their annual meeting in recognizing corporate liability for debts incurred by the general manager, without knowledge that they exceeded the debt limit, is not a waiver of a right of action against the general manager for wrongfully contracting such liability.⁴³ A mistake in that the directors honestly believed that, in prosecuting one for libel, they were giving effect to the wishes of a large majority of the stockholders, has been held not to make them personally liable for the sums expended in the prosecution;⁴⁴ although the better rule would seem to be that if directors or other officers are acting not only beyond their own powers but also beyond the powers of the corporation, the fact that he is acting with the approval of a majority of the stockholders is no defense.⁴⁵

The directors of a corporation, however, cannot bind the stockholders or corporation by authorizing a subordinate officer or agent to do ultra vires acts which constitute a fraud upon, or violation of his duty to, the corporation. If they authorize or acquiesce in such an act, they are guilty of a breach of their duty to the corporation, and their consent is no justification to the subordinate officer.⁴⁶ Thus,

⁴¹ *Citizens' Building, Loan & Savings Ass'n v. Coriell*, 34 N. J. Eq. 383; *Holmes, Booth & Haydens v. Willard*, 125 N. Y. 75, 11 L. R. A. 170, 25 N. E. 1083; *In re Watts' Appeal*, 78 Pa. St. 370, 394. See also *Trisconi v. Winship*, 43 La. Ann. 45, 26 Am. St. Rep. 175, 9 So. 29; *Scott v. Depeyster*, 1 Edw. Ch. (N. Y.) 513.

The managing officer of a corporation is not liable to it for an ultra vires act—an accommodation indorsement, for example—where the act is authorized or acquiesced in by the stockholders or directors. *Holmes, Booth & Haydens v. Willard*, 125 N. Y. 75, 11 L. R. A. 170, 25 N. E. 1083,

aff'g 53 Hun (N. Y.) 629, 5 N. Y. Supp. 610.

⁴² *In re Watts' Appeal*, 78 Pa. St. 370.

⁴³ *Fergus Falls Woolen Mills Co. v. Boyum*, 136 Minn. 411, 162 N. W. 516.

⁴⁴ *Pickering v. Stephenson*, L. R. 14 Eq. 322, 41 L. J. Ch. (N. S.) 493, 26 L. T. (N. S.) 608, 20 Wkly. Rep. 654, followed in *Studdert v. Grosvenor*, L. R. 33 Ch. Div. 528.

⁴⁵ See opinion of Justice Lindley in *Cullerne v. London & S. General Permanent Bldg. Society*, L. R. 25 Q. B. Div. 485.

⁴⁶ *Holmes, Booth & Haydens v. Wil-*

where a corporation is forbidden to incur debts in excess of a certain limit, the directors of the company have no power to ratify debts incurred in excess of such limit by the general manager or other officers.⁴⁷ So the cashier of a bank and the sureties on his bond are not relieved from liability for his acts in excess of the powers of the bank, and which constitute a breach of the condition of the bond, because such acts were authorized by the directors.⁴⁸

D. Negligence

§ 2442. In general. The liability of directors and other officers of a corporation is not limited to wilful breaches of trust or excess of power, but extends also to negligence. Whether a director or other corporate officer be considered as an agent or as a trustee, he is liable to the corporation for injury resulting from his negligence as such,⁴⁹

lard, 125 N. Y. 75, 11 L. R. A. 170, 25 N. E. 1083.

A general manager is personally liable to the corporation for losses sustained by it, where resulting from speculating in grain options which was expressly forbidden corporate officers by the by-laws of the company; and it is no defense that the officer acted in good faith nor that the board of directors knew of the acts and acquiesced therein since the directors cannot ratify acts expressly forbidden by the by-laws. *Hoffman v. Farmers' Co-op. Shipping Ass'n*, 78 Kan. 561, 97 Pac. 440.

Where the president of a corporation made a loan of its funds which was illegal under a statute because not sufficiently secured, it was held that he was none the less liable for the loss because the loan was ratified by the directors. *Seventeenth Ward Bank v. Smith*, 51 N. Y. App. Div. 259, 64 N. Y. Supp. 888.

⁴⁷*Fergus Falls Woolen Mills Co. v. Boyum*, 136 Minn. 411, 162 N. W. 516.

⁴⁸*Minor v. Mechanics' Bank of Alexandria*, 1 Pet. (U. S.) 46, 7 L. Ed. 47; *Bank of Washington v. Barrington*, 2 Pen. & W. (Pa.) 27.

⁴⁹*United States. Briggs v. Spaulding*, 141 U. S. 132, 35 L. Ed. 662; *Warner v. Penoyer*, 91 Fed. 587, 44 L. R. A. 761, rev'g 82 Fed. 181; *Lawrence v. Stearns*, 70 Fed. 878; *Mutual Bldg. Fund & Dollar Sav. Bank v. Bossieux*, 4 Hughes 387, 3 Fed. 817; *Corbett v. Woodward*, 5 Sawy. 416, Fed. Cas. No. 3,223.

California. *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 74, 53 Pac. 410; *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508.

Illinois. *Delano v. Case*, 17 Ill. App. 531, aff'd 121 Ill. 247, 2 Am. St. Rep. 81, 12 N. E. 676.

Kentucky. *Savings Bank of Louisville's Assignee v. Caperton*, 87 Ky. 306, 12 Am. St. Rep. 488, 8 S. W. 885; *Dunn's Adm'r v. Kyle's Ex'r*, 14 Bush 134.

Louisiana. *Percy v. Millaudon*, 8 Mart. (N. S.) 68, 3 La. 568.

Maine. *Bank of Mutual Redemption v. Hill*, 56 Me. 385, 96 Am. Dec. 470.

Michigan. *Flynn v. Third Nat. Bank*, 122 Mich. 642, 81 N. W. 572; *Commercial Bank of Bay City v. Chatfield*, 121 Mich. 641, 80 N. W. 712.

Mississippi. *Wolfe v. Simmons*, 75 Miss. 539, 23 So. 586.

whatever may be the rule as to his liability to creditors of the corporation.⁵⁰ If considered as an agent, then the rule of agency which is applicable is that an agent must exercise in the performance of his duty "that degree of skill, care and diligence which the nature of the undertaking and the time, place and circumstances of the perform-

Missouri. *Union Nat. Bank v. Hill*, 148 Mo. 380, 71 Am. St. Rep. 615, 49 S. W. 1012.

New Jersey. *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775; *Ackerman v. Halsey*, 37 N. J. Eq. 356, aff'd 38 N. J. Eq. 501.

New York. *Mason v. Henry*, 152 N. Y. 529, 46 N. E. 837; *Bloom v. National United Ben. Savings & Loan Co.*, 152 N. Y. 114, 46 N. E. 166; *Brinkerhoff v. Bostwick*, 88 N. Y. 52; *Hun v. Cary*, 82 N. Y. 65, 37 Am. Rep. 546; *Sayles v. White*, 18 App. Div. 590, 46 N. Y. Supp. 194; *Scharf v. Warren-Scharf Asphalt Paving Co.*, 15 App. Div. 480, 44 N. Y. Supp. 491; *Sayles v. Central Nat. Bank of Rome*, 18 Misc. 155, 41 N. Y. Supp. 1063; *Watkins v. Watkins & Turner Lumber Co.*, 17 Misc. 227, 40 N. Y. Supp. 1042; *Scott v. Depeyster*, 1 Edw. Ch. 547; *Robinson v. Smith*, 3 Paige 222, 24 Am. Dec. 212.

North Carolina. *Houston v. Thornton*, 122 N. C. 365, 65 Am. St. Rep. 699, 29 S. E. 827; *Solomon v. Bates*, 118 N. C. 311, 54 Am. St. Rep. 725, 24 S. E. 478. See *Tate v. Bates*, 118 N. C. 287, 54 Am. St. Rep. 719, 24 S. E. 482.

Pennsylvania. *Swentzel v. Penn Bank*, 147 Pa. St. 140, 15 L. R. A. 305, 30 Am. St. Rep. 718, 23 Atl. 405; *In re Spering's Appeal*, 71 Pa. St. 11, 10 Am. Rep. 684.

Rhode Island. *Hodges v. New England Screw Co.*, 1 R. I. 312, 53 Am. Dec. 624.

South Carolina. *Williams v. Gregg*, 2 Strob. Eq. 297.

Tennessee. *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep.

625, 15 S. W. 448; *Shea v. Mabry*, 1 Lea 319.

Utah. *Warren v. Robison*, 19 Utah 289, 75 Am. St. Rep. 734, 57 Pac. 287.

Virginia. *Marshall v. Farmers' & Mechanics' Sav. Bank of Alexander*, 85 Va. 676, 2 L. R. A. 534, 17 Am. St. Rep. 84, 8 S. E. 586.

Wisconsin. *North Hudson Mut. Building & Loan Ass'n v. Childs*, 82 Wis. 460, 33 Am. St. Rep. 57, 52 N. W. 600.

England. *Charitable Corporation v. Sutton*, 2 Atk. 405; *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392; *Land Credit Co. of Ireland v. Lord Fermoy*, 5 Ch. App. 763; *Western Bank v. Douglas*, 11 Sess. Cas. 112.

A director who does not direct is liable for his neglect of duty. *Jackson v. Hooper*, 76 N. J. Eq. 592, 27 L. R. A. (N. S.) 658, 75 Atl. 568.

Directors may be held liable for waste of the corporate property due to negligence on their part. *Great Western Min. & Mfg. Co. v. Harris' Estate*, 111 Fed. 38; *Bosworth v. Allen*, 168 N. Y. 157, 55 L. R. A. 751, 85 Am. St. Rep. 667, 61 N. E. 163, rev'g 57 N. Y. App. Div. 633, 67 N. Y. Supp. 1133; *Polhemus v. Polhemus*, 114 N. Y. App. Div. 781, 100 N. Y. Supp. 263; *Young v. Equitable Life Assur. Soc. of United States*, 49 N. Y. Misc. 347, 99 N. Y. Supp. 446.

But the negligence of directors cannot be imputed to one dealing with the corporation merely because he was a copartner in business with one of the directors. *Anthony v. Jeffress*, 172 N. C. 378, 90 S. E. 414.

⁵⁰ See §§ 2574-2578, *infra*.

ance ordinarily and reasonably demand," and that an agent is liable for failure to perform such duty whereby the principal naturally and proximately suffers loss or injury;⁵¹ and it has been stated that "there is no general rule of liability for wrongful neglect in the exercise of such agency, applicable to directors as a class by themselves, independently of the law which prescribes and defines the duties and liabilities of agents."⁵² If considered as a trustee, then the rule governing trustees in general, that a trustee is liable for want of reasonable care, is applicable⁵³—the same rule applicable to agents.

The only question is what constitutes negligence. In determining whether directors are liable for negligent mismanagement, the courts have been prone to use fine sounding phrases in defining the duties of directors, and then proceed to decide the case without reference thereto—the rules laid down being such glittering generalities that the case could be decided either way thereunder without violating the rules. For this reason, it is almost impossible to say that there is any considerable conflict of opinion. All that can be said is that (1) the rule is stated more explicitly and as imposing greater duties to some extent in some cases than in others, and that (2) in the final analysis each case is determined upon the particular facts appearing in the case at bar. As to whether the negligence must be gross in order to be actionable, there is some apparent conflict in the authorities, more apparent than real, although it is now the general rule that want of ordinary care creates liability.⁵⁴ Moreover, there is some conflict of opinion as to whether the degree of care is that of an ordinarily prudent man in his own business or that of an ordinarily prudent man under like circumstances.⁵⁵ The fact remains, however, that, except as already stated, the courts are practically unanimous in their general statements that directors and other corporate officers must be diligent and careful in performing their duties; that the directors must be something more than mere figureheads, etc.⁵⁶ In the application of these rules, however, some, if not most, of the

⁵¹ Rule applicable to agents in general, see 1 Mechem, Agency (2nd Ed.), § 1275 et seq.

⁵² *New Haven Trust Co. v. Doherty*, 75 Conn. 555, 96 Am. St. Rep. 239, 54 Atl. 209.

⁵³ See textbooks relating to Trusts and Trustees for rules governing trustees in general.

⁵⁴ See § 2448, *infra*.

⁵⁵ See §§ 2450, 2451, *infra*.

⁵⁶ Perhaps the best, or at least the most exhaustive, review of the decisions in this country relating to negligence of directors is found in the opinion of Vice Chancellor Pitney, now one of the justices of the United States Supreme Court, delivered while a vice chancellor of the Court of Chancery of New Jersey, in 1901, in the case of *Campbell v. Watson*, 62 N. J. Eq. 396, 50 Atl. 120.

courts, have been very lenient in favor of corporate directors; and additional legislation is necessary to protect stockholders and creditors who are injured by the negligence of the directors. It has been suggested that "business reorganization may be capable of developing directors of different classes, those directly charged with the management of the business, quasi managers, and those standing in an advisory capacity merely. Heretofore men have felt justified in undertaking more directorships than they could possibly understand or give their attention to. The consequence is that the investing public, stockholders and creditors, have often lost their money and have not been reimbursed. * * * Before this problem can be satisfactorily solved the courts must be assisted with some well considered legislation and business reorganization."⁵⁷

§ 2443. Negligence as question of fact. Whether officers have been guilty of mismanagement in a particular case is largely a matter of fact dependent upon the circumstances of each case.⁵⁸ The Supreme Court of the United States has stated that "the degree of care required depends upon the subject to which it is to be applied, and each case has to be determined in view of all the circumstances."⁵⁹

Admitting that reasonable care is the test, and this is undoubtedly true according to the great weight of authority, the question of "what is reasonable in any given case," to use the language of Professor Mechem in his work on Agency in stating the rule as to agents in general, which seems to be equally applicable to corporate officers in this respect, "is not one which can ordinarily be measured by any pre-established inflexible standard. There are cases, it is true, where a limit must be fixed, and one so fixed, though purely arbitrary, is to be observed. But there is a growing tendency on the part of courts, and it is in furtherance of justice, to measure each case by the more flexible standard of its own facts and circumstances."⁶⁰ Thus it is stated in a leading work on the law of negligence that "in very many cases the law gives no better definition of negligence than the want of such care as men of ordinary prudence or good men of business

⁵⁷ Article by M. C. Lynch in 3 Cal. Law Rev. 21, 40.

⁵⁸ *New Haven Trust Co. v. Doherty*, 74 Conn. 353, 356, 50 Atl. 887; *Bounds v. Stephenson*, — Tex. Civ. App. —, 187 S. W. 1031.

What constitutes negligence of directors in failing to make examinations of the affairs of a bank at prop-

er times and in proper manner is largely dependent upon the facts of the particular case. *Bates v. Dresser*, 229 Fed. 772.

⁵⁹ *Briggs v. Spaulding*, 141 U. S. 132, 147, 35 L. Ed. 662.

⁶⁰ 1 Mechem, Agency (2nd Ed.), § 1279.

would use under similar circumstances. Of course, this raises a question of fact as to what men of this character usually do under the same circumstances. This is a point upon which a jury have a right to pass, even though no evidence of the usage were given; for they may properly determine the question by referring to their own experience and observation. Indeed, they must do so; since expert evidence on such points is usually not admissible. Consequently a case of this kind must be left to the jury, even if there is no conflict of evidence, unless, indeed, there is evidence enough to decide this point as well as all other questions in the cause."⁶¹ And in the same work, the reverse side of the rule is stated thus: "When the facts are clearly settled, and the course which common prudence dictated can be so clearly discerned that only one inference can be drawn, it is not only the duty of the court to set aside a verdict contrary to such inference, but to take the case away from the jury and direct a verdict or a nonsuit, as the case may require. The question is then one of law, for the court to decide."⁶² Negligence, in this connection, has been said to be "the want of care according to the circumstances, and the circumstances are everything in considering this question."⁶³

Whether a given statement of facts constitutes negligence is commonly a question to be determined by a jury, or by a court exercising the functions of a jury; and it is difficult, and in many cases impossible, to decide in advance, or to formulate tests for deciding as a matter of law, whether directors or other officers have been guilty of that degree of negligence which will render them liable.⁶⁴

It has been said in New York that "the degree of care required depends upon the subjects to which it is to be applied";⁶⁵ and that "what would be slight neglect in the care of a quantity of iron might be gross neglect in the care of a jewel," and further that "what would be slight neglect in the care exercised in the affairs of a turnpike corporation, or even a manufacturing corporation, might be gross neglect in the care exercised in the management of a savings bank intrusted

⁶¹ 1 Shearman & Redfield, Negligence (6th Ed.), § 53.

⁶² 1 Shearman & Redfield, Negligence (6th Ed.), § 56.

⁶³ Swentzel v. Penn Bank, 147 Pa. St. 140, 15 L. R. A. 305, 30 Am. St. Rep. 718, 23 Atl. 405.

As said in New Hampshire, "the question of negligence, being here regarded as one of fact, is to be determined in the light of all the circum-

stances peculiar to the particular case. A certain fact, set in the midst of one kind of surroundings, may have a very different probative effect from what it would have with different surroundings." Ricker v. Hall, 69 N. H. 592, 45 Atl. 556.

⁶⁴ See note in 17 Am. St. Rep. 95, 99.

⁶⁵ Hun v. Cary, 82 N. Y. 65, 37 Am. Rep. 546.

with the savings of a multitude of poor people, depending for its life upon credit and liable to be wrecked by the breath of suspicion.”⁶⁶ However, it may be said that in such a case the degree of care remains the same, i. e., ordinary care as exercised by reasonably prudent men, but that what is in fact such reasonable care in a particular instance depends upon the circumstances.

It is common for courts to look at the liability of directors from two different viewpoints. In the one case, the question is looked at from the viewpoint of the director, and the fact of his receiving no compensation, or his absence or inability to attend meetings of the directors, or the existence of other important business is dwelt upon. In the other case, the question is looked at from the public side, and the rights of stockholders or depositors are considered. And the following from a leading textbook writer on the law of Banking is found to be so true after careful examination of the decisions that attention is specially directed thereto, viz.: “Doubtless every court looks from both sides; but it is just as certain that its judgment is often deflected from the rules to the inculpatated directors. The evidence against them is examined, an opinion is formed of their guilt or innocence, and then a color or modification, if necessary, is given to the rule, to fit it properly to the facts. The numerous penumbra that surround the rules above given are unquestionable proof of the working of the judicial mind in these controversies.”⁶⁷

In determining whether there was negligence, it has been pointed out that it must be kept in mind “that the facts must be viewed and considered as they then presented themselves, and not from the illumined viewpoint of subsequent events.”⁶⁸ Furthermore, the fact that the directors owned all or most of the stock of the corporation, or were heavy stockholders is to be considered;⁶⁹ and it has been said that “as the directors are themselves stockholders, interested as well as all others that the affairs and business of the corporation should be successful, when we ascertain and determine that they have not sought to make any profit not common to all stockholders, we raise a strong presumption that they have brought to the administration their best judgment and skill.”⁷⁰

⁶⁶ Hun v. Cary, 82 N. Y. 65, 37 Am. Rep. 546.

⁶⁷ 1 Bolles, Modern Law of Banking, p. 279.

⁶⁸ Bailey v. Babcock, 241 Fed. 501, 514.

⁶⁹ Bailey v. Babcock, 241 Fed. 501, 514.

⁷⁰ In re Spering's Appeal, 71 Pa. St. 11, 10 Am. Rep. 684.

§ 2444. **Effect of officers receiving no compensation.** Liability of corporate officers for their mismanagement exists although they receive no compensation for their services.⁷¹ But the fact that the services of directors are gratuitous, when this is true, may, however, have some weight.⁷² However, at the present day, directors are usually compensated, to a greater or less extent, for the time and labor; and therefore what is said in some of the decisions about the care required of directors who receive no compensation is not applicable in so far as it is based on the fact that they served without pay; and in a New Jersey case decided in 1901 this is referred to as follows: "That at one time and in some instances bank directors were unpaid servants, who were not expected to spend much time or to give much attention to the affairs of the institution, and on that account were dealt with leniently by the courts; but at this day such officers are not expected to work gratuitously, and are usually paid a fair compensation; and, whether paid or not, they are entitled to no indulgence on that account."⁷³ As stated by the late A. C. Freeman in a note in the American State Reports, "in some instances the salary paid them [directors], taken in connection with other circumstances, shows that the corporation was entitled to all or a greater proportion of their time and attention, while in others it is clear that they have not undertaken, nor been understood as undertaking, to give to the affairs of the corporation any more than occasional attention, consisting chiefly of attendance at meetings of the board of directors, and investigating and voting upon such matters as are there presented for their action. In the latter class of cases, directors may doubtless, without rendering themselves liable, be ignorant of many matters affecting the corporate interests, of which

⁷¹ Virginia-Carolina Chemical Co. v. Ehrich, 230 Fed. 1005, 1016; Union Nat. Bank v. Hill, 148 Mo. 380, 71 Am. St. Rep. 615, 49 S. W. 1012; Williams v. McKay, 46 N. J. Eq. 25, 18 Atl. 824, 40 N. J. Eq. 189, 53 Am. Rep. 775; Michelson v. Pierce, 107 Wis. 85, 82 N. W. 707.

"It is true that the defendants were unpaid servants, but the duty of bringing to their office ordinary skill and vigilance was none the less on that account; for, to this extent, there is no distinction known to the law between a volunteer and a salaried

agent." Campbell v. Watson, 62 N. J. Eq. 396, 50 Atl. 120, followed in Greenfield Sav. Bank v. Abercrombie, 211 Mass. 252, 39 L. R. A. (N. S.) 173, Ann. Cas. 1913 B 420, 97 N. E. 897.

Application of rule to agents in general, see 1 Mechem, Agency (2nd Ed.), §§ 1281-1283; 1 Clark & Skyles, Agency, § 433.

⁷² New Haven Trust Co. v. Doherty, 75 Conn. 555, 96 Am. St. Rep. 239, 54 Atl. 209.

⁷³ Campbell v. Watson, 62 N. J. Eq. 396, 50 Atl. 120.

directors of the other class could remain in ignorance only by a failure to discharge with ordinary fidelity and care the duties of their office."⁷⁴ The amount of compensation may be material. For instance, a president of a corporation who receives a mere nominal sum as such should be held to a less strict accountability, under ordinary circumstances, than in the case of a president who receives a large sum such as to apparently demand all or the greater portion of his time.⁷⁵ In Kentucky, the following language has recently been approved: "That a higher degree of vigilance is to be required of the president of a bank, whose salary for a general supervision of its affairs is sufficient to compensate him in devoting his entire time and attention to its business, may be conceded; but directors who receive no compensation, or a president who is a mere figure-head of the institution, are liable for only gross neglect (in the absence of fraud) in the management of the corporation, and this rule most certainly applies when stockholders are attempting to make them liable."⁷⁶ So in Kentucky it was expressly held that while directors cannot be held for failure to detect fraudulent entries made by the cashier in the books of the bank, although extending over a period of nine years, where they received no compensation for their services, yet if a director receives a salary such as paid a president or general manager, he would be liable in such a case.⁷⁷ This want of compensation is the ground upon which the Supreme Court of Pennsylvania bases its ruling that directors are liable only for gross negligence to be measured by the care exercised by other directors of like corporations;⁷⁸ and the same is true as to some decisions in Wisconsin⁷⁹ and the federal courts.⁸⁰

⁷⁴ Note in 17 Am. St. Rep. 95, 99.

⁷⁵ "Nor should the president, with a nominal salary, be held to a stricter account than the use of ordinary care, as the small amount was no doubt paid him in this case, more for the reason that he was oftener at the bank than the other members of the board, than as compensation for services as president." *Dunn's Adm'r v. Kyle's Ex'r*, 77 Ky. 134, 142.

⁷⁶ *Jones v. Johnson*, 86 Ky. 530, 6 S. W. 582, approved in *First State Bank of Nortonville v. Morton*, 146 Ky. 287, 294, 142 S. W. 694.

⁷⁷ *Savings Bank of Louisville's Assignee v. Caperton*, 87 Ky. 306, 314, 12 Am. St. Rep. 488, 8 S. W. 885.

⁷⁸ *Swentzel v. Penn Bank*, 147 Pa. St. 140, 15 L. R. A. 305, 30 Am. St. Rep. 718, 23 Atl. 405, and see § 2447, *infra*.

⁷⁹ *North Hudson Mut. Building & Loan Ass'n v. Childs*, 82 Wis. 460, 33 Am. St. Rep. 57, 52 N. W. 600, and see § 2447, *infra*.

⁸⁰ *Briggs v. Spaulding*, 141 U. S. 132, 35 L. Ed. 662, and see § 2447, *infra*.

§ 2445. **Rules as to directors as applicable to other officers.** Most of the decisions involving the question as to the required degree of care are expressly limited to directors, and there is very little law as to the degree of care required of other officers. Of course, a director of a corporation is not required to devote the same amount of attention to the business of a corporation as the general manager, or the president who is paid a salary, or the cashier of a bank, or a paid secretary or treasurer, who devote all or a greater part of their time to the business of the company. It follows that paid officers other than directors may be held liable in a case where directors would be held not liable.⁸¹

§ 2446. **Negligence as slight, ordinary or gross—In general.** The courts have in many instances attempted to define the degree of care required of directors and other corporate officers, to absolve them from liability for negligence. Some of the statements are mere glittering generalities. Others are more specific, embracing in some cases more or less conflict of opinion. All of them are of little value in the abstract, and when they are applied by a jury, as is usually the case, the courts will not interfere with the verdict of the jury except in a clear case. The theory of three degrees of negligence, described as slight, ordinary and gross, was introduced into the common law, it has been said, from some of the commentators on Roman law.⁸² However, much to the relief of all concerned, the courts have largely discarded this classification.

As to some propositions, the courts all agree. First, there is no question but that the officer is not bound to exercise the highest possible degree of care—a rule applicable to all agents.⁸³ As early as 1829, in Louisiana, in the first case in this country where the negligence of bank directors was judicially reviewed by an appellate court, it was decided that the highest degree of care was not necessary but only ordinary care and attention.⁸⁴

⁸¹ Effect of compensation, see § 2444, *supra*.

⁸² See *The New World v. King*, 16 How. (U. S.) 469, 14 L. Ed. 1019.

⁸³ See 1 *Mechem, Agency* (2nd Ed.), § 1278.

The directors of a corporation are not in the position of bailees for hire, and are clearly not to be held to the same high degree of care. Nor are they technically trustees. Their relation to the corporation is that of

agents or mandatories. "They can only be regarded," said Judge Sharswood in a leading case, "as mandatories—persons who have gratuitously undertaken to perform certain duties, and who are therefore bound to apply ordinary skill and diligence, but no more." *In re Spering's Appeal*, 71 Pa. St. 11, 10 Am. Rep. 684.

⁸⁴ *Percy v. Millaudon*, 18 Martin N. S. (La.) 68, 74.

Second, he is not liable for a mere mistake, i. e., an error of judgment.⁸⁵

On the other hand, it is settled beyond question that he is liable, in any event, for gross negligence,⁸⁶ although just what the courts mean in the use of the term "gross negligence" is not always apparent.⁸⁷

§ 2447. — Gross negligence as test. There is no question but that directors and other corporate officers are liable for gross negligence,⁸⁸ and in some jurisdictions their liability to the corporation is confined to such degree of negligence, according to the broad statements in some of the decisions.⁸⁹ However, different courts attach different meanings to the words "gross negligence," as used in this connection. Some of them intend to signify no more by these terms than want of that care and attention which men of common prudence ordinarily give to their affairs, while others understand the same words as implying that degree of inattention and want of care indicative either of wilful recklessness, or intent to defraud or permit others to defraud.⁹⁰ Thus, in a recent case in Georgia, Justice Lumpkin said: "Some courts have declared that they are only liable for gross negligence or breach of duty resulting in injury. But in some, probably most, of the cases so declaring, it will be found that the failure of directors to use ordinary care in supervision has been treated as amounting to gross negligence."⁹¹ In Alabama, however, it is said that, "with respect to particular acts within the range of their au-

⁸⁵ See § 2452, *infra*.

⁸⁶ *Elliott v. Farmers' Bank of Illinois*, 61 W. Va. 641, 57 S. E. 242.

Directors are, at least, liable in case of gross negligence in the performance of their duties as directors. *Loan Society of Philadelphia v. Eavens*, 248 Pa. 407, 94 Atl. 121.

⁸⁷ See § 2447, *infra*.

⁸⁸ See § 2446, *supra*.

⁸⁹ *Alabama*. *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897.

California. *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508.

Kentucky. *First State Bank of Nortonville v. Morton*, 146 Ky. 287, 142 S. W. 694; *Savings Bank of Louisville's Assignee v. Caperton*, 87 Ky. 306, 12 Am. St. Rep. 488, 8 S. W. 885;

Jones v. Johnson, 86 Ky. 530, 6 S. W. 582; *Dunn's Adm'r v. Kyle's Ex'r*, 14 Bush 134.

Maryland. *Carrington v. Thomas C. Basshor Co.*, 118 Md. 419, 84 Atl. 746, applying rule to care of trust funds; *Foutz v. Miller*, 112 Md. 458, 76 Atl. 1111; *Booth v. Robinson*, 55 Md. 419.

England. *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1889] 2 Ch. 392.

⁹⁰ See note in 17 Am. St. Rep. 95, 98, and also *Overend & Gurney Co. v. Gibb*, L. R. 5 H. L. 480, 42 L. J. Ch. (N. S.) 67; *In re Liverpool Household Stores Ass'n*, 62 L. T. (N. S.) 873.

⁹¹ *McEwen v. Kelly*, 140 Ga. 720, 79 S. E. 777.

thority, and subject to their discretion, directors are not liable to the corporation so long as they act in good faith, and without gross negligence which would support an imputation of fraud;"⁹³ and in Maryland it seems that there is no liability for loss sustained by mismanagement unless it was so gross as to constitute fraud.⁹⁴ In Kentucky, it is held that "directors who receive no compensation, or a president who is a mere figure-head of the institution, are liable for only gross neglect (in the absence of fraud) in the management of the corporation."⁹⁴ In England, in a recent case, Justice Neville said that "it has been laid down that so long as they [directors] act honestly they cannot be made responsible in damages unless guilty of gross negligence. There is admittedly a want of precision in this statement of a director's liability. In truth, one cannot say whether a man has been guilty of negligence, gross or otherwise, unless one can determine what is the extent of the duty which he is alleged to have neglected. A director's duty has been laid down as requiring him to act with such care as is reasonably to be expected from him, having regard to his knowledge and experience. He is, I think, not bound to bring any special qualifications to his office. He may undertake the management of a rubber company in complete ignorance of everything connected with rubber, without incurring responsibility for the mistakes which may result from such ignorance; while, if he is acquainted with the rubber business he must give the company the advantage of his knowledge when transacting the company's business. He is not, I think, bound to take any definite part in the conduct of the company's business, but so far as he does undertake it he must use reasonable care in its despatch. Such reasonable care must, I think, be measured by the care an ordinary man might be expected to take in the same circumstances on his own behalf."⁹⁵ "These directors," it was said in a New Jersey case, "serve without pay. They were selected by their fellow stockholders to manage gratuitously the affairs of the association in which they and the other stockholders were jointly interested. To apply to them the strict

⁹³ King v. Livingston Mfg. Co., 192 Ala. 269, 68 So. 897, which, however, approves Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 652, 24 Am. St. Rep. 625, 15 S. W. 448, which defines gross negligence as less diligence than that exercised by prudent men about their own affairs.

⁹⁴ David Reus Permanent Loan &

Savings Co. v. Conrad, 101 Md. 224, 60 Atl. 737.

⁹⁴ Jones v. Johnson, 86 Ky. 530, 6 S. W. 582, approved in First State Bank of Nortonville v. Morton, 146 Ky. 287, 142 S. W. 694.

⁹⁵ In re Brazilian Rubber Plantations & Estates, Ltd., [1911] 1 Ch. 425, 436.

rules which are applicable to trustees who assume the discharge of the duties of private trusts, would be unjust. In the absence of fraud, and where they have neither derived, nor expected to derive, any profit, benefit or advantage from their management which was not common to the other stockholders; when they have acted fairly, and have not been guilty of gross neglect or gross inattention, they should not be held liable. The rule applicable to mandataries is sufficiently stringent for such cases, and is a reasonable one. They should be held liable only in case of fraud, gross negligence or misuser."⁹⁶

In addition, it is to be noticed that several of the states which adopt this gross negligence rule also hold that the care required is only that of ordinarily prudent men under similar circumstances, and seem to treat the two statements as meaning the same thing.⁹⁷

If gross negligence be understood as meaning something nearly approaching fraud or bad faith, then the rule is not to be commended and is against the decided weight of authority. In criticising this rule of gross negligence, Mr. Morawetz calls attention to the fact that such a rule is at the best misleading, and that "the plain and obvious rule is, that directors impliedly undertake to use as much diligence and care as the proper performance of the duties of their office requires. What constitutes a proper performance of the duties of a director is a question of fact, which must be determined in each case in view of all the circumstances; the character of the company, the condition of its business, the usual methods of managing such companies, and all other relevant facts must be taken into consideration. It is evident that no abstract reasoning can be of service in reaching a proper solution."⁹⁸

§ 2448. — Ordinary care as test. In most jurisdictions ordinary or reasonable care is the test.⁹⁹ The directors, "when acting within the scope of their authority, are bound only to the exercise of good faith and the use of their best judgment in the conduct of the business. * * * Their duties do not make them insurers of the property of the company, nor guarantors that the enterprise undertaken

⁹⁶ Citizens' Building, Loan & Savings Ass'n v. Coriell, 34 N. J. Eq. 383, 392. However, later cases in New Jersey do not follow this rule if it be construed as limiting liability to actually gross negligence.

⁹⁷ See, for instance, Swentzel v.

Penn Bank, 147 Pa. St. 140, 15 L. R. A. 305, 30 Am. St. Rep. 718, 23 Atl. 405.

⁹⁸ 1 Morawetz, Corporations, § 552.

⁹⁹ General Rubber Co. v. Benedict, 164 N. Y. App. Div. 332, 149 N. Y. Supp. 880, aff'd 215 N. Y. 18, L. R. A. 1915 F 617, 109 N. E. 96.

by the corporation shall be successful and profitable.”¹ “The law requires them to do no more than exercise ordinary diligence, intelligence, and judgment in the management of the corporate business.”² Directors “are bound to use fair and reasonable diligence in the management of the company’s affairs, and to act honestly, but they are not bound to do more.”³

§ 2449. What constitutes “ordinary” or “reasonable” care—In general. Assuming that ordinary or reasonable care is the standard of care required, what is meant by that term? By reference to general textbooks on the law of Negligence, it will be seen that “ordinary” or “reasonable” care means, it is generally held, such care as an ordinarily careful and prudent person would exercise in similar relations, and under the same circumstances, with reference to his own affairs. In regard to corporate directors, however, the decisions are in conflict.

§ 2450. — Care required as that which men of ordinary prudence exercise in regard to their own affairs. So far as agents in general are concerned—including agents of individuals or firms as well as agents of corporations—the rule has been stated that they must “exercise reasonable diligence, and such care and skill as are ordinarily possessed by persons of common capacity engaged in the same business.”⁴

In regard to trustees in general, a leading textbook writer on the law of Trusts makes the following statement: “It was observed in *Harden v. Parsons* [1 Eden 148] that no man can require, or with reason expect, that a trustee should manage another’s property with the same care and discretion as his own. But this is neither sound morality nor good law. A trustee must use the same care for the safety of the trust fund, and for the interests of the cestui que trust, that he uses for his own property and interests. And even this will not be sufficient if he is careless in his own concerns; for a trustee must in all events use such care as a man of ordinary prudence uses in his own business of a similar nature.”⁵

¹ *McConnell v. Combination Mining & Milling Co.*, 31 Mont. 563, 79 Pac. 248.

² *Braswell v. Pamlico Insurance & Banking Co.*, 159 N. C. 628, 42 L. E. A. (N. S.) 101, 75 S. E. 813.

³ *Northern Trust Co. v. Butchart*, 35

Dom. L. R. (Can.) 169, 176, citing *In re Forest of Dean Coal Min. Co.*, 10 Ch. Div. 450, 452.

⁴ 41 Mechem, Agency (2nd Ed.), § 1279.

⁵ 1 Perry, Trusts (6th Ed.), § 441.

In a leading New York case, involving the liability of the trustees of a savings bank, it was said by Judge Earl: "The trustees are bound to observe the limits placed upon their powers in the charter, and if they transcend such limits and cause damage, they incur liability. If they act fraudulently or do a wilful wrong, it is not doubted that they may be held for all the damage they cause to the bank or its depositors. But if they act in good faith within the limits of powers conferred, using proper prudence and diligence, they are not responsible for mere mistakes or errors of judgment. That the trustees of such corporations are bound to use some diligence in the discharge of their duties cannot be disputed. All the authorities hold so. What degree of care and diligence are they bound to exercise? Not the highest degree, not such as a very vigilant or extremely careful person would exercise. If such were required, it would be difficult to find trustees who would incur the responsibility of such trust positions. It would not be proper to answer the question by saying the lowest degree. Few persons would be willing to deposit money in savings banks, or to take stock in corporations, with the understanding that the trustees or directors were bound only to exercise slight care, such as inattentive persons would give to their own business, in the management of the large and important interests committed to their hands. When one deposits money in a savings bank, or takes stock in a corporation, thus divesting himself of the immediate control of his property, he expects, and has the right to expect, that the trustees or directors, who are chosen to take his place in the management and control of his property, will exercise ordinary care and prudence in the trusts committed to them—the same degree of care and prudence that men prompted by self-interest generally exercise in their own affairs. When one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice, and public policy unite in requiring of him such a degree of care and prudence, and it is a gross breach of duty—*crassa negligentia*—not to bestow them."⁶

"The law is settled in this state," said Chief Justice Parker in a later decision of the New York Court of Appeals, "that directors of monetary corporations are held to the same degree of care that men of ordinary prudence exercise in regard to their own affairs."⁷ And in that state, the Court of Appeals, as late as 1915, states the

⁶ *Hun v. Cary*, 82 N. Y. 65, 37 Am. 359, 38 N. Y. Supp. 726; *Scott v. Depeyster*, 1 Edw. Ch. 513.
Rep. 546. See also *Seymour v. Spring Forest Cemetery Ass'n*, 157 N. Y. 697,
⁷ *Hanna v. Lyon*, 179 N. Y. 107, 71
51 N. E. 1094, aff'g 4 N. Y. App. Div. N. E. 778.

rule that a director must take the same care of the corporate property "that men of average prudence take of their own property."⁸ This is also the rule adopted in several of the other states.⁹

In regard to the directors of a bank, the Appellate Division of the Supreme Court of New York, in the third department, expressed *itself* as follows: "If the by-laws require monthly meetings, they must *make* diligent effort to be present thereat. They must give *their* best efforts to advance the interest of the corporation, both *by advice* and counsel and by active work on behalf of the corporation *when* such work may be assigned to them. If at their meetings, or otherwise, information should come to them of irregularity in the proceedings of the bank, they are bound to take steps to correct these irregularities. The law has no place for dummy directors. They are bound generally to use every effort that a prudent business man would use in supervising his own affairs, with the right, however, ordinarily to rely upon the vigilance of the executive committee to ascertain and report any irregularity or improvident acts in its management."¹⁰

It has been suggested that this New York rule might be the only rule for the directors of some corporations and yet be extremely harsh for others, and that it might be advisable to divide corporations into several classes for this purpose.¹¹

⁸ General Rubber Co. v. Benedict, 215 N. Y. 18, L. R. A. 1915 F 617, 109 N. E. 96.

⁹ Iowa. Toledo Sav. Bank v. Johnston, 94 Iowa 212, 220, 62 N. W. 748.

Maryland. Fisher v. Parr, 92 Md. 245, 48 Atl. 621. But see Foutz v. Miller, 112 Md. 458, 76 Atl. 1111; Murphy v. Penniman, 105 Md. 452, 121 Am. St. Rep. 583, 66 Atl. 282.

Michigan. Commercial Bank of Bay City v. Chatfield, 121 Mich. 641, 80 N. W. 712.

Minnesota. Horn Silver Min. Co. v. Ryan, 42 Minn. 196, 44 N. W. 56.

New Jersey. Campbell v. Watson, 62 N. J. Eq. 396, 50 Atl. 120; Williams v. McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775; Ackerman v. Halsey, 37 N. J. Eq. 356, aff'd 38 N. J. Eq. 501.

Rhode Island. See Hodges v. New England Screw Co., 1 R. I. 312, 346, 53 Am. Dec. 624.

Texas. Seale v. Baker, 70 Tex. 283, 291, 8 Am. St. Rep. 592, 7 S. W. 742.

Utah. Warren v. Robison, 19 Utah 289, 75 Am. St. Rep. 734, 57 Pac. 287.

Virginia. Marshall v. Farmers' & Mechanics' Sav. Bank of Alexander, 85 Va. 676, 2 L. R. A. 534, 17 Am. St. Rep. 84, 8 S. E. 586.

The general rule is that the directors or trustees of a corporation are bound to manage the affairs of the corporation with the same degree of care which is generally exercised by business men in the management of their own affairs. Marshall v. Farmers' & Mechanics' Sav. Bank of Alexander, 85 Va. 676, 2 L. R. A. 534, 17 Am. St. Rep. 84, 8 S. E. 586.

¹⁰ Per Presiding Justice Smith in Kavanaugh v. Gould, 147 N. Y. App. Div. 281, 288, 131 N. Y. Supp. 1059.

¹¹ See article by M. C. Lynch in 3 Cal. Law Rev. 21, 29, 40.

It has also been suggested that this rule as applied to the executive officers of a corporation, e. g., the cashier of a bank, would be a just and reasonable one, but that it should not be required that directors shall devote the same amount of attention to the affairs of the corporation as the executive officers.¹²

It has also been said, in regard to this New York rule, that "it is doubtful if the courts that have formally adopted such criterion have ever really determined the question of the directors' liability by reference to it."¹³ However, there is some practical importance in the distinction. Those courts which follow the Pennsylvania rule, doubtless would allow evidence of custom of directors of other banks in the same city, or perhaps in other nearby cities, to show that the conduct of the directors was the same as that of directors in other banks, while the courts following the New York rule might reject such evidence.

§ 2451. — Care required as that of ordinarily prudent men under similar circumstances. On the other hand, it is held in the federal courts, in Pennsylvania and some other states, that the degree of care required of a director is not the same ordinary care that he takes of his own affairs but is the ordinary care of a director of a corporation in a like business, or, as it is sometimes put, the degree of care an ordinarily prudent man would exercise under similar circumstances. This question was considered at length in a very able opinion of the Supreme Court of Pennsylvania in 1892, where the rule laid down in an earlier case was approved.¹⁴ In the later case, Chief Justice Paxson said, in regard to directors of a bank (and the same rule applies in that state to directors of other corporations); "It cannot be the rule that the director of a bank is to be held to the same ordinary care that he takes of his own affairs. He receives no compensation for his services. He is a gratuitous mandatary. His principal business at the bank is to assist in discounting paper, and for that purpose he attends at the bank at stated periods—generally once or twice a week—for an hour or two. The condition of the bank is then laid before him, in order that he may know how much money there is to loan. Once or twice a year there is an examination of the

¹² Note in 55 L. R. A. 751, 756.

¹³ Note in 55 L. R. A. 751, 756.

¹⁴ Swentzel v. Penn Bank, 147 Pa. St. 140, 15 L. R. A. 305, 30 Am. St. Rep. 718, 23 Atl. 405, approving In re Sperring's Appeal, 71 Pa. St. 11, 10 Am.

Rep. 684. See also Loan Society of Philadelphia v. Eavenson, 248 Pa. 407, 94 Atl. 121; Hibernia Bldg. Ass'n v. McGrath, 154 Pa. St. 296, 35 Am. St. Rep. 828, 26 Atl. 377.

condition of the bank, in which he participates. The cash on hand is counted, the bills receivable and securities examined, to see whether they correspond with the statement as furnished by the officers. Beyond this he has little to do with either the cash or the books of the bank. They are in the care of salaried officials, who are paid for such services, and selected by reason of their supposed integrity and fitness. To expect a director, under such circumstances, to give the affairs of the bank the same care that he takes of his own business is unreasonable, and few responsible men would be willing to serve upon such terms. In the case of a city bank, doing a large business, he would be obliged to abandon his own affairs entirely. A business man generally understands the details of his own business, but a bank director cannot grasp the details of a large bank without devoting all his time to it, to the utter neglect of his own affairs.

* * * In regard to what is ordinary care, regard must be had to the usages of the particular business. Thus if the director of a bank performed his duties as such in the same manner as they were performed by all other directors of all other banks in the same city, it could not fairly be said that he was guilty of gross negligence. And care must be taken that we do not hold mere gratuitous mandataries to such a severe rule as to drive all honest men out of such positions.

* * * Holding, then, the rule to be, that directors who are gratuitous mandataries are only liable for fraud, or for such gross negligence as amounts to fraud, it remains but to apply this principle to the facts of this case." This is, in effect, the rule adopted by the Supreme Court of the United States in holding the degree of care required is that which ordinarily prudent and diligent men would exercise "under similar circumstances, and in determining that, the restrictions of the statute and the usages of business should be taken into account."¹⁵

"Under similar circumstances," as the term is used therein, means, it would seem, what a reasonably prudent person would himself do if he was a director in the corporation; and this view is fortified by a later holding in a lower federal court that the true standard is that

¹⁵ *Briggs v. Spaulding*, 141 U. S. 132, 152, 35 L. Ed. 662. See also *Warner v. Penoyer*, 91 Fed. 587, 44 L. R. A. 761, rev'g 82 Fed. 181; *Mutual Bldg. Fund & Dollar Sav. Bank v. Bossieux*, 4 Hughes 387, 3 Fed. 817.

In case of the president and manag-

ing officer of a bank, a federal court, however, said that he must exercise such care "as a careful man would exercise in his own affairs of like magnitude and importance." *Stearns v. Lawrence*, 83 Fed. 738, 746.

set by the "ordinary director" and not the standard of "the ordinary man on the street."¹⁶

This rule is also adopted in Missouri¹⁷ and Wisconsin,¹⁸ and seems to be the rule in Tennessee.¹⁹ So in Connecticut, in case of directors of savings banks, it is held that the test is not whether the officers have conducted themselves as might reasonably be expected of ordinarily prudent men, but whether they have conducted the affairs of the bank as might reasonably be expected of ordinarily prudent bank directors.²⁰ In other words, under the line of decisions, in determining what is reasonable care, regard must be had to the usages of the particular business.²¹

¹⁶ *Allen v. Roydhouse*, 232 Fed. 1010, 1014.

¹⁷ *Stone v. Rottman*, 183 Mo. 552, 82 S. W. 76. But see *Union Nat. Bank v. Hill*, 148 Mo. 380, 390, 71 Am. St. Rep. 615, 49 S. W. 1012. Compare note 23, *infra*.

¹⁸ *North Hudson Mut. Building & Loan Ass'n v. Childs*, 82 Wis. 460, 33 Am. St. Rep. 57, 52 N. W. 600, followed in *Killen v. Barnes*, 106 Wis. 546, 82 N. W. 536.

The "degree of care they are bound to exercise is that which ordinarily prudent and diligent men would exercise under similar circumstances in respect to a like gratuitous employment, regard being had to the usages of business and the circumstances of each particular case." *North Hudson Mut. Building & Loan Ass'n v. Childs*, 82 Wis. 460, 33 Am. St. Rep. 57, 52 N. W. 600.

"Where the ground of liability is for nonfeasance, negligence, or misjudgment in respect to matters within the scope of the proper powers of the officer, he will be held responsible only for a failure to bring to the discharge of his duties such degree of attention, care, skill, and judgment as are ordinarily used and practiced in the discharge of such duties or employments; the degree of care, skill, and judgment depending upon the subject to which it is to be applied, the particular circumstances of the case,

and the usages of business." *North Hudson Mut. Building & Loan Ass'n v. Childs*, 82 Wis. 460, 33 Am. St. Rep. 57, 52 N. W. 600.

The degree of care required of a general manager has been stated in Wisconsin to be that of "absolute good faith, and such diligence, judgment, and exertion as the ordinarily capable, diligent, and prudent man would give under like circumstances. * * * Among those circumstances are the character of the service he was to render, the conditions under which he was compelled or expected to perform it, the means therefor which he had, or which were within his power to have, the extent to which attention to detail was consistent with proper consideration and direction of the more important general policy, and very many others." Per Justice Dodge in *Johnson v. Stoughton Wagon Co.*, 118 Wis. 438, 95 N. W. 394.

¹⁹ "Reasonable conformity to the customs and methods in vogue among prudent bankers is the degree of diligence required of such officers." *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448. Compare *Vance v. Phoenix Ins. Co.*, 4 Lea 385.

²⁰ *Lippitt v. Ashley*, 89 Conn. 451, 94 Atl. 995, 998.

²¹ *Bailey v. Babcock*, 241 Fed. 501, 510.

However, in a concurring opinion in a Missouri case, Justice Faris states, as his view, that the care which an ordinarily prudent person would exercise under the same or similar circumstances "does not mean an ordinarily careful or prudent expert in figures, or an ordinarily careful or prudent professional accountant, but it means the ordinarily careful and prudent man, such as the usual bank directorates in city and country are made up of."²² Continuing, however, he says that while the director of a bank is not required to devote the same amount of time to the bank as that which he devotes to his own affairs, "yet that is so only in the matter of degree or in time expended. * * * In other words, when he is about the bank's business, when he is performing his statutory duties of 'passing upon the business of the bank' (section 1099, R. S. 1909), he ought to be held to a degree of care at least equal to that which an ordinarily careful and prudent person would, under similar circumstances, exercise in his own personal business. * * * If he cannot, unless hindered by an act of God, give this attention and this degree of attention to his duties, he owes it to the bank's depositors to resign, or take the consequences."²³

The basis of most of these decisions seems to be that a director receives no salary and therefore is a mere mandatary within the rule that a mere mandatary is liable only for gross neglect. The theory is that the corporate officer sought to be held liable is an agent, but instead of an agent paid a compensation he is merely a gratuitous agent, i. e., a mandatary.

§ 2452. Mistakes and errors of judgment—General rule. Mistakes of judgment may be classified as mistakes of fact and mistakes of law. Mistakes of law usually are mistakes as to the powers of the corporation or of the particular officer, which are treated of more particularly, together with the effect of advice of counsel as excusing a mistake, in another connection.²⁴

It is too well settled to admit of controversy that ordinarily neither the directors nor the other officers of a corporation are liable for mere mistake or errors of judgment, either of law or fact,²⁵ i. e., for

²² *Lyons v. Corder*, 253 Mo. 539, 162 S. W. 606.

²³ *Lyons v. Corder*, 253 Mo. 539, 162 S. W. 606.

²⁴ See §§ 2438-2440, *supra*.

²⁵ *United States*. *Briggs v. Spaulding*, 141 U. S. 132, 35 L. Ed. 662

(where there was a very full consideration of the question, and a practically exhaustive review of the cases); *Warner v. Penoyer*, 91 Fed. 587, 44 L. R. A. 761; *Ritchie v. McMullen*, 79 Fed. 522; *Wheeler v. Aiken County Loan & Savings Bank*, 75 Fed.

mistakes which may properly be classified under the head of

751; *McMullen v. Ritchie*, 64 Fed. 253.

Alabama. *Booth v. Dexter Steam Fire Engine Co.*, 118 Ala. 369, 24 So. 405; *Smith v. Prattville Mfg. Co.*, 29 Ala. 503, 509; *Godbold v. Branch Bank at Mobile*, 11 Ala. 191, 46 Am. Dec. 211.

Connecticut. *Myers v. Jacques*, 53 Conn. 517, 4 Atl. 259.

Illinois. *Bubbins v. Bank of Commerce*, 79 Ill. App. 150, 157.

Indiana. *Mowbray v. Antrim*, 123 Ind. 24, 23 N. E. 858.

Kentucky. *Savings Bank of Louisville's Assignee v. Caperton*, 87 Ky. 306, 12 Am. St. Rep. 488, 8 S. W. 885; *Lexington & O. R. Co. v. Bridges*, 7 B. Mon. 556, 46 Am. Dec. 528; *Dunn's Adm'r v. Kyle's Ex'r*, 14 Bush 134.

Massachusetts. *United Zinc Companies v. Harwood*, 216 Mass. 474, Ann. Cas. 1915 B 948, 103 N. E. 1037; *Greenfield Sav. Bank v. Abercrombie*, 211 Mass. 252, 39 L. R. A. (N. S.) 173, Ann. Cas. 1913 B 420, 97 N. E. 897; *Lyman v. Bonney*, 118 Mass. 222.

New Jersey. *Freeman v. Sea View Hotel Co.*, 57 N. J. Eq. 68, 40 Atl. 218; *Williams v. McDonald*, 37 N. J. Eq. 409; *Ackerman v. Halsey*, 37 N. J. Eq. 356, aff'd 38 N. J. Eq. 501; *Citizens' Building, Loan & Savings Ass'n v. Coriell*, 34 N. J. Eq. 383.

New York. *Seymour v. Spring Forest Cemetery Ass'n*, 157 N. Y. 697, 51 N. E. 1094, aff'g 4 App. Div. 359, 38 N. Y. Supp. 726; *Van Dyck v. McQuade*, 86 N. Y. 38; *Hun v. Cary*, 82 N. Y. 65, 37 Am. Rep. 546; *Excelsior Petroleum Co. v. Lacey*, 63 N. Y. 422; *Holmes v. St. Joseph Lead Co.*, 168 App. Div. 688, 154 N. Y. Supp. 513, 168 App. Div. 685, 154 N. Y. Supp. 517; *Cass v. Realty Securities Co.*, 148 App. Div. 96, 132 N. Y. Supp. 1074; *People v. Equitable Life Assur.*

Soc. of United States, 124 App. Div. 714, 109 N. Y. Supp. 453.

Oregon. *Hedges v. Paquett*, 3 Ore. 77.

Pennsylvania. *Hibernia Bldg. Ass'n v. McGrath*, 154 Pa. St. 296, 35 Am. St. Rep. 828, 26 Atl. 377; *Swentzel v. Penn Bank*, 147 Pa. St. 140, 15 L. R. A. 305, 30 Am. St. Rep. 718, 23 Atl. 405; *In re Watts' Appeal*, 78 Pa. St. 391; *In re Spering's Appeal*, 71 Pa. St. 11, 10 Am. Rep. 684.

Rhode Island. *Hodges v. New England Screw Co.*, 3 R. I. 9, 1 R. I. 312, 53 Am. Dec. 624.

Tennessee. *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448; *Shea v. Knoxville & K. R. Co.*, 6 Baxt. 277; *Vance v. Phoenix Ins. Co.*, 4 Lea 385.

Utah. *Warren v. Robison*, 19 Utah 289, 75 Am. St. Rep. 734, 57 Pac. 287.

Virginia. *Marshall v. Farmers' & Mechanics' Sav. Bank of Alexander*, 85 Va. 676, 2 L. R. A. 534, 17 Am. St. Rep. 84, 8 S. E. 586.

West Virginia. *Smith v. Cornelius*, 41 W. Va. 59, 30 L. R. A. 747, 25 S. E. 599.

Wisconsin. *Killen v. Barnes*, 106 Wis. 546, 82 N. W. 536; *North Hudson Mut. Building & Loan Ass'n v. Childs*, 82 Wis. 460, 33 Am. St. Rep. 57, 52 N. W. 600.

England. *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392; *In re Denham & Co.*, 25 Ch. Div. 752; *In re Forest of Dean Coal Min. Co.*, 10 Ch. Div. 450; *Cullerne v. London & S. General Permanent Bldg. Society*, 25 Q. B. Div. 485.

While directors may be held liable for depreciation in the value of corporate property due to their neglect, where acting in good faith, they cannot be held liable for such depreciation due to mere errors of business judgment. *David Reus Permanent*

honest mistakes.³⁶ Bad judgment, without bad faith, does not ordinarily make officers individually liable.³⁷

This is true, not only of directors, but also of the treasurer, cashier and other officers.³⁸ Stated in another way, the duties of directors and other officers may be classified as those relating to (1) ministerial acts and those relating to (2) matters of discretion. As to the former there is no opportunity for exercise of judgment or discretion. As to the latter, there is no liability in case of honest and excusable mistake or error of judgment. As stated by Mr. Morawetz: "Directors merely undertake to make honest use of such judgment as they possess. They do not insure the correctness of their judgment; and they cannot be charged with the consequences of an honest error of judgment or accidental mistake in the exercise of their discretionary powers."³⁹

To illustrate: directors are not liable for refusing to enter into a contract for the corporation if they acted in good faith.⁴⁰ So an error of judgment in regard to repairing property taken for a debt, to facilitate a sale thereof,⁴¹ or as to the purchase of an interest in property where the corporation held the other interest as security for debt,⁴² or as to effecting a settlement with an officer although he was not legally entitled to compensation,⁴³ has been held not actionable in favor of the company against the officer.

§ 2453. — Limitations of rule. The rule exempting officers of corporations from liability for mere mistakes and errors of judgment does not apply where the loss is the result of failure to exercise proper care, skill and diligence. "Directors are not merely bound to be honest; they must also be diligent and careful in per-

Loan & Savings Co. v. Conrad, 101 Md. 224, 60 Atl. 737; *Warren v. Robinson*, 25 Utah 205, 70 Pac. 989; *Johnson v. Stoughton Wagon Co.*, 118 Wis. 438, 95 N. W. 394.

³⁶ *Braswell v. Pamlico Insurance & Banking Co.*, 159 N. C. 628, 42 L. R. A. (N. S.) 101, 75 S. E. 813.

³⁷ *Witters v. Sowles*, 31 Fed. 1.

³⁸ *Hibernia Bldg. Ass'n v. McGrath*, 154 Pa. St. 296, 35 Am. St. Rep. 828, 26 Atl. 377. See also *Commercial Bank of Bay City v. Chatfield*, 121 Mich. 641, 80 N. W. 712.

The treasurer of a corporation who deposits the corporate funds in a bank

is not liable for loss thereof by failure of the bank, where no negligence or breach of trust is imputable to him. *Booth v. Dexter Steam Fire Engine Co.*, 118 Ala. 369, 24 So. 405; *Laurel Springs Land Co. v. Fougerey*, 57 N. J. Eq. 318, 41 Atl. 694.

³⁹ 1 Morawetz, *Corporations*, § 553.

⁴⁰ *Ritchie v. McMullen*, 168 U. S. 710, 42 L. Ed. 1212 (mem. dec.), 79 Fed. 522; *McMullen v. Ritchie*, 64 Fed. 253.

⁴¹ *Cooper v. Hill*, 94 Fed. 582.

⁴² *Cockrill v. Abeles*, 86 Fed. 505.

⁴³ *Jones v. Johnson*, 86 Ky. 530, 6 S. W. 582.

forming the duties they have undertaken. They cannot excuse imprudence on the ground of their ignorance or inexperience, or the honesty of their intentions; and, if they commit an error of judgment through mere recklessness, or want of ordinary prudence and skill, the corporation may hold them responsible for the consequences."³⁴ Directors are liable for the failure to use "ordinary knowledge and skill" in the discharge of their duties, i. e., a person, in taking the office of director impliedly represents that he possesses at least ordinary knowledge and skill, so that if directors commit a mistake through want of ordinary knowledge and skill they are liable.³⁵ And it has been said that the error, to be actionable, must be one so gross that a man of common sense and ordinary attention would not have fallen into it.³⁶ The statement of Judge Sharswood that directors "are not liable for mistakes of judgment, even though they may be so gross as to appear to us absurd and ridiculous, provided they are honest and provided they are fairly within the scope of the powers and discretion confided to the managing body,"³⁷ has been justly criticised by the New York Court of Appeals,³⁸ and it is submitted that it is not to be followed if it means that a director may escape liability in case of either an entire lack of business experience or other matter going to make mental capacity for the position, or in case he has in fact given the matter no thought or consideration one way or the other but has in effect exercised no discretion whatever. And it is held that where a company is formed to carry out a particular contract, if a discretion is left to the directors by the charter, they are bound to exercise it with regard to adopting the agreement.³⁹

In short, mistakes are not excusable where reasonable care is not exercised to avoid mistakes.⁴⁰

§ 2454. — Applications of rule to loans and investments. This rule as to mistake of judgment is often applied to mistakes in mak-

³⁴ *Marshall v. Farmers' & Mechanics' Sav. Bank of Alexander*, 85 Va. 676, 2 L. R. A. 534, 17 Am. St. Rep. 84, 8 S. E. 586.

³⁵ *Hun v. Cary*, 82 N. Y. 65, 37 Am. Rep. 546; *Marshall v. Farmers' & Mechanics' Sav. Bank of Alexander*, 85 Va. 676, 2 L. R. A. 534, 17 Am. St. Rep. 84, 8 S. E. 586.

³⁶ *Percy v. Millaudon*, 8 Mart. N. S. (La.) 68.

³⁷ *In re Spering's Appeal*, 71 Pa. St. 11, 10 Am. Rep. 684. To same effect, *Turquand v. Marshall*, L. R. 4 Ch. 376, rev'g L. R. 6 Eq. 112.

³⁸ *Hun v. Cary*, 82 N. Y. 65, 37 Am. Rep. 546.

³⁹ *In re Brazilian Rubber Plantations & Estates*, [1911] 1 Ch. 425, 437.

⁴⁰ See *New Haven Trust Co. v. Doherty*, 75 Conn. 555, 96 Am. St. Rep. 239, 54 Atl. 209.

ing loans or investments of money,⁴¹ especially in case of bank officers;⁴² but in determining the wisdom of a loan or investment it must always be remembered that the conditions at the time it was made are the important ones and that the deal is not to be viewed merely from its after effects.⁴³ Directors of a building and loan association are not liable for losses resulting from an honest mistake in estimating the value of a stockholder's land on which they loaned money.⁴⁴

§ 2455. Degree or amount of care as dependent upon kind of corporation. In the leading New York case on the subject under discussion, it was said that "it is impossible to give the measure of culpable negligence for all cases, as the degree of care required depends upon the subjects to which it is to be applied," and that "what would be slight neglect in the care exercised in the affairs of a turnpike corporation, or even of a manufacturing corporation, might be gross neglect in the care exercised in the management of a savings bank intrusted with the savings of a multitude of poor people, depending for its life upon credit and liable to be wrecked by the breath of suspicion."⁴⁵ This liability of directors or trustees of savings banks, as involving an especially high amount of care, has also been commented on in other decisions.⁴⁶

§ 2456. Degree or amount of care as dependent upon residence or standing of director. Under some circumstances, at least, a less amount of care and attention is required of nonresident directors than of resident directors.⁴⁷ But while the high character and

⁴¹ *Excelsior Water & Mining Co. v. Pierce*, 90 Cal. 131, 27 Pac. 44; *Culperne v. London & S. General Permanent Bldg. Society*, L. R. 25 Q. B. Div. 485. See also § 2432, *supra*.

⁴² *Wheeler v. Aiken County Loan & Sav. Bank*, 75 Fed. 781; *Witters v. Sowles*, 31 Fed. 1; *Jones v. Johnson*, 86 Ky. 530, 6 S. W. 582; *Williams v. McDonald*, 42 N. J. Eq. 392, 7 Atl. 866.

⁴³ *Wheeler v. Aiken County Loan & Savings Bank*, 75 Fed. 781.

⁴⁴ *Citizens' Building, Loan & Savings Ass'n v. Coriell*, 34 N. J. Eq. 383.

⁴⁵ *Hun v. Cary*, 82 N. Y. 65, 71, 37 Am. Rep. 546.

⁴⁶ *Lippitt v. Ashley*, 89 Conn. 451, 94 Atl. 995.

Thus, in Massachusetts it was recently held that such officers "are held to the same duty as ordinary trustees of a direct trust," and that "they cannot excuse themselves from the consequences of their misconduct or of their ignorance or negligence by averring that they have failed merely to exercise ordinary skill, care and vigilance." *Greenfield Sav. Bank v. Abercrombie*, 211 Mass. 252, 39 L. R. A. (N. S.) 173, Ann. Cas. 1913 B 420, 97 N. E. 897.

⁴⁷ *Wallach v. Billings*, 277 Ill. 218, 115 N. E. 382. But see § 2467, *infra*.

standing in business of directors in a community enhances the credit of the corporation, it has been said that the "degree of care in the discharge of their duties imposed upon them was no higher for that reason."⁴⁸

§ 2457. Standard of diligence as that of business man rather than that of judge. In regard to loans of money by bank officers, the Tennessee court has said that "among business men, there is found a degree of trust and reliance upon moral character, business integrity, and thrift justifying to a business man the soundness and prudence of a transaction which, to judges and lawyers engaged in applying the hard and fast rules of law, would seem indefensible and reckless. The standard of diligence and prudence by which bank officers and bank directors should be tried is that which business men have erected for themselves."⁴⁹

§ 2458. Nonobservance of duties prescribed by statute. Now the duties of directors, or at least directors of banks, are sometimes expressly enumerated, more or less in detail, by a statute. Thus, in Missouri, boards of directors of banks are required to meet at least once a month, pass on the business of the bank, record their approval or disapproval of loans, etc., and also to approve bonds of the cashier and other like officers. In such a case, it was held that the failure of the directors "to comply with the aforesaid statutory duties was negligence in and of itself as a matter of law, and rendered them liable for all losses thereby caused, independently of the neglect on their part of the non-statutory duty to exercise in the governance and control and watchfulness of the business of the bank, ordinary care and diligence or that degree of care, diligence and skill demanded by the particular nature of the business intrusted to their management—in other words, care equal to the occasion."⁵⁰ And it was held that where there would have been no loss had the statutory requirements been complied with, the failure to so comply rendered the directors liable for defalcations of the cashier.

§ 2459. Liability as limited by charter. If the charter provides that no director shall be liable for damage "which shall happen in

⁴⁸ Virginia-Carolina Chemical Co. v. Ehrich, 230 Fed. 1005, 1016.

⁵⁰ Lyons v. Corder, 253 Mo. 539, 162 S. W. 606.

⁴⁹ Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448.

the execution of the duties of his office or in relation thereto, unless the same happen through his own dishonesty," a director is not liable for negligence where no dishonesty is shown.⁵¹

§ 2460. Particular acts as negligence—In general. Whether particular acts constitute negligence is difficult to state because so much depends upon the circumstances of the particular case. Certain acts, however, as to which reasonable minds could not differ, have been held actionable or the contrary.⁵² Thus, a president who has willingly or unintentionally, by culpable negligence, received forged municipal bonds in exchange for its stock, is personally liable for the loss.⁵³ So the president and general manager of a bank has been held liable for loss sustained by the bank from his purchase with corporate assets of a large amount of commercial paper affected with a patent infirmity which was liable, if not certain, to destroy its value.⁵⁴ But the vice president of a bank is not, by virtue of his office alone, charged with the duty of seeing that notice of the dishonor of commercial paper is given to the person entitled thereto, nor personally liable in any manner if he fails to do so.⁵⁵

§ 2461. — Failure to attend directors' meetings. Mere failure of a director to attend a meeting of the board is not necessarily negligence.⁵⁶ "We are not willing," said Justice Boyd in a well considered case in Maryland, "to give our approval of any doctrine that would require directors to attend every regular meeting of the board, much less every special meeting * * * We do not mean to intimate that directors should be free from liability simply because they were not present at a meeting of the board when some unlawful or improper act was done, which resulted in loss to the company, if it was their duty to be there, and their absence in any way caused the loss, nor do we mean to say that there may not be cases in which the burden would be on the directors to allege and prove

⁵¹ *In re Brazilian Rubber Plantations & Estates, Ltd.*, [1911] 1 Ch. 425, 440.

⁵² Acceptance by the president of a bank of doubtful securities in payment of good debts is negligence, and renders him liable for the resulting loss. *Lawrence v. Stearns*, 79 Fed. 878.

⁵³ *Fidelity & Deposit Co. of Maryland v. Wiseman*, 103 Tex. 286, 126 S. W. 1109, 124 S. W. 621.

⁵⁴ *Stearns v. Lawrence*, 83 Fed. 738, 746, *aff'g* 79 Fed. 878.

⁵⁵ *First Nat. Bank of Louisville v. Bickel*, 154 Ky. 11, 156 S. W. 856.

⁵⁶ *Williams v. Brady*, 221 Fed. 118; *Warner v. Penoyer*, 91 Fed. 587, 594, 44 L. R. A. 761; *Murphy v. Penniman*, 105 Md. 452, 121 Am. St. Rep. 583, 66 Atl. 282.

See also §§ 2466, 2467, *infra*.

sufficient excuse for non-attendance.”⁵⁷ “Neglect or omission to attend meetings is not,” said Justice Stirling in a case decided in England, “the same thing as neglect or omission of a duty which ought to be performed at those meetings,” although if a director has knowledge or notice that no meetings of directors are being held or that “a duty which ought to be discharged at those meetings was not being performed, it might be right to hold that he was guilty of neglect or omission of the duty.”⁵⁸ On the other hand, “it is not open to doubt,” said Justice Haight in a recent federal decision, “that a wilful and continued failure on the part of a director to attend meetings of the board at which the business of the bank is conducted, and to familiarize himself, to some extent with the bank’s affairs, is a violation of the duty which the common law imposes upon directors, and, if loss results therefrom, that he is liable, because such action is, in itself, a failure to exercise the ordinary care and prudence in the administration of affairs of the bank which the law imposes upon directors.”⁵⁹

§ 2462. — Failure to keep property insured. Directors are not in duty bound to keep the corporate property insured, nor liable in damages to the company where the uninsured property burns, in the absence of any special circumstances.⁶⁰

§ 2463. — Permitting large debt for goods sold. It has been held that the president of a company is liable to it, on the ground of negligence, for the loss resulting from a sale of its products to a firm in which he was interested where, instead of requiring payment, he permitted a large debt to accumulate which was lost by the insolvency of the firm.⁶¹

§ 2464. Excuses—In general. Imprudent acts of directors or other corporate officers cannot be excused, ordinarily, because of their (a) ignorance,⁶² or (b) inexperience,⁶³ or the honesty of their intentions.⁶⁴

⁵⁷ *Murphy v. Penniman*, 105 Md. 452, 121 Am. St. Rep. 583, 66 Atl. 282.

⁵⁸ *In re Cardiff Sav. Bank*, [1892] 2 Ch. 100.

⁵⁹ *Williams v. Brady*, 232 Fed. 740, 744.

⁶⁰ *Charlestown Boot & Shoe Co. v. Dunsmore*, 60 N. H. 85.

That agents in general are not

bound to insure property of principal, see 1 *Mechem, Agency* (2nd Ed.), §§ 1297, 1298; 1 *Clark & Skyles, Agency*, § 402b.

⁶¹ *Doe v. Northwestern Coal & Transportation Co.*, 78 Fed. 62.

⁶² See § 2468, *infra*.

⁶³ See § 2469, *infra*.

⁶⁴ See § 2465, *infra*.

Chief Justice Bartch of the Supreme Court of Utah, in a well considered decision, states the rule, as to directors of banks, that "when sued for losses which resulted from careless or unlawful acts and unfortunate transactions, they can never set up as a defense that they did not examine the books or accounts of the bank, knew nothing about the loans or discounts, were ignorant of banking business, or that they intrusted the management and supervision of the business to the executive officers, in whom they had confidence. The welfare of the public and the interests of banking institutions alike forbid this."⁶⁵ Continuing, he states that "the duties of directors are administrative, relate to supervision and direction, and when it is sought to hold them responsible for a dereliction of duty, because of which a loss occurred to stockholders and creditors, they cannot evade liability by pleading ignorance of the affairs of the institution, incompetency, or gratuitous service, or that the management of the banking business was in the hands of the cashier or other executive officer."⁶⁶ It is no excuse for the negligence of one officer that another officer or officers were also negligent.⁶⁷

§ 2465. — Honesty and good faith. It is not enough to excuse a director that no actual dishonesty is shown, nor that he was influenced by other than disinterested motives.⁶⁸ "Good faith alone will not excuse them [directors] when there is lack of the proper care, attention, and circumspection in the affairs of the corporation which is exacted of them as trustees."⁶⁹

§ 2466. — Illness and age. Age and illness have been recognized as excuses for directors in the leading case of *Briggs v. Spaulding*.⁷⁰ It has been said that "a passing illness, temporary in character, is an excuse for the period it lasts, but, if a person becomes a confirmed invalid for a number of years and unable to attend to the duties of a director, he has no right to hold on to the position and at the same time decline its corresponding responsibilities. By do-

⁶⁵ *Warren v. Robison*, 19 Utah 289, 75 Am. St. Rep. 734, 57 Pac. 287.

⁶⁶ *Warren v. Robison*, 19 Utah 289, 75 Am. St. Rep. 734, 57 Pac. 287.

⁶⁷ It is no justification for a cashier, charged with having made a bad loan, to say that the directors of the bank did not do their duty, and that if they had they would have discovered the loan. *San Joaquin Valley Bank v. Bours*, 65 Cal. 247, 3 Pac. 864.

⁶⁸ *Commercial Bank of Bay City v. Chatfield*, 121 Mich. 641, 80 N. W. 712; *Marshall v. Farmers' & Mechanics' Sav. Bank*, 85 Va. 676, 2 L. R. A. 534, 17 Am. St. Rep. 84, 8 S. E. 586.

⁶⁹ *Anthony v. Jeffress*, 172 N. C. 378, 90 S. E. 414.

⁷⁰ 141 U. S. 132, 35 L. Ed. 662.

ing so he invites others to trust the bank on the strength of his name, and in such case he ought to bear his share of the consequences growing out of such a dual relation."⁷¹

§ 2467. — **Nonresidence.** Where a corporation officer is sought to be held personally liable for negligence, he cannot ordinarily escape liability merely on the ground that he is a nonresident. In the case of bank directors, it has been said that "there is no principle of law or morals that will permit the selection of nonresident directors of good character, whose names shall be a pledge of honest management, upon which the public shall make deposits and buy the stock of the bank, and then, when the crash comes, will excuse such directors from liability, because, being nonresidents, they could not give proper attention to their duties, and by private arrangement it was agreed that they should not be required to do so."⁷² So it is no excuse that the director lived far away.⁷³ However, there is some authority holding that the duties of a nonresident director are less than those of a resident director.⁷⁴

§ 2468. — **Ignorance.** Ignorance on the part of the directors of any fact which it was their duty to know, and which they would have known if they had exercised ordinary care and diligence in the performance of their duty, cannot be set up by them to escape liability.⁷⁵ This includes knowledge of the insolvency of the com-

⁷¹ Rankin v. Cooper, 149 Fed. 1010, 1016.

⁷² Houston v. Thornton, 122 N. C. 365, 65 Am. St. Rep. 699, 29 S. E. 827.

⁷³ McCormick v. King, 241 Fed. 737, 745.

⁷⁴ Wallach v. Billings, 277 Ill. 218, 115 N. E. 382.

⁷⁵ United States. Mutual Bldg. Fund & Dollar Sav. Bank v. Bossieux, 4 Hughes 387, 3 Fed. 817; Corbett v. Woodward, 5 Sawy. 416, Fed. Cas. No. 3,223.

Illinois. Delano v. Case, 17 Ill. App. 531, aff'd 121 Ill. 247, 2 Am. St. Rep. 81, 12 N. E. 676.

Maine. Bank of Mutual Redemption v. Hill, 56 Me. 385, 96 Am. Dec. 470.

Missouri. Union Nat. Bank v. Hill,

148 Mo. 380, 71 Am. St. Rep. 615, 49 S. W. 1012.

New Jersey. Williams v. McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775.

North Carolina. Houston v. Thornton, 122 N. C. 365, 65 Am. St. Rep. 699, 29 S. E. 827; Solomon v. Bates, 118 N. C. 311, 54 Am. St. Rep. 725, 24 S. E. 746; Tate v. Bates, 118 N. C. 287, 54 Am. St. Rep. 719, 24 S. W. 482.

Virginia. Marshall v. Farmers' & Mechanics' Sav. Bank of Alexandria, 85 Va. 676, 2 L. R. A. 534, 17 Am. St. Rep. 84, 8 S. E. 586.

England. Land Credit Co. of Ireland v. Lord Fermoy, 5 Ch. App. 763.

In an action against a director by a co-operative insurance company to recover moneys alleged to have been wrongfully paid out, the director will

pany.⁷⁶ As said in connection with another rule of law by the Supreme Court of the United States,⁷⁷ directors cannot "shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank, and to make declarations of dividends." So in England it has been held that if the ignorance of the director "arises

be charged with knowledge gained by him in the exercise of his duties or which he might have obtained by exercising reasonable care. *McClure v. Wilson*, 70 N. Y. App. Div. 149, 75 N. Y. Supp. 212.

The treasurer of a corporation is not excused from liability for a deficit on the mere ground that he was unaware thereof until the deficit was discovered by other persons. *Equitable Savings & Loan Ass'n v. Roland*, 198 Pa. 643, 48 Atl. 866.

⁷⁶ The duty of a director to the corporation requires him to know its financial standing, and he cannot set up his ignorance as a defense to the consequences of his own dereliction of duty. *Folsom v. Smith*, 113 Me. 88, 92 Atl. 1003.

In Indiana the following instruction was approved: "The directors of a bank are conclusively presumed to know the business and financial condition of the bank. It is their duty to know whether it is solvent or not, and they cannot avoid responsibility on the ground of their ignorance of the bank's financial condition. They cannot be heard to say that they were not apprised of a fact, the existence of which is shown by the books, acts, and correspondence of the bank, and which would have come to their knowledge but for their neglect or inattention to the business of the bank;" and the Supreme Court, in commenting thereon, said that "ignorance of the important transactions

of the corporation and of the general state of affairs, unless excusable for some special reason, which it is incumbent on them to establish, constitutes no defense to an action for damages for losses occasioned by or traceable to their failure to perform their official obligations." *Coddington v. Canaday*, 157 Ind. 243, 61 N. E. 567.

"It is immaterial whether the defendants were cognizant of the insolvent condition of the company or not. The law charges them with actual knowledge of its financial condition, and holds them responsible for damages sustained by stockholders and creditors by reason of their negligence, fraud, or deceit. *Pender v. Speight*, 159 N. C. 616, 75 S. E. 851; *Townsend v. Williams*, 117 N. C. 330, 23 S. E. 461; *Solomon v. Bates*, 118 N. C. 315, 24 S. E. 478, 54 Am. St. Rep. 725. While the directors are not liable for losses resulting from mistakes of judgment, such as are excused in law, they are liable for losses resulting from gross mismanagement and neglect of the affairs of the corporation. Good faith alone will not excuse them when there is lack of proper care, attention, and circumspection in the affairs of the corporation which is exacted of them as trustees." *Anthony v. Jeffress*, 172 N. C. 378, 90 S. E. 414.

⁷⁷ *Martin v. Webb*, 110 U. S. 7, 15, 28 L. Ed. 49.

from his wilfully shutting his eyes to the facts which are before him, he is equally guilty."⁷⁶

A director, however, is not chargeable with knowledge of its business transactions, for the purpose of holding him liable for mismanagement, merely because of his position as a director, when he has not been guilty of negligence.⁷⁹

How far is knowledge to be imputed to a director or other corporate officer, when he seeks to evade liability by setting up his want of knowledge as a defense? So far as the powers of the corporation, and the powers and duties of the officers, are prescribed by statute, or charter or by-law, knowledge thereof is imputed to the officer. As to this there is no question. It is sometimes said that the directors and the managing officers are presumed to have knowledge of facts contained in the corporate records,⁸⁰ but there are contrary statements that knowledge of what the corporate books and papers show is not to be imputed to the directors.⁸¹ In Tennessee it has been held that "a director in a suit between himself and the corporation, or those suing upon the corporate right of action, is not presumed to have knowledge of all that is shown by the books of the company. The presumption of knowledge attaching to a director * * * applies only to suits between the bank and a stranger."⁸²

§ 2469. — Want of experience or skill. In a leading Pennsylvania case, Judge Sharswood said that directors "are not liable for mistakes of judgment, even though they may be so gross as to appear to us absurd and ridiculous, provided they were honest and provided they are fairly within the scope of the powers and discretion confided to the managing body."⁸³ But in New York the Court of Appeals refused to assent to such rule, and held that a director "is bound not only to exercise proper care and diligence, but or-

⁷⁶ Rance's Case, L. R. 6 Ch. 104.

501; Coddington v. Canaday, 157 Ind. 243, 61 N. E. 567.

"Wilfully shutting his eyes," as used herein, includes "culpable negligence or reckless indifference by the director in the performance of his duties." Dovey v. Cory, [1901] A. C. 477, 490.

⁸¹ Briggs v. Spaulding, 141 U. S. 132, 162, 35 L. Ed. 662; Wakeman v. Dalley, 51 N. Y. 27, 32, 10 Am. Rep. 551; Mason v. Moore, 73 Ohio St. 275, 4 L. R. A. (N. S.) 597, 4 Ann. Cas. 240, 76 N. E. 932.

⁷⁹ Rudd v. Robinson, 126 N. Y. 113, 12 L. R. A. 473, 22 Am. St. Rep. 816, 26 N. E. 1046; Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448.

⁸² Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448.

⁸⁰ Mountain Water Works Const. Co. v. Holme, 49 Colo. 412, 113 Pac.

⁸³ In re Spering's Appeal, 71 Pa. St. 11, 10 Am. Rep. 684. To same effect, Dunn v. Kyle, 14 Bush (Ky.) 134, 140.

dinary skill and judgment. As he is bound to exercise ordinary skill and judgment, he cannot set up that he did not possess them. When damage is caused by his want of judgment, he cannot excuse himself by alleging his gross ignorance. One who voluntarily takes the position of director, and invites confidence in that relation, undertakes, like a mandatary, with those whom he represents or for whom he acts, that he possesses at least ordinary knowledge and skill, and that he will bring them to bear in the discharge of his duties."⁸⁴ However, even under the New York rule, it is evident that if a director has a practical business experience, the mere fact that he was not acquainted with the particular business in which the corporation is engaged, at the time of his election or appointment, is immaterial;⁸⁵ but where the president and secretary, paid officers of a life insurance company, were sued for losses sustained by the company through their negligence, they could not set up as an excuse their lack of experience in the business of life insurance.⁸⁶

In line with the New York rule, it has been said, in a Utah case, in regard to bank directors, that the public "have a right to suppose that they are men of high character for integrity, of reasonably sound judgment, and of such good business sense as is necessary to conduct the affairs of the bank wisely and with reasonable safety."⁸⁷

§ 2470. — Agreement whereby director was not to be obliged to attend meetings. It is no defense that a director consented to go upon the board of directors upon an understanding with the president of the company that he should not be called upon to attend any of the meetings of the board, but would simply allow the use of his name in the directorate.⁸⁸

§ 2471. Liability of directors of national banks for negligence. The National Banking Act provides that if the directors of any

⁸⁴ *Hun v. Cary*, 82 N. Y. 65, 73, 37 Am. Rep. 546.

⁸⁵ *In re Brazilian Rubber Plantations & Estates*, [1911] 1 Ch. 425, 436.

⁸⁶ *New Haven Trust Co. v. Doherty*, 74 Conn. 353, 356, 50 Atl. 887.

The fact that the principal salaried officers of an insurance company were inexperienced in the insurance business does not excuse them from "ex-

ercising such care and skill as ordinarily prudent management might require." *New Haven Trust Co. v. Doherty*, 74 Conn. 353, 50 Atl. 887.

⁸⁷ *Warren v. Robison*, 19 Utah 289, 303, 75 Am. St. Rep. 734, 57 Pac. 287.

⁸⁸ *Kavanaugh v. Gould*, 147 N. Y. App. Div. 281, 131 N. Y. Supp. 1059. Compare *Briggs v. Spaulding*, 141 U. S. 132, 35 L. Ed. 662.

national bank shall "knowingly" violate, or "knowingly permit" any of its agents to violate any of the provisions of that act, "every director who participated in or assented to" the violation shall be personally liable for damages resulting therefrom. The National Banking Act imposes upon directors duties which do not rest upon them at common law, among which is the furnishing to the Comptroller of the Currency reports concerning the condition of the bank and the publication thereof. The Supreme Court of the United States held that the former section "affords the exclusive rule by which to measure the right to recover damages from directors, based upon a loss alleged to have resulted solely from the violation by such directors of a duty expressly imposed upon them by a provision of the act," and that "liability cannot be entailed upon them by exacting a different and higher standard of conduct as regards such commands than that established by the statute without depriving directors of an immunity conferred upon them." In a state court, the judgment of which was reversed, it was held that directors who merely negligently participate in or assent to an untrue report are liable, but the Supreme Court held that the false report must be "knowingly" made.⁸⁹ In a later case, the Supreme Court of the United States held that there was liability, in case of an intentional violation of a statute by deliberately refusing to examine that which it was the duty of the directors to examine; and that where the Comptroller of the Currency gave notice to directors to charge off certain assets, the disregarding of such notice and representing such assets in a statement to be good was a violation of the statute so as to make the directors liable to one injured thereby.⁹⁰ These decisions, it has been contended, are to be construed as taking away all common-law liability of a director of a national bank; but it seems that there is a liability on the part of national bank directors for failure to perform the duty which the general principles of the law cast upon them when they become directors, distinct from and in addition to the duties and liabilities imposed by the statutes.⁹¹

⁸⁹ *Yates v. Jones Nat. Bank*, 206 U. S. 158, 51 L. Ed. 1002, rev'g 74 Neb. 734, 105 N. W. 287.

On a new trial and subsequent writ of error, the court held that the directors had "knowingly" made a false report. *Jones Nat. Bank v. Yates*, 240 U. S. 541, 60 L. Ed. 788,

rev'g 93 Neb. 121, 139 N. W. 844, 1135.

⁹⁰ *Thomas v. Taylor*, 224 U. S. 73, 56 L. Ed. 673, aff'g 195 N. Y. 590, 89 N. E. 1113, 124 N. Y. App. Div. 53, 108 N. Y. Supp. 454.

⁹¹ *Williams v. Brady*, 232 Fed. 740. The provisions of the National

E. Liability of Directors or Other Officers for Acts of Co-director or Other Officer

§ 2472. **General considerations.** The question of liability of one officer for the act of another may arise where it is sought to hold a director or directors liable (1) for acts or omissions of co-directors, or (2) for acts or omissions of officers or agents other than co-directors, or where it is sought to hold (3) an officer other than a director for acts or omissions of other officers or agents. The alleged negligence of directors, for which it is sought to hold them liable where loss has resulted from the misconduct of a cashier or other executive officer, is variously alleged, but the most usual grounds relied upon are one or more of the following: negligence in appointing an incompetent or untrustworthy person to the office, negligence in failing to require a fidelity bond from the officer, negligence in failure to appoint an executive committee, in case of a bank, to examine the books of the bank, and to pass upon loans made by the bank, negligence in supervising loans and overdrafts, in case of a bank, negligence in failing to examine the books of the corporation, and negligence in failure to attend meetings of the directors.

The tendency of the courts, especially the Supreme Court of the United States and the lower federal courts, has been to be very lenient towards directors who have not been guilty of affirmative misconduct but who have merely been guilty of acts of omission. At the same time, the tendency of the later decisions, in most of the courts, is to hold directors to a more strict accountability, and to serve notice on "dummy" and "figurehead" directors that they cannot stay away from directors' meetings as a practice, or rely entirely upon others to attend to the corporate business, and escape liability for the wrongful acts of omission or commission of other directors or officers.

The liability of an agent to his principal for acts of subagents is considered at length in textbooks on Agency,⁹² as is the liability of agents for the neglect of co-agents.⁹³

§ 2473. **Higher officers not insurers.** Directors are not insurers of the fidelity of other officers or agents of the corporation, including

Banking Act defining the duties of directors does not relieve them from their common-law liability for failure to be honest and diligent. *Allen v. Luke*, 163 Fed. 1018.

⁹² See 1 Clark & Skyles, *Agency*, §§ 436-990.

⁹³ See 1 Mechem, *Agency* (2nd Ed.), § 1289.

those they have themselves appointed to the position. The directors of a corporation, it was said in the Supreme Court of the United States, "are not insurers of the fidelity of the agents whom they have appointed, who are not their agents but the agents of the corporation; and they cannot be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty, either for failure to supervise the business with attention or in neglecting to use proper care in the appointment of agents."⁹⁴

§ 2474. Matters material to solution of question—In general. Whether directors may depend upon subordinates, and the extent to which they may so depend, at least as to all ordinary matters and questions of detail, depends, of course, to some extent, upon the magnitude of the business and the exigencies of the case. But the rule as to liability of directors for acts of co-directors, or of directors for acts of other officers, or of other officers for acts of inferior officers, seems to be not affected by the element whether the liability is sought to be enforced by the corporation or stockholders, or by creditors of the corporation, provided it be conceded that creditors may recover for mere nonfeasance.

§ 2475. — Liability as dependent upon kind of corporation involved. Most of the cases which have been decided involve the liability of bank directors, and in some of them special stress has been laid on the fact that the bank was a savings bank in which were the savings of poor people. And it is submitted that the courts do, and should, hold directors of banks, especially savings banks, to the duty of a more rigid supervision over its officers who handle large sums of money daily and are subjected to great temptation, than in case of a corporation where the handling of money is merely the handling of the money of the corporation and represents a very small part of the actual work of the company. In any event, no higher degree of care should be imposed upon directors of mercantile corporations, in regard to supervision, than is imposed upon directors of banks.⁹⁵

§ 2476. Grounds of liability. That a director or other officer may be liable for the misdeeds of another director or officer, under some

⁹⁴ Chief Justice Fuller, in *Briggs v. Spaulding*, 141 U. S. 132, 35 L. Ed. 662.

⁹⁵ *Virginia-Carolina Chemical Co. v. Ehrich*, 230 Fed. 1005, 1015.

circumstances, admits of no controversy.⁹⁶ This liability is sought to be enforced not on the theory of respondeat superior, but on the ground of negligence of the directors or other superior officer in not supervising the acts of the co-director or subordinate officer or agent. Officers and agents appointed by the directors or other officers are agents of the corporation and not of the appointing officer or officers, and the latter cannot be held liable on the theory of agency. However, where directors personally and knowingly derive a benefit from the fraud of a subagent they may be held liable on the ground that he thereby becomes in a sense their agent.⁹⁷

Ordinarily, however, the only grounds upon which directors or other officers can be held liable for the acts of other officers are that (1) they participated therein, or (2) were negligent in supervising the corporate business,⁹⁸ or (3) were negligent in the appointment of the wrongdoer.⁹⁹

§ 2477. Liability as dependent upon lack of supervision—In general. To be liable for acts of other officers not directors, a director must, where he did not actually participate in the wrong, be guilty of negligence, i. e., want of ordinary or reasonable care.¹ Doubt-

⁹⁶ **United States.** *Warner v. Penoyer*, 91 Fed. 587, 44 L. R. A. 761, rev'g 82 Fed. 181; *Mutual Bldg. Fund & Dollar Sav. Bank v. Bossieux*, 4 Hughes 398, 3 Fed. 817.

California. *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 74, 53 Pac. 410.

Kentucky. *Savings Bank of Louisville's Assignee v. Caperton*, 87 Ky. 306, 12 Am. St. Rep. 488, 8 S. W. 885; *Dunn's Adm'r v. Kyle's Ex'r*, 14 Bush 134.

Missouri. *Union Nat. Bank v. Hill*, 148 Mo. 380, 71 Am. St. Rep. 615, 49 S. W. 1012.

Utah. *Warren v. Robison*, 19 Utah 289, 75 Am. St. Rep. 734, 57 Pac. 287.

Virginia. *Marshall v. Farmers' & Mechanics' Sav. Bank of Alexander*, 85 Va. 676, 2 L. R. A. 534, 17 Am. St. Rep. 84, 8 S. E. 586.

⁹⁷ *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897; *Re Traders Trust Co.*, 26 Dom. L. R. (Can.) 41, 47.

⁹⁸ See § 2477 et seq., *infra*.

⁹⁹ See § 2485, *infra*.

¹ If the exercise of ordinary care on the part of the directors would have prevented the loss, they are liable. *Mutual Bldg. Fund & Dollar Sav. Bank v. Bossieux*, 3 Fed. 817.

If the directors act in good faith and with ordinary diligence in their general supervision, they are not liable for secret losses resulting from secret speculations and secret false entries of the cashier. *Mason v. Moore*, 73 Ohio St. 275, 4 L. R. A. (N. S.) 597, 4 Ann. Cas. 240, 76 N. E. 932.

While it is not incumbent upon the directors to give their time to the details of current business, they are under obligation to give to the corporate management such time and attention as will enable them to know at all times what the officers in charge of the corporation and what their fellow directors are doing, and what disposition is being made of the corporate funds and property. *Fisher v. Parr*, 92 Md. 245, 48 Atl. 621.

less all the courts agree that the responsibility of a board of directors, or of an individual director, does not end with the appointment of honest and capable men to the executive offices,² and that ordinary care on the part of directors requires reasonable oversight and supervision.³ No court, it is submitted, takes the stand that

² See *Warren v. Robison*, 19 Utah 289, 298, 75 Am. St. Rep. 734, 57 Pac. 287.

³ *United States*. *Briggs v. Spaulding*, 141 U. S. 132, 35 L. Ed. 662; *Warner v. Penoyer*, 91 Fed. 587, 44 L. E. A. 761, rev'g 82 Fed. 181.

Connecticut. *Lippitt v. Ashley*, 89 Conn. 451, 94 Atl. 995; *Lowndes v. City Nat. Bank of South Norwalk*, 82 Conn. 8, 22 L. E. A. (N. S.) 408, 72 Atl. 150.

Michigan. *Commercial Bank of Bay City v. Chatfield*, 121 Mich. 641, 80 N. W. 712.

New Hampshire. *Ricker v. Hall*, 69 N. H. 592, 45 Atl. 556.

New Jersey. *Campbell v. Watson*, 62 N. J. Eq. 396, 50 Atl. 120.

New York. *Arthur v. Griswold*, 55 N. Y. 400; *Bloom v. National United Ben. Savings & Loan Co.*, 81 Hun 120, 30 N. Y. Supp. 700.

Pennsylvania. *Swentzel v. Penn Bank*, 147 Pa. St. 140, 15 L. R. A. 305, 30 Am. St. Rep. 718, 23 Atl. 405.

Tennessee. *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448; *Vance v. Phoenix Ins. Co.*, 4 Lea 385.

Wisconsin. *North Hudson Mut. Building & Loan Ass'n v. Childs*, 82 Wis. 460, 33 Am. St. Rep. 57, 52 N. W. 600.

A director is not liable for the acts of other corporate officers unless he participated therein or had some knowledge by which, in the exercise of reasonable care, he could have prevented the loss, or connived at it, or failed to perform his duty of exercising the authority he possessed to prevent losses which should, in the

exercise of reasonable care and skill, have been foreseen and guarded against. *People v. Equitable Life Assur. Soc. of United States*, 124 N. Y. App. Div. 714, 109 N. Y. Supp. 453.

Directors are not liable to creditors for the acts of other officers in misappropriating money where they are in no ways negligent. *Virginia-Carolina Chemical Co. v. Ehrich*, 230 Fed. 1005, 1014.

It seems that neither the president, secretary nor treasurer, where constituting a minority of the board of directors, can be sued as ex officio directors for misconduct or negligence, but can only be sued as executive officers. *North Hudson Mut. Building & Loan Ass'n v. Childs*, 82 Wis. 460, 33 Am. St. Rep. 57, 52 N. W. 600.

Directors cannot be held for depreciation due to secret acts of the manager of which they would not have known by the exercise of reasonable diligence. *Warren v. Robison*, 25 Utah 205, 70 Pac. 989.

"The mismanagement of an employee of the company does not necessarily charge the directors for any loss sustained thereby, unless it is apparent that they knowingly and wilfully allowed such employee to pursue a course of action with reference to the business from which resulting loss would be equivalent to misappropriation of the assets of the company." *McConnell v. Combination Mining & Milling Co.*, 31 Mont. 563, 79 Pac. 248, aff'g 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194.

Of course, in the absence of such a degree of negligence as is sufficient to impose liability, directors or other

a director may escape liability where he utterly failed to exercise any supervision over corporate affairs and officers, but it is unanimously held that directors are liable for negligence, under ordinary circumstances, where the loss or injury is due to their total failure to in any way supervise the acts of the recreant officer,⁴ especially in case of directors of banks.⁵ That corporate directors owe a duty of supervision, to some extent, of the acts of executive officers and other officers and agents to whom they have delegated certain authority is not disputed, and the same thing is true in respect to corporate officers not directors, so far as officers or agents under them are concerned. On the other hand, it is not disputed, of course, that directors are not obliged to investigate every minor detail of the business in order to see that the officers and agents are properly performing their duties. The important question is how far must directors go, and what must they do, to fulfil this duty of supervision, and it is self-evident that it cannot be precisely defined because dependent to so great an extent upon the circumstances of the particular case. It may be said, however, that generally the efforts to hold directors liable on such ground have been futile; and many of the courts have been very lenient with directors where they did not actively participate in the wrongdoing nor have any reason to suspect the recreant officer.

The important question is what is meant by "reasonable supervision." Under the New York rule that directors must exercise the same care that an ordinarily prudent person would exercise over his own affairs,⁶ it would seem that "reasonable supervision" means something more than most of the courts are inclined to hold the directors to. Suppose there is no ground for suspicion of the

officers are clearly not liable for losses of money or property due to theft, embezzlement or accident. *Mowbray v. Antrim*, 123 Ind. 24, 23 N. E. 858; *Vance v. Phoenix Ins. Co.*, 4 Lea (Tenn.) 385.

"That which they ought, by proper diligence, to have known, as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that

course of business." *Martin v. Webb*, 110 U. S. 7, 15, 28 L. Ed. 49.

⁴ Directors of an insurance company cannot escape liability for the purchase of worthless negotiable paper by delegating the selection of the paper to the president. *Wait v. McKee*, 95 Ark. 124, 128 S. W. 1028.

⁵ *Ellis v. H. P. Gates Mercantile Co.*, 103 Miss. 560, 43 L. R. A. (N. S.) 982, Ann. Cas. 1915 B 526, 60 So. 649.

⁶ See § 2450, *supra*.

executive officers? Can the directors then sit back and claim there is no necessity for examination? Some of the courts would seem to support such a rule;⁷ but the great majority of the decisions require something more than this in the way of supervision. Ordinarily, according to the better line of cases, the directors of a bank are liable for the negligence and defalcations of the cashier where they could have ascertained the facts by the exercise of ordinary care in the management of the corporation;⁸ but whether bank directors are liable for defalcations of their president or cashier depends largely upon the facts of the particular case.⁹

"Noninterference with those in charge of special work, when confidence is justified," it has been said "does not mean neglect or abandonment of the duty of supervision, but is sometimes its

⁷ Generally, directors are not bound to examine entries in the company's books. *In re Denham & Co.*, [1883] 25 Ch. Div. 752; *Hallmark's Case*, [1878] 9 Ch. Div. 329.

"It was the duty of the general manager [of a bank] and (possibly) of the chairman to go carefully through the returns from the branches [branch banks], and to bring before the board any matter requiring their consideration; but the respondent was not, in my opinion, guilty of negligence in not examining them for himself, notwithstanding that they were laid on the table of the board for reference." *Dovey v. Cory*, [1901] A. C. 477, 493.

Directors "are not liable for the fraudulent conduct of their fellow directors or the company's officials as to transactions in which they took no part, if they have no reason to suspect them." *Northern Trust Co. v. Butchart*, 35 Dom. L. R. 169, 176, citing *In re Denham & Co.*, 25 Ch. Div. 752.

⁸ *Bank of Commerce v. Goolsby*, — Ark. —, 196 S. W. 803, refusing to follow *Briggs v. Spaulding*, 141 U. S. 132, 35 L. Ed. 662, in so far as it may be construed to hold that such liability exists only where their igno-

rance of the wrongdoing is the result of gross inattention.

⁹ *United States*. *Warner v. Penoyer*, 91 Fed. 587, 44 L. R. A. 761, rev'g 82 Fed. 181; *Gibbons v. Anderson*, 80 Fed. 345.

Arkansas. *Bank of Des Arc v. Moody*, 110 Ark. 39, 161 S. W. 134; *Bailey v. O'Neal*, 92 Ark. 327, 135 Am. St. Rep. 185, 122 S. W. 503.

Indiana. *Coddington v. Canaday*, 157 Ind. 243, 61 N. E. 567.

Kentucky. *Savings Bank of Louisville's Assignee v. Caperton*, 87 Ky. 306, 12 Am. St. Rep. 488, 8 S. W. 885; *Dunn v. Kyle*, 14 Bush 134.

Missouri. *Lyons v. Corder*, 253 Mo. 539, 162 S. W. 606.

New Jersey. *Campbell v. Watson*, 62 N. J. Eq. 396, 50 Atl. 120.

Pennsylvania. *Swentzel v. Penn Bank*, 147 Pa. St. 140, 15 L. R. A. 305, 30 Am. St. Rep. 718, 23 Atl. 405.

Tennessee. *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448.

"Decisions of the courts are not of great value as authorities as each decision is based upon the facts of the particular case decided, and in no two cases are the facts the same." *Wallach v. Billings*, 277 Ill. 218, 115 N. E. 382.

wisest exercise."¹⁰ And the argument against supervision of details is that business cannot be carried on upon principles of distrust;¹¹ but that argument is of little force to-day when the system of examinations of corporate books at regular intervals, by expert accountants or others, is recognized as no reflection upon any of the corporate officers or agents but instead a business protection generally adopted by corporations.

In Kentucky, the Court of Appeals has been inclined to favor directors by absolving them from liability for misconduct of the cashier except in very clear cases.¹² Thus, in one case it was held that it was not the duty of bank directors "to examine the books of the bank in the absence of any reason for suspecting the honesty of the bank's cashier, with a view of testing their correctness with the weekly statements made them" nor "when making their periodical

¹⁰ *Allen v. Roydhouse*, 232 Fed. 1010, 1015.

¹¹ "Business cannot be carried on upon principles of distrust. Men in responsible positions must be trusted by those above them as well as by those below them until there is reason to distrust them. Care and prudence do not involve distrust, but for a director acting honestly himself to be held legally liable for negligence in trust in the officers under him, not to conceal from him what they ought to report to him, appears to us to be laying too heavy a burden upon honest business men." *Re Traders Trust Co.*, 26 Dom. L. R. (Can.) 41, 48.

Is a director of a bank negligent where he acts on the information and advice of the cashier or general manager of the bank, by whose statements he is misled, where he had no reason for suspecting the integrity or skill of such cashier or manager? This question was considered by the House of Lords in England, wherein the Earl of Halsbury states the views of the tribunal as follows: "The charge of neglect appears to rest on the assertion that Mr. Cory, like the other directors, did not attend to any details of business not brought before

them by the general manager or the chairman, and the argument raises a serious question as to the responsibility of all persons holding positions like that of directors, how far they are called upon to distrust and be on their guard against the possibility of fraud being committed by their subordinates of every degree. It is obvious if there is such a duty it must render anything like an intelligent devolution of labor impossible. Was Mr. Cory to turn himself into an auditor, a managing director, a chairman, and find out whether auditors, managing directors, and chairmen were all deceiving him? * * * I cannot think that it can be expected of a director that he should be watching either the inferior officers of the bank or verifying the calculations of the auditors himself. The business of life could not go on if people could not trust those who are put into a position of trust for the express purpose of attending to details of management." *Dovey v. Cory*, [1901] A. C. 477, 485, 486.

¹² *Savings Bank of Louisville's Assignee v. Caperton*, 87 Ky. 306, 12 Am. St. Rep. 488, 8 S. W. 885; *Dunn v. Kyle*, 14 Bush (Ky.) 134.

investigation of the money on hand, and the notes, bills and bonds belonging to the bank,—it being manifest that the frauds could have been easily discovered, at least by a bookkeeper of ordinary intelligence.” Continuing, the court said that “it is difficult to define each and every duty pertaining to such a position, but we are satisfied that a bank director is neither required to be an expert or a competent bookkeeper, or do more in the general management of the bank, with reference to its cashier and bookkeeper, than to see, in the absence of any reason for doubting his fidelity to the trust confided to him, that the weekly, daily or monthly statements made to the board correspond with the general balances upon the books.”¹³

Directors of a bank have been held liable, however, for defalcations of the cashier, where they continued for over three years, during all of which time the directors sued were in office, and where many of the acts were not of secret occurrence and sudden development but were such as must have been known to the directors if they gave even the most casual attention to the affairs of the bank.¹⁴

Directors of a warehouse company are liable to one storing goods with the company for the loss of the goods through the embezzlement thereof by the general manager, where the directors by the use of ordinary care would have had knowledge of the embezzlement.¹⁵

Although it is primarily the duty of the president and secretary of corporations to make the annual report required by statute, yet the directors are negligent if they knowingly permit such officers to make a false report.¹⁶

With reference to the duties of bank directors, the court in a federal case said: “Briefly summarized, I understand the law on this subject to be as follows: (1) Directors are charged with the duty of reasonable supervision over the affairs of the bank. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision over its affairs. (2) They are not insurers or guarantors of the fidelity and

¹³ *Savings Bank of Louisville's Assignee v. Caperton*, 87 Ky. 306, 318, 12 Am. St. Rep. 488, 8 S. W. 885, where, however, the fact that directors received no compensation is dwelt upon as a material factor in the holding.

¹⁴ *Robinson v. Hall*, 63 Fed. 222, rev'g 59 Fed. 645—the decision of

the lower court stating the rule in favor of directors altogether too leniently.

¹⁵ *Frontier Milling & Elevator Co. v. Roy White Co-operative Mercantile Co.*, 25 Idaho 478, 138 Pac. 825.

¹⁶ *Bank of Commerce v. Goolsby*, — Ark. —, 196 S. W. 803.

proper conduct of the executive officers of the bank, and they are not responsible for losses resulting from their wrongful acts or omissions, provided they have exercised ordinary care in the discharge of their own duties as directors. (3) Ordinary care, in this matter as in other departments of the law, means that degree of care which ordinary prudent and diligent men would exercise under similar circumstances. (4) The degree of care required further depends upon the subject to which it is to be applied, and each case must be determined in view of all the circumstances. (5) If nothing has come to the knowledge to awaken suspicion that something is going wrong, ordinary attention to the affairs of the institution is sufficient. If, upon the other hand, directors know, or by the exercise of ordinary care should have known, any facts which would awaken suspicion and put a prudent man on his guard, then a degree of care commensurate with the evil to be avoided is required, and a want of that care makes them responsible. Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. (6) Directors are not expected to watch the routine of every day's business, but they ought to have a general knowledge of the manner in which the bank's business is conducted, and upon what securities its larger lines of credit are given, and generally to know of and give direction to the important and general affairs of the bank. (7) It is incumbent upon bank directors in the exercise of ordinary prudence, and as a part of their duty of general supervision, to cause an examination of the condition and resources of the bank to be made with reasonable frequency."¹⁷

§ 2478. Acts of directors in turning over or leaving entire business to others. It is negligence for directors to leave the management entirely to others; and they may be held liable for breaches of trust committed by the officers to whom the management is intrusted.¹⁸ Thus, directors of a bank cannot escape liability by delegating the management of the corporation to its president¹⁹ or

¹⁷ Rankin v. Cooper, 149 Fed. 1010, 1013.

¹⁸ McCormick v. King, 241 Fed. 737, 744; King v. Livingston Mfg. Co., 192 Ala. 269, 68 So. 897; Fletcher v. Eagle, 74 Ark. 585, 109 Am. St. Rep. 100, 86 S. W. 810; Charitable Corporation v. Sutton, 2 Atk. 400.

But it may not be deemed an act of bad faith on the part of a corporate

president to intrust a sale of certain of the corporate bonds to the vice president where the bonds were turned over to the president to be sold by him. Owego Gas Light Co. v. Boyer, 111 N. Y. App. Div. 140, 96 N. Y. Supp. 486.

¹⁹ Fletcher v. Eagle, 74 Ark. 585, 109 Am. St. Rep. 100, 86 S. W. 810.

cashier.²⁰ So directors of a bank are liable for losses resulting from turning over the management of the bank to able officers, without any further supervision or examination than mere inquiry of the officer.²¹ While directors may commit the active transaction of the corporate business to duly authorized officers, they are not thereby absolved from the duty of reasonable supervision.²² "Unfortunately some directors appear to think that they have fully discharged their duties by acting as figureheads and dummies," says Justice Lumpkin, but he adds that "this is a mistake and a delusion from which some of them are now and then awakened by a judgment for damages arising from allowing the corporation to be looted while they sat negligently by and looked wise."²³

In other words, a director cannot escape liability merely by picking out able and apparently trustworthy men to act as president, general manager, cashier or the like, and take charge of the business, and then paying no attention to the acts of such executive officer or officers or to the corporate business. The rule is clearly and briefly stated by Chief Justice Hill, in an Arkansas case, as follows: "No matter how honest and capable the president is, the directors have their duties to perform, and cannot fail to perform them because their confidence in the president renders them unnecessary in their opinion. It was their duty as directors to perform the functions required of them by statute, common usage and the by-laws of the corporation, and any committal of management to the president which meant a nonfulfillment of their duties as directors was negligence for which they are liable, provided other facts fixing liability were present."²⁴

²⁰ *Union Nat. Bank v. Hill*, 148 Mo. 380, 71 Am. St. Rep. 615, 49 S. W. 1012; *Kitchens v. J. H. Teasdale Commission Co.*, 105 Mo. App. 463, 79 S. W. 1177; *Campbell v. Watson*, 62 N. J. Eq. 396, 50 Atl. 120.

Directors of a bank are liable for the mismanagement of its cashier to whom they had surrendered all of their duties and had created in effect a "one-man power." *Lowndes v. City Nat. Bank of South Norwalk*, 82 Conn. 8, 22 L. & R. A. (N. S.) 408, 72 Atl. 150.

By appointing a cashier, the directors of a bank cannot divest themselves of the duty of general super-

vision and control. They must not be mere figureheads, and cannot confide the exclusive management of the affairs of the bank to the cashier. They cannot escape liability by relying entirely upon his good faith and judgment. *Bailey v. O'Neal*, 92 Ark. 327, 135 Am. St. Rep. 185, 122 S. W. 503.

²¹ *Gibbons v. Anderson*, 80 Fed. 345.

²² *McEwen v. Kelly*, 140 Ga. 720, 79 S. E. 777.

²³ *McEwen v. Kelly*, 140 Ga. 720, 79 S. E. 777.

²⁴ *Fletcher v. Eagle*, 74 Ark. 585, 109 Am. St. Rep. 100, 86 S. W. 810.

§ 2479. Isolated acts as distinguished from continuous misconduct. Of course, if negligent or wrongful acts of officers are merely isolated acts then it might well be that the directors would not be chargeable with notice thereof, but if the wrongful acts are part of a system which has long been practiced by the wrongdoer, the presumption is that the directors, ordinarily, would have discovered the wrongdoing if they had been reasonably diligent.²⁵

§ 2480. What constitutes negligence—In general. It is not actionable negligence for the directors to permit the same person to be both cashier and bookkeeper.²⁶

Failure of bank directors to make certain examinations required by statute every six months, with the result that the negligence or misfeasance of other officers of the corporation was not discovered, where it would have been discovered if the examination had been made, is culpable negligence.²⁷

§ 2481. — Failure to take bond. The negligence may consist in the failure to take a bond from the erring officer.²⁸ However, if the taking of an official bond of executive officers in favor of the corporation is discretionary with the board of directors, it has been held that the omission of the directors to take a bond of a bank cashier of good repute and character and of some visible property does not render them personally liable for losses caused by his misconduct.²⁹

§ 2482. — Lack of system. In the case of savings banks, it is held that "the omission to make use of an ordinary and approved precaution against the known risks of the business is, in the absence of any substitute for such omitted precaution, prima facie evidence of a want of reasonable care"; and, in a particular case, where the custom of savings banks was shown to be to require the treasurer to take trial balances off the depositors' ledgers from time to time, the directors were held liable where this was not required and the treasurer was a defaulter for many years.³⁰

²⁵ Williams v. McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775.

²⁶ Savings Bank of Louisville's Assignee v. Caperton, 87 Ky. 306, 320, 12 Am. St. Rep. 488, 8 S. W. 885.

²⁷ Green v. Officers & Directors of Knoxville Banking & Trust Co., 133 Tenn. 609, 182 S. W. 244.

²⁸ Pontchartrain R. Co. v. Paul-

ing, 11 La. 41, 30 Am. Dec. 708; Vance v. Phoenix Ins. Co., 4 Lea (Tenn.) 385.

²⁹ Robinson v. Hall, 59 Fed. 648, 651, rev'd on other grounds. 63 Fed. 222.

³⁰ Lippitt v. Ashley, 89 Conn. 451, 94 Atl. 995.

"This duty of supervision," said Justice Beach in a recent Connecticut case, where a savings bank was involved, "is not performed by reposing confidence" in custodians of their funds, "however worthy of confidence they may seem to be. The history of the business, known to every bank director, shows that confidence without supervision has often proved to be a temptation and an opportunity. We do not mean to say that directors are required to proceed on the theory that their officers are under suspicion, or to examine the books themselves, or to employ expert accountants specially commissioned to detect possible defalcations. Until something happens which is calculated to put reasonably prudent bank directors on inquiry, they are entitled to assume that their officers, if selected with reasonable care, are honest. Yet there is a proper field for oversight and supervision of books and accounts within these limits, and for the purposes of this case it is sufficient to say that bank directors are bound to see that an approved system of bookkeeping is adopted, which will tend to furnish some protection to the bank against mistakes and false entries; and that they are bound to exercise reasonable care in seeing that the bank gets the benefit of the protection which such a system of bookkeeping purports to give."³¹

So it has been held that "a system of doing business which ignores a factor which, by statute, ought to be part of that system is *prima facie* a defective and negligent system, and if loss can be shown to have resulted from it, then I think a case of misfeasance would be made out."³²

§ 2483. — **Absence on vacation.** It has been held that a member of the executive committee of a trust company is not negligent in taking a summer vacation of two months and a half where there were sufficient members of the committee within reach to constitute a quorum during his absence, and the condition of the company appeared sound when he left.³³

§ 2484. **Matters putting directors upon inquiry.** Of course, if a director acquires knowledge which tends to raise a suspicion against executive officers or agents, in connection with their positions, he must follow it up or inform the other directors. Thus, a director

³¹ Lippitt v. Ashley, 89 Conn. 451, 94 Atl. 995.

³² Kavanagh v. Gould, 147 N. Y. App. Div. 281, 302, 131 N. Y. Supp. 1059.

³³ Re Dominion Trust Co., 32 Dom. L. R. (Can.) 63, 65, modifying. 26 Dom. L. R. 408.

of a bank is negligent where he fails to report to his co-directors a letter written to him as president of the company in regard to the theft of a package of money, belonging to the writer, from the bank, and a subsequent conversation in which the writer told him there was a thief in the bank and to look after a certain paying teller who was stated to be living at a fast pace; and where an investigation of the teller at that time would have resulted in a discovery of his thefts, such director is responsible for his subsequent defalcations.³⁴ So a director of a bank, told by the president of the bank which was negotiating for the purchase of the first bank, that a possible cause for the great decrease of deposits in the first bank was a current report that one of the bank officers was frequenting bucket shops and living pretty fast, is responsible for defalcations by such officer after the lapse of what would be a reasonable time for investigating such officer, where no such investigation was made but if it had been made past thefts would have been disclosed.³⁵ Similarly where a bank has been paying dividends for years, the fact that a dividend is twice passed by the officers in charge, without explanation, should put the directors upon inquiry as to the reason why.³⁶

§ 2485. Negligence in appointment of untrustworthy or incompetent officer. This form of negligence rarely occurs. Generally the defaulting officer has always been deemed trustworthy by all the directors, and there is no question as to his competency. However, there is no question but that the directors may be personally liable where their appointee is untrustworthy or incompetent, and the directors were negligent in making the appointment.³⁷ But the mere fact that directors of a bank employ as a cashier one who was known by them to have lost some few thousand dollars in stock speculations some four years before his election as cashier, does not necessarily make them liable for his subsequent defalcations.³⁸

Re-employment by the board of directors of one known to be dishonest, in a responsible position, making possible a subsequent theft of a large sum, renders the directors personally liable.³⁹

³⁴ *Bates v. Dresser*, 229 Fed. 772, 797.

³⁵ *Bates v. Dresser*, 229 Fed. 772, 797.

³⁶ *Gibbons v. Anderson*, 80 Fed. 345, 351.

³⁷ See *Scott v. Depeyster*, 1 Edw. Ch. (N. Y.) 513.

³⁸ *Ricker v. Hall*, 69 N. H. 592, 45 Atl. 556.

³⁹ *Loan Soc. of Philadelphia v. Havenson*, 248 Pa. 407, 94 Atl. 121.

§ 2486. Liability as terminated by going out of office. It need hardly be said that one cannot be held liable as a director for wrongs of other corporate officers or agents after he has ceased to sustain the relation of director to the corporation.⁴⁰

§ 2487. Statutes as affecting liability. In California, a special statute expressly makes directors personally liable for misappropriation of corporate funds by corporate officers. Such statute is penal in its character and therefore subject to strict construction.⁴¹

In Washington, the statute relating to mercantile corporations provides that the members thereof shall be "subject to all the conditions and liabilities herein imposed, and to none others." There is no provision in the statute making directors or trustees liable for the acts of the president or manager of the corporation. It was held that trustees cannot be held liable for fraud perpetrated on a third person by the president and general manager of the corporation, but only for acts done by the trustees or in which they participated.⁴²

§ 2488. Particular leading cases—In general. The leading cases in this country on this subject are worthy of careful study, for the reason that they are so often cited and the facts of the particular case are of such great importance. For clearness, ability and evidence of careful research, attention is called to the cases cited below which embrace most of what may be called the leading cases on this question.⁴³

So far as banks are concerned, the duties of directors, in order

⁴⁰ *Briggs v. Spaulding*, 141 U. S. 132, 152-154, 35 L. Ed. 662, holding that there was no liability after resignation; *Brown v. Clow*, 158 Ind. 403, 62 N. E. 1006.

⁴¹ *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153, 69 Pac. 77, 64 Pac. 692.

⁴² *Northern Codfish Co. v. Stiberg*, 96 Wash. 126, 164 Pac. 750.

⁴³ *United States*. *Briggs v. Spaulding*, 141 U. S. 132, 35 L. Ed. 662.

Connecticut. *Lippitt v. Ashley*, 89 Conn. 451, 94 Atl. 995; *Lowndes v. City Nat. Bank of South Norwalk*, 82 Conn. 8, 22 L. R. A. (N. S.) 408, 72 Atl. 150.

Illinois. *Wallach v. Billings*, 277 Ill. 218, 115 N. E. 382.

Indiana. *Coddington v. Canaday*, 157 Ind. 243, 61 N. E. 567.

Kentucky. *Savings Bank of Louisville's Assignee v. Caperton*, 87 Ky. 306, 12 Am. St. Rep. 488, 8 S. W. 885.

New Jersey. *Campbell v. Watson*, 62 N. J. Eq. 396, 50 Atl. 120.

New York. *Hun v. Cary*, 82 N. Y. 65, 37 Am. Rep. 546; *Kavanaugh v. Gould*, 147 App. Div. 281, 131 N. Y. Supp. 1059.

Pennsylvania. *Swentzel v. Penn Bank*, 147 Pa. St. 140, 15 L. R. A. 305, 30 Am. St. Rep. 718, 23 Atl. 405.

Utah. *Warren v. Robison*, 19 Utah

to avoid liability for the misconduct of the cashier or other executive officers, has been well stated by the Utah Supreme Court as follows: "While such directors are not required to watch the ordinary routine of business, or observe the exact state of each day's accounts, still they are bound to possess a general knowledge of the manner in which the business is transacted, and of the character of the transactions, and to maintain such a degree of vigilance over, and intimacy with, the business as will enable them to know to whom, and upon what security, the large lines of credit are given. Especially is this so as to large loans and discounts, or matters at once affecting the stability and prosperity of the bank, and the safety of depositors."⁴⁴

The Supreme Court of Indiana, speaking through Justice Dowling, after enumerating the statutory and other duties of directors of a bank, sums up as follows: "The supervision of the directors over the business of the bank should have been such as would have enabled them at all times to know its general financial condition, and to check or prevent improvident or dishonest conduct by the president or cashier. They had the means of knowing, and they were bound to know the amount and value of the paper and securities held by the bank. They were also bound to know the character and habits of the men they had placed and kept in charge of the bank as its president and cashier. There could be no excuse for their failure to examine the books of the bank, and for their ignorance of the manner in which its business was conducted."⁴⁵

In a leading case in Pennsylvania, directors of a bank were sought to be held liable for amounts abstracted from the bank by the president and lost in speculations, on the ground that the directors ought to have known of the speculations. The speculation with the funds of the bank was done with the knowledge of the cashier and the co-operation of one or more clerks or subordinates, but it was not claimed that the directors actually knew of the wrongful acts. False entries were made in the books, and false accounts or accounts with fictitious persons were opened so as to hide the theft. However, if the directors had inspected the books they would not have found

²⁸⁹, 75 Am. St. Rep. 734, 57 Pac. 287, a study of which is especially recommended.

^{Virginia}. *Marshall v. Farmers' & Mechanics' Sav. Bank of Alexander*, 85 Va. 676, 2 L. R. A. 534, 17 Am. St. Rep. 84, 8 S. E. 586.

⁴⁴ *Warren v. Robison*, 19 Utah 289, 299, 75 Am. St. Rep. 734, 57 Pac. 287. This is a leading case which discusses the liability of officers at considerable length and with much ability.

⁴⁵ *Coddington v. Canaday*, 157 Ind. 243, 61 N. E. 567.

out anything, except in case of one book—the individual ledger—which contained the accounts of the individual depositors; but by the rules of the bank and of most of the other banks in the city, directors were not allowed to inspect this book. Keeping in mind that the rule in Pennsylvania is that the degree of care the directors are required to exercise is such ordinary care as is exercised by directors of corporations in the same line of business, rather than the care that a person takes of his own affairs,⁴⁶ the court, in a very able opinion, held that the directors were not guilty of gross negligence in not examining the individual ledger and were not liable. Summing up, Chief Justice Paxson said: “Nor do we think the directors were bound to regard the statements submitted to them as false, and the president, cashier and clerks as thieves. They had nothing to arouse suspicion. All of these gentlemen stood high. They were the trusted agents of the corporation, paid for their services, and regarded in the community in which they lived as honest men. Aside from this, the directors were among the heaviest stockholders of the bank. * * * They did not desert the ship like a parcel of drowning rats, but imperiled their private fortunes in an effort to keep it afloat. Under such circumstances, it would be an act of gross injustice to hold them liable for the frauds of others, in which they had not participated,—of which they had no knowledge,—and which have only been brought to light with the aid of experts.”⁴⁷

In a late federal case, bank directors were held liable for thefts of a paying teller where they made only two examinations of the bank during the six years which the thefts covered. In holding them liable, the court also held that in making the examination, there was negligence in not examining the depositors' ledger to see whether the balance due depositors compared with the balance as shown on the cashier's ledger; that the fact that the bank funds were diminishing at an unprecedented rate while the number of depositors were not falling off and the daily deposits were in fact increasing, should have put the directors upon inquiry; and that the fact that the national bank examiners examined the bank twice a year was no excuse, where the directors knew how brief and superficial such an examination is.⁴⁸

§ 2489. — Briggs v. Spaulding. The case most often cited, at least in support of holdings exonerating directors from liability, was de-

⁴⁶ See § 2451, *supra*.

⁴⁸ *Bates v. Dresser*, 229 Fed. 772.

⁴⁷ *Swentzel v. Penn Bank*, 147 Pa. St. 140, 15 L. R. A. 305, 30 Am. St. Rep. 718, 23 Atl. 405.

cided by the Supreme Court of the United States in 1890 by a vote of five to four.⁴⁰ The majority opinion was written by Chief Justice Fuller while Mr. Justice Harlan delivered the dissenting opinion. While the case involved a national bank, the reasoning pro and con is applicable to directors of other corporations. The directors were all held not liable, on one ground or another, some of the reasons applying only to particular directors, for losses due to mismanagement by the executive officers of the bank, where the directors had failed to make an investigation of the books of the bank and its condition within ninety days after they became directors. The chief executive officer was reputed to be trustworthy and owned most of the stock and it was generally believed that the bank was in a sound and prosperous condition. The bank became bankrupt ninety days after the directors were elected. For fourteen years prior to the failure, the business of the bank had been conducted by the president, and for many years no investigating committees had been appointed by the board and no investigations or examinations of the bank made, and the meetings of the board were infrequent and perfunctory. The facts were that the manager and principal stockholder of the bank whose misconduct in making loans wrecked the bank, induced several of the directors to become such, and they paid no attention to the business of the bank except to inquire of him from time to time as to how the business was going. One of the directors obtained a year's leave of absence shortly after his election, another became physically unable to attend to business, and another who was an experienced bank man expected to act merely in an advisory capacity. It was contended that the directors should have insisted upon meetings of the board or had special meetings called, and at those meetings or otherwise, made personal examination into the affairs of the bank, and that if they had done so they

⁴⁰ *Briggs v. Spaulding*, 141 U. S. 132, 35 L. Ed. 662.

For review of this case, see *Robinson v. Hall*, 63 Fed. 222, 226, and see article in 17 *Yale Law Journal* 33.

"The rule of duty and liability declared in *Briggs v. Spaulding* has been reluctantly followed by the lower federal courts in subsequent cases. The remarks on several occasions clearly reveal that their real opinion was quite different from that which they were required to adopt and apply. Re-

membering, therefore, that four of the nine judges who decided the case entertained a different view, that most of the federal judges in subsequent cases have followed it from necessity and not from conviction of its soundness, that with very few exceptions it has encountered the disapproval of the state tribunals, is it unreasonable to suppose that the question would receive the same answer should it ever be reviewed?" 1 *Bolles, Modern Law of Banking*, p. 293.

would have discovered the condition of the bank and prevented the subsequent losses. The prevailing opinion, while expressly stating that directors are not absolved from the duty of reasonable supervision by committing the conduct of the business to executive officers, held that the directors were not liable on the theory that in the short time of ninety days they were not guilty of negligence, in the absence of anything to excite suspicion, in not ordering a thorough examination of the affairs of the bank. The dissenting opinion, which has been favorably commented on by several leading textbook writers, undoubtedly represents the trend of the later decisions of the state courts, and well sums up the situation in the case at bar as follows: "In fact, those gentlemen, while they were directors, had no knowledge whatever of what was being done by Lee in the conduct of the bank. They took his word that all was right, and gave no attention whatever to the management of its business. Their eyes were as completely closed to what he did, from day to day, in directing the affairs of the bank, as if they had deliberately determined not to see and not to know how he controlled its business." In short the whole case, so far as the difference of opinion among the judges is concerned, may be summed up as follows: the majority held that the duty of reasonable supervision existed but that such duty had not been breached; the minority held that such duty not only existed but in the case at bar had been neglected.

This case has been quoted and referred to more than any other decision on this question. It has been distinguished in decisions of lower federal courts and it has been criticised by some of the state courts. It is difficult to attack it for the reason that it lays down fair rules and then proceeds to look at the whole matter from the viewpoint of the individual directors. To one director, it says that he should not be liable because he was granted a year's leave of absence; to another, that it would be wrong to hold you liable because your wife became very sick and the extra strain on you incapacitated you physically and mentally from properly attending to business; to another, you should not be held liable because you were over seventy years of age and had retired from business and because it was understood that you were to be not an active but merely an advisory director. From the viewpoint of the directors, all this sounds reasonable. But from the viewpoint of the stockholders there is much to be said against the reasons for excusing the individual directors. And when the dissenting opinion of Mr. Justice Harlan is read, the majority of unprejudiced minds will, it is submitted, agree with his conclusion

that "the proof is clear and convincing that a considerable part of the amount lost to the bank, and therefore to its stockholders and depositors, could have been saved, if they had exercised such care in the supervision and management of the bank's business as men of ordinary diligence exercise in respect to their own business."

§ 2490. — **Campbell v. Watson.** The case of *Campbell v. Watson* was decided by the Court of Chancery of New Jersey in 1901.⁵⁰ The opinion was written by Vice Chancellor Pitney, now one of the justices of the Supreme Court of the United States. It is submitted that the decision represents what may be said to be the growing tendency of the courts to hold directors liable for acts of executive officers, in a proper case, instead of using high sounding and flowery language in announcing the responsible duties and grave liabilities of directors and then exonerating them from liability because they did not actually participate in, or have actual knowledge of, the misdeeds of the executive officer. The opinion can almost be said to be a textbook in itself on this important branch of the law, and its review of the authorities is extensive and thorough. While it relates to the liabilities of bank directors, much that is said is equally applicable to directors of other corporations. To quote at length all of the material statements of the opinion would be a waste of time and space. However, a few of the rules laid down, especially applicable to this branch of the law, will be briefly noticed and stated, viz.:

1. The language used by the courts "must, in all cases, be construed in the light of the facts of the particular case."

2. What was not negligence in supervision in the early days of banking may be negligence now, owing to the new manifestations of ingenuity on the part of bank thieves.⁵¹

3. "So numerous have been the defalcations and dishonest abstractions of money by employees of high grade, who had by years of right living and acting earned the confidence of their employers that it has become well-nigh a maxim with such institutions to, so to speak, trust nobody beyond what is necessary to the practical busi-

⁵⁰ 62 N. J. Eq. 396, 50 Atl. 120.

⁵¹ Since "experience has developed modes of theft by such employees [of banks] unknown and unthought of half a century ago, and these manifestations of ingenuity on the part of the thieves has been met by new

safeguards on the part of the directors," therefore "what years ago would have been considered due diligence cannot be so considered to-day." *Campbell v. Watson*, 62 N. J. Eq. 396, 50 Atl. 120.

ness of the bank, and to subject the work of each one, from the highest to the lowest, to periodical investigation."

4. Directors of banks are bound "to acquaint themselves with the extent and mode of supervision exercised by officers of well-conducted banking institutions in the neighborhood," and the fact that a bank is a small country bank does not relieve its directors "from adopting the same practical measures for protection against frauds and thefts as were in use by its greater neighbors in the larger towns."

5. That by the common law of the land and the usages of banks, independently of a by-law providing therefor, the duty of the directors included the occasional examination of accounts of the officers, especially where such examinations by committees have been a part of the routine duties of boards of directors of all banks in the vicinity for many years.

6. That "if a man feels that he has not had sufficient business experience to qualify him to perform the duties of a director, he should either acquire the knowledge by inquiry, or refuse to act."

7. That the directors have no right to rely exclusively on examinations made by state examiners once in one or two years, at least where a by-law requires examinations by the board.

8. That a charter provision requiring the publication in newspapers of quarterly statements showing the "actual condition" of the bank requires something more than a showing of the condition as shown by the books of the bank, i. e., that it is the duty of the directors to use reasonable means of knowing that the statements so published are reasonably accurate and reliable.

9. That ignorance of a by-law requiring examinations of the books is no excuse.

10. That the duty of examination is not excused on the theory that it requires a director to be an expert bookkeeper as well as a spy and detective, since the examination is an open one and it did not, in the present case, require an expert.

11. That directors are bound only to exercise "such care and diligence in looking over his [cashier's] work as experience has shown is at once proper as well as practicable, and as is exercised by other experienced directors, and as is required by their charter and by-laws."

12. Depositors in banks ordinarily occupy the position of creditors of the bank, but in savings banks, in some states, where there are no stockholders, the relations existing between the directors and the depositors are, so far as the duties and liabilities to the depositors

are concerned, precisely those that exist between the stockholders of an ordinary bank of discount and its directors.⁵³

Applying these rules, it was held that there was actionable negligence on the part of bank directors where the thefts of the cashier from a correspondent bank could have been discovered by an examination and comparison of the balance sheet or transcript of account of the correspondent bank, with the books of the insolvent bank, although the theft could not be discovered by an examination of the books of the insolvent bank.⁵³

§ 2491. Negligence as proximate cause. In a federal case, where certain directors were sought to be held liable for failure to attend meetings of the board, the court said that it was not a necessary or legitimate inference that the omission was a contributory cause of the loss, and held that "before they can be made responsible for losses which have occurred through the mismanagement or dishonesty of the cashier, it must appear that such losses resulted as a consequence of the omission of some duty on their part. If, in all probability these would have occurred just the same, notwithstanding they had been ordinarily diligent and vigilant, there is no justice in shifting them upon the directors, and no principle of law to justify it."⁵⁴ An apparently just criticism of this holding, however, has been stated as follows: "These neglectful defendants were under a sworn duty to exercise an active supervision over the affairs of the bank. Great losses had been incurred by the 'superficial' attention of the directors as a body and here were two who had not even taken the pains to attend the stated meetings of the board. Yet the court would impose the duty on the complainant of proving that they would have prevented the frauds by attendance! Of course, taking up the directors one by one, it would be impossible to prove that the absence of any one was a proximate cause of the loss. Would it not be the better rule to hold that in the case of such frauds by an officer, all the directors guilty of negligence were, *prima facie*, personally liable and the burden be placed on each one to show such facts as would

⁵³ *Campbell v. Watson*, 62 N. J. Eq. 396, 50 Atl. 120.

⁵³ "The work of comparing them was no greater or more difficult than that performed by most, if not all, ordinary business men in checking off their individual bank accounts and comparing the vouchers. The mere

clerical work could be done by a clerk." *Campbell v. Watson*, 62 N. J. Eq. 396, 50 Atl. 120.

⁵⁴ *Warner v. Penoyer*, 91 Fed. 587, 591, 44 L. R. A. 761, followed in *Wallach v. Billings*, 277 Ill. 218, 115 N. E. 382.

exculpate him?"⁵⁵ In Kansas, it has been held that a director of an insolvent bank is not excused because the insolvency was caused by misconduct of the cashier which an examination of the books would not have revealed, where the director made no examination.⁵⁶

§ 2492. Nonresident directors. In a decision in Illinois the liabilities of one elected as a nonresident director of a bank for illegal loans by the president was in question, and it was said that it would be manifestly unjust to hold him, under the facts alleged, "to the same degree of attention to the bank's affairs as the resident directors, whose duty it unquestionably was to supervise the local loans and the management of the bank."⁵⁷

§ 2493. Liability for acts of co-directors—In general. It is generally the rule that a director is not liable for the misconduct of co-directors where he has not participated therein,⁵⁸ unless the loss is the result of their own neglect of duty.⁵⁹ Stated in another way the rule is that a director is not liable for the acts or omissions of co-directors unless (1) he connives at or participates therein; or (2) he is negligent in not acting. In 1887, it was stated in a federal decision, that "there is no case which has been cited or observed in which it has been decided that a director of a corporation was liable to make good a loss occasioned by the fraud or misconduct of a co-director, in which he had no part, and which was perpetrated without his connivance or knowledge."⁶⁰ And on appeal the Supreme Court of the United States said that "it should be observed that even trustees are not liable for the wrongful acts of their co-trustees un-

⁵⁵ Article by Frederick Dwight in 17 Yale Law Journal 33, 40.

⁵⁶ *Forbes v. Mohr*, 69 Kan. 342, 76 Pac. 827.

⁵⁷ *Wallach v. Billings*, 277 Ill. 218, 115 N. E. 382. But see § 2467, *supra*.

⁵⁸ *Warner v. Penoyer*, 91 Fed. 587, 44 L. R. A. 761; *Fisher v. Graves*, 80 Fed. 590; *Witters v. Sowles*, 31 Fed. 1; *Movius v. Lee*, 30 Fed. 298; *Commercial Bank of Bay City v. Chatfield*, 121 Mich. 641, 80 N. W. 712.

⁵⁹ *Dodd v. Wilkinson*, 42 N. J. Eq. 647, 9 Atl. 685, *aff'd* 42 N. J. Eq. 234, 7 Atl. 327; *Smith v. Cornelius*, 41 W. Va. 59, 70, 30 L. R. A. 747, 752, 23 S. E. 599.

Since a director is not liable for the misconduct of his co-directors, not participated in by him as a wrongdoer, a bill which seeks to fix upon a director liability for negligent acts of the board, but which does not charge him personally with any neglect, charging neglect only by the board of directors, without mentioning him, and alleging that information showing the character of their acts was accessible to all the directors, is insufficient. *Fisher v. Graves*, 80 Fed. 590.

⁶⁰ *Movius v. Lee*, 30 Fed. 298, 307.

less they connive at them or are guilty of negligence conducive to their commission." ⁶¹

In New York, "the rule still is and must be, however, that each director is only liable for his own acts or omissions, and that one is not liable for the acts or omissions of another unless he participated therein to the injury of the corporation, or had some knowledge, by which, in the exercise of reasonable care, he could have prevented the loss, or connived at it, or failed to perform his duty of exercising the authority he possessed to prevent losses which should, in the exercise of reasonable care and skill, have been foreseen and guarded against." ⁶² But if directors permit a portion of their number to divert corporate funds to an unauthorized purpose, they are equally liable. ⁶³

It has been held that directors who vote for a resolution to pay an officer a salary to which he is not entitled, but who do not participate in a subsequent resolution that such salary be paid by the issuing of negotiable notes of the corporation, are not liable to the corporation for the damages caused by issuing the notes, for the reason that the original "act, although wrongful, was harmless, * * * until supplemented by further action in which they did not participate, and for which, * * * they cannot be held responsible." ⁶⁴ But it has been held that where the conduct and practice of certain directors, when present at a meeting, encouraged and led to the illegal acts of their associates when they were absent, they are equally liable. ⁶⁵

The president is almost universally a director and hence the liability of directors for acts of the president are in reality more or less to be governed by the rules as to the liability for acts of co-directors, although it may be said in such a case that the director is acting as a president and not merely as a director and hence not governed by the rules as to co-directors. A director of a bank may be liable for loss accruing to the bank through another director who is the president, although the mismanagement of the president was not known to or participated in by the directors sought to be charged, where they were negligent in not supervising or in any way examining his management of the bank. ⁶⁶ An individual director is not

⁶¹ *Briggs v. Spaulding*, 141 U. S. 132, 159, 35 L. Ed. 662.

⁶² *People v. Equitable Life Assur. Soc. of United States*, 124 N. Y. App. Div. 714, 109 N. Y. Supp. 453.

⁶³ *Miller v. Denman*, 49 Wash. 217, 16 L. R. A. (N. S.) 348, 95 Pac. 67.

⁶⁴ *Metropolitan El. Ry. Co. v. Kneeland*, 120 N. Y. 134, 8 L. R. A. 253, 17 Am. St. Rep. 619, 24 N. E. 381.

⁶⁵ *Dodd v. Wilkinson*, 42 N. J. Eq. 647, 9 Atl. 685.

⁶⁶ *Gibbons v. Anderson*, 80 Fed. 345.

personally liable to the corporation for unauthorized loans of its funds made by its president, merely because the director knew of and consented to such loans, where such consent was not an official act, since his individual consent would not be an act of the corporation.⁶⁷

§ 2494. — Directors who are mere figureheads. Directors who confide their duties to the other directors and take no part in the management of the corporation are liable, ordinarily, for misconduct of the other directors.⁶⁸ Similarly, a director is liable for the wrongful acts of a co-director, where the former neglects his duties and trusts to the judgment of co-directors, and when he learns of such acts acquiesces therein and takes no steps to protect the rights of the corporation.⁶⁹

§ 2495. — Directors not present at meeting of board. It is held that misconduct of the board does not make a director liable where he was not present at the meeting,⁷⁰ but the nonattendance may be so continuous as to amount to a practical abdication of the duties of a director so as to make him liable for misconduct of the co-directors.⁷¹ And a director who intentionally and without excuse absents himself from directors' meetings for a long time is liable for the negligence of his co-directors.⁷² Whether absentee directors can be held liable for acts of the board of directors under a statute creating liability of directors for "assenting" to certain acts, is considered hereafter.⁷³

§ 2496. — Excuses for failure to attend meetings. A temporary illness is an excuse for the period it lasts,⁷⁴ but necessary absences in

⁶⁷ *Hirsch v. Jones*, 115 N. Y. App. Div. 156, 100 N. Y. Supp. 687.

⁶⁸ *Folsom v. Smith*, 113 Me. 83, 92 Atl. 1003; *Marshall v. Farmers' & Mechanics' Sav. Bank of Alexander*, 85 Va. 676, 2 L. R. A. 534, 17 Am. St. Rep. 84, 8 S. E. 586.

⁶⁹ *Folsom v. Smith*, 113 Me. 83, 92 Atl. 1003.

⁷⁰ *Re Montrotier Asphalte Co.*, 34 L. T. (N. S.) 716. See also *In re Cardiff Sav. Bank*, [1892] 2 Ch. 100.

⁷¹ *Mutual Bldg. Fund & Dollar Sav. Bank v. Bossieux*, 3 Fed. 817; *Charitable Corporation v. Sutton*, 2 Atk. 400.

⁷² *Bates v. Dresser*, 229 Fed. 772, 792.

"The rule is that an absent director may be held equally responsible with his associates, in case of extreme neglect of duty in omitting to attend the board meetings, or where the wrongful acts of his associates have come to his knowledge, and he acquiesces, and takes no steps to avert their injurious consequences, when, by due diligence, he might have prevented the wrongful acts from being done." *Schout v. Conkey Ave. Saving Aid & Loan Ass'n*, 11 N. Y. Misc. 454, 32 N. Y. Supp. 713.

⁷³ See § 2632, *infra*.

⁷⁴ *Rankin v. Cooper*, 149 Fed. 1010, 1016.

connection with other business is no excuse.⁷⁵ This matter is further considered elsewhere.⁷⁶

§ 2497. — Director who has been granted leave of absence. Where a director who was also the president of the bank was given a leave of absence by the board for one year, on account of ill health, it was held by the Supreme Court of the United States that he was not liable for acts or omissions of the board during his absence. This was agreed to even by the four dissenting judges in the dissenting opinion of Justice Harlan. The contentions ruled against were (1) that the leave referred to absence as president and not as director; (2) that no power existed to allow leave of absence to a member of the board; (3) that the leave was an excuse for nonattendance at the bank but not for absence from the city; and (4) that if he wished to be absolved from responsibility while absent in search of restored health he should have resigned.⁷⁷

§ 2498. — Necessity for interference on obtaining knowledge of misconduct. If a director wishes to escape liability for acts of a co-director not participated in by him, he should, on learning thereof, notify the other directors and thus give them an opportunity to approve or disapprove of the acts.⁷⁸ A fortiori, a director is liable for the acts of a co-director where, although not actually participating therein, they are for their joint benefit as partners and he did not repudiate the acts when brought to his knowledge.⁷⁹ It would seem, however, that a co-director who does not participate need not, on learning of the acts of the board, take legal proceedings to set aside the executed contract.⁸⁰

In England, the rule is stated as follows: "Even a director who is aware of the intention of his fellows to make such an illegal application of the company's funds [payment of dividends from capital] is also liable, unless he takes the steps necessary to exonerate himself from liability. By sec. 34 he may do that by inscribing a

⁷⁵ "To permit this to operate as a defense in a case of this kind would be putting a premium on the failure to attend board meetings and a penalty on those who attend regularly." Rankin v. Cooper, 149 Fed. 1010, 1016.

⁷⁶ See §§ 2466-2470, supra.

⁷⁷ Briggs v. Spaulding, 141 U. S. 132, 155, 35 L. Ed. 662.

⁷⁸ Citizens' Nat. Bank v. Blizzard, — W. Va. —, 93 S. E. 338, applying rule where acts of co-director were for the joint benefit of the two.

⁷⁹ Citizens' Nat. Bank v. Blizzard, — W. Va. —, 93 S. E. 338.

⁸⁰ In re Lands Allotment Co., [1894] 1 Ch. 616, 635.

protest upon the minutes, and by giving public notice. Until this means of exonerating himself was supplied by statute his position was more difficult. He could then only relieve himself by doing everything in his power to prevent the unlawful proceeding, even going so far as to begin an action, if he could not prevent it in any other way.”⁸¹

§ 2499. — Where erring director practically controls corporation. The fact that the erring director is a man of reputed integrity and financial ability and that he practically controlled the bank does not relieve a co-director from the discharge of his official duty to the bank.⁸²

§ 2500. — Liability of directors for negligence of executive committee. The custom of boards of directors of appointing executive committees, in large corporations, is a reasonable one and to be approved, especially in the case of banks.⁸³ In banks in large cities, it is the custom to intrust to the executive committee of the board the supervision of the detail management of the corporation; and in such a case the directors not on the executive committee ordinarily are not liable for the negligence or the like of the members of the executive committee. However, as has been stated, “this custom, however, does not relieve directors generally of all responsibility. If the by-laws require monthly meetings, they must make diligent effort to be present thereat. They must give their best efforts to advance the interest of the corporation, both by advice and counsel and by active work on behalf of the corporation when such work may be assigned to them. If at their meetings, or otherwise, information should come to them of irregularity in the proceedings of the bank, they are bound to take steps to correct those irregularities. The law has no place for dummy directors. They are bound generally to use every effort that a prudent business man would use in supervising his own affairs, with the right, however, ordinarily to rely upon the vigilance of the executive committee to ascertain and report any irregularity or improvident acts in its management.”⁸⁴ Directors cannot escape liability by appoint-

⁸¹ Northern Trust Co. v. Butchard, 35 Dom. L. R. 169, 175.

⁸² Citizens' Nat. Bank v. Blizzard, — W. Va. —, 93 S. E. 338.

⁸³ Stone v. Rottman, 183 Mo. 552, 82 S. W. 76.

⁸⁴ Kavanaugh v. Gould, 147 N. Y. App. Div. 281, 131 N. Y. Supp. 1059, stating reason for rule to be that otherwise able men could not be procured as directors.

ing small committees from their number to superintend executive office and dispose of unimportant detail and routine work, but must supervise, at least in a general way, their conduct.⁸⁵ In some bank cases, however, directors who were members of the discount and examining committees of the board of directors of a bank have been held liable for defalcations of the cashier or other officer, on the ground of negligence in supervision, while directors not members of such committees have been held not liable.⁸⁶

§ 2501. **Liability of officers not directors for acts of other officers—In general.** The question of the liability of officers not directors, for the misconduct of other officers or agents does not arise as often as does the one as to the liability of directors. However, for the most part, the same principles are applicable.⁸⁷ Neither the president, treasurer nor secretary of a corporation are liable for the misconduct of each other in which they did not participate.⁸⁸ The treasurer is not liable for a libel published by the directors merely because he paid the execution on the judgment against the corporation.⁸⁹ A cashier who personally employed a bookkeeper is liable for the defaults of the bookkeeper during several years where the cashier was unable to attend to the business because of his continual drunkenness, but nevertheless continued to draw his salary.⁹⁰ As to the liability of a cashier for the misconduct of subordinates, it has been held that he "is not an insurer of the honesty and fidelity of those who occupy subordinate positions in the bank, and * * * he is not required to examine by actual inspection every original entry made by those under him, but his care extends to a general supervision of the books and affairs of the bank; and when

⁸⁵ In such a case, a man of common prudence "might not look so closely into the affairs of the business as to detect concealed and isolated instances of wrong-doing, but he would so familiarize himself with their workings that he would readily detect habitual looseness, carelessness, and wrong-doing." *Williams v. McKay*, 46 N. J. Eq. 25, 18 Atl. 824.

⁸⁶ *Warner v. Penoyer*, 91 Fed. 587, 593, 44 L. R. A. 761. *

⁸⁷ A paying teller is liable to the bank for money stolen from it by co-employees, who were his subordinates,

with his knowledge and connivance. *Latimer v. Veader*, 20 N. Y. App. Div. 418, 46 N. Y. Supp. 823.

⁸⁸ *North Hudson Mut. Building & Loan Ass'n v. Childs*, 82 Wis. 460, 33 Am. St. Rep. 57, 52 N. W. 600.

⁸⁹ *Hill v. Murphy*, 212 Mass. 1, 40 L. R. A. (N. S.) 1102, Ann. Cas. 1913 C 374, 98 N. E. 781.

⁹⁰ *Grant County Deposit Bank v. Points*, 22 Ky. L. Rep. 114, 56 S. W. 662, where, however, bank was held not entitled to recover in part because of delay.

it is shown that he has exercised such diligence as a prudent man would in the control of those under him and in the supervision of their work, he has discharged his duty."⁹¹

§ 2502. — President. The president of a corporation is generally expected to exercise a more personal supervision than an ordinary director,⁹² at least where he devotes all or a large portion of his time to the corporate business and receives an adequate salary for his labor. He should, if in fact the financial manager of the corporation, restrain the treasurer if the latter deals with the corporate funds contrary to law.⁹³ So where it is the duty of the president of a corporation to supervise its affairs, and take and keep bonds from subordinate officers, and he negligently fails to take the required bond from an officer who is intrusted with funds, and who becomes a defaulter, he is liable to the corporation for the loss.⁹⁴ But it is not necessarily negligence nor improper for the president of a company to turn over corporate bonds, which the financial officer had intrusted to the president for sale, to the vice president for sale, and the president cannot be compelled to account for the proceeds received by the vice president.⁹⁵ So it is held that the president of a small bank who receives no salary and lives upon his farm in the country, is not liable for mere omissions of duty, where the entire management was practically given over to the cashier.⁹⁶

§ 2503. — General manager. The duties of a general manager are more extensive than those of a mere director, and his liability for misdeeds of subordinates, as based on his negligence, is more extensive than the liability of a mere director for like misdeeds.⁹⁷ This question of liability of one officer for the acts of another was ably considered at some length in a Wisconsin case where it was sought to hold the general manager of a corporation engaged in manufacturing wagons liable for funds withdrawn by the secretary of the company. On the one hand it was contended that the manager, as

⁹¹ Batchelor v. Planters' Nat. Bank, 78 Ky. 435, 446.

⁹² Davenport v. Prentice, 126 N. Y. App. Div. 451, 110 N. Y. Supp. 1056.

⁹³ Com. v. Dow, 217 Mass. 473, 105 N. E. 995.

⁹⁴ Pontchartrain R. Co. v. Paulding, 11 La. 41, 30 Am. Dec. 708.

⁹⁵ Owego Gas Light Co. v. Boyer, 111 N. Y. App. Div. 140, 96 N. Y. Supp. 486.

⁹⁶ First State Bank of Nortonville v. Morton, 146 Ky. 287, 142 S. W. 694.

⁹⁷ San Pedro Lumber Co. v. Reynolds, 121 Cal. 74, 81, 82, 53 Pac. 410.

executive head of the business, was bound to know of and control every detail of every department of the company, and was liable for damages resulting from any act or omission which would have been negligent in one charged with the duty of such specific act. The other side contended that the field of activity delegated to the secretary, either by express by-law or the custom of the corporation, was wholly outside of the manager's responsibility; that they were co-ordinate officers, each independent and beyond the control of the other, and each responsible only for his own acts or omissions. The court held that neither theory was entirely right; that while the manager was not a mere co-ordinate of the secretary, yet the secretary and the bookkeeping force working under him were not a mere implement selected and entirely controlled by the manager; that the secretary and his account books were existing institutions when the manager took office, created by the board of directors, and in detail, at least, not controllable by the manager, except by appeal to the board; that nevertheless, since the conduct of that department was one of the elements involved in successful prosecution of the business, the manager owed the duty of such attention thereto and supervision thereof as the general prosperity of the enterprise demanded, subject to the limitations suggested.⁹⁸ Applying such general considerations to the facts of the particular case, the court held, *inter alia*, that the manager was guilty of negligence in failing to discover and thus in permitting the secretary to withdraw funds of the company in excess of his salary through a period of seven years; that, on discovery of the defaults, the manager was negligent in permitting him to remain in office and appropriate more funds for several months, under the belief that he might reform and reduce his indebtedness; but that the manager was not liable, however, for items entered upon the books on the day of the secretary's discharge, where only by accident could they have come to the manager's knowledge and where there was no proof of damage to the corporation.⁹⁹

It was also held in that case that it cannot be said to be negligence for the general manager of a business of considerable magnitude "to rely upon trusted employees, justly supposed to be diligent and capable, for the mere ascertainment of the amount due upon an open account."¹ In another case, a general manager was

⁹⁸ Johnson v. Stoughton Wagon Co., 118 Wis. 438, 95 N. W. 394.
118 Wis. 438, 95 N. W. 394.

¹ Johnson v. Stoughton Wagon Co.,

⁹⁹ Johnson v. Stoughton Wagon Co., 118 Wis. 438, 95 N. W. 394.

held not liable for unknown misappropriations of a clerk employed by him, in purchasing an automobile, where the directors and stockholders had full knowledge of the employment and of the authority vested in the clerk.²

F. Fraud

§ 2504. General rule. Directors or other officers of a corporation are liable to the corporation for a loss to the corporation resulting from the fraud of such officers.³ This proposition is elementary and is not disputed. In fact the question has seldom arisen, since usually the liability is sought to be enforced either upon the ground of negligence, misappropriation or acts beyond the powers of the corporation. A corporation may recover damages for conspiracy from directors who obtained control of the corporation merely to ruin it and prevent it becoming a competitor of another corporation.⁴ A manager of a corporation is personally liable to a stockholder who is damaged by a fraudulent scheme of such officer and the corporation, whereby the officer secured a benefit through the corporation which had obtained money for stock sold to such stockholder, by ultimately gaining possession of its property.⁵

Directors or other officers of a corporation are clearly liable to it for any loss which it may sustain by reason of their refusal or failure to enter into a contract for its benefit, if they do not act in good faith;⁶ but directors are not liable for refusal to accept a proposition which, although advantageous to the corporation, was conditioned upon their resignation.⁷ It is a fraud for a majority of the directors who own less than a majority of the stock, to collusively issue stock to one of their number in order to obtain control by holding a majority of the stock, and such directors may be enjoined from voting or transferring such additional stock and be

² *Bastin v. Givens' Adm'x*, 170 Ky. 201, 185 S. W. 835.

³ *Salina Mercantile Co. v. Stiefel*, 82 Kan. 7, 107 Pac. 774; *Shepard v. Morgan*, 123 N. Y. App. Div. 128, 108 N. Y. Supp. 379; *Continental Securities Co. v. Belmont*, 83 N. Y. Misc. 340, 144 N. Y. Supp. 801.

What constitutes breach of duty in general, see § 2424 et seq., *supra*.

In regard to banks, directors are liable for fraudulent conduct, "regardless of any statute, primarily to

the bank, and secondarily to its creditors, whom they have defrauded." 1 Bolles, *Modern Law of Banking*, p. 275.

⁴ *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.*, 166 Fed. 254.

⁵ *Heckendorn v. Romadka*, 138 Wis. 416, 120 N. W. 257.

⁶ See *Ritchie v. McMullen*, 79 Fed. 522, *McMullen v. Ritchie*, 64 Fed. 522.

⁷ *Bayles v. Vanderveer*, 11 N. Y. Misc. 207, 32 N. Y. Supp. 1117.

required to surrender it for cancellation.⁸ In a recent case the Court of Appeals of New York held that where plaintiff, a corporation, practically owned a subsidiary company, and defendant, who was a director of the plaintiff company, had exclusive knowledge that the manager of the subsidiary company was about to loot it, but did not warn plaintiff of the fact, he was liable for a breach of his duty as director.⁹

G. Misappropriation, Conversion or Diversion of Corporate Assets

§ 2505. General rules. The fiduciary relation of the corporate officers to the corporation and its stockholders as a whole imposes upon them the obligation to serve the purpose of their trust with fidelity, and forbids the doing of any act by them, or by any one of them, by which the assets of the corporation are wrongfully diverted from corporate purposes.¹⁰ There is little or no controversy as to the liability in general of directors or other corporate officers for misappropriation, diversion or conversion of corporate assets. Such a liability exists¹¹ and may be enforced by the corporation,¹²

⁸ *Trask v. Chase*, 107 Me. 137, 77 Atl. 698.

⁹ *General Rubber Co. v. Benedict*, 215 N. Y. 18, L. E. A. 1915 F 617, 109 N. E. 96, aff'g 164 N. Y. App. Div. 332, 149 N. Y. Supp. 880.

¹⁰ *Hanson Sheep Co. v. Farmers' & Traders' State Bank*, 53 Mont. 324, 163 Pac. 1151, applying rule to president of corporation.

¹¹ *United States*. *Cooper v. Hill*, 94 Fed. 582; *Cockrill v. Abeles*, 86 Fed. 505; *Cockrill v. Cooper*, 86 Fed. 7.

Maryland. *Murphy v. Penniman*, 105 Md. 452, 121 Am. St. Rep. 583, 66 Atl. 282.

Michigan. *Holland Furniture Co. v. Knooihuizen*, 163 N. W. 884.

Minnesota. See *Shearer v. Barnes*, 118 Minn. 179, 136 N. W. 861, following trust property into hands of third person.

New York. *Bowers v. Male*, 186 N. Y. 28, 78 N. E. 577; *Rathbone v. Ayer*, 84 App. Div. 184, 82 N. Y. Supp. 239; *Drucklieb v. Harris*, 84 Misc. 291, 147 N. Y. Supp. 298.

Texas. *Allen v. Hutcheson*, 57 Tex. Civ. App. 71, 121 S. W. 1141.

Vermont. *First Nat. Bank of Brandon v. Briggs' Estate*, 70 Vt. 599, 41 Atl. 586.

Washington. See *First Nat. Bank v. Gaddis*, 31 Wash. 596, 72 Pac. 460.

"It is settled that funds of a corporation can be lawfully used for corporate purposes only, and if misappropriated by the directors, they and whoever with notice participates with them are jointly and severally liable to the corporation for the loss and damage." *Corey v. Independent Ice Co.*, 226 Mass. 391, 393, 115 N. E. 488.

The fact that the treasurer of a brewing company deposits money in a trust company of which he was also treasurer, and mixes it so that the amount deposited cannot be determined, does not make any one except himself liable to the brewing company, and hence the trust company is not liable. *Elk Brewing Co. v. Neubert*, 213 Pa. 171, 62 Atl. 782.

¹² *Corey v. Independent Ice Co.*, 226

or by the stockholders in a proper case,¹³ and may also be enforced, in some cases, by creditors of the corporation.¹⁴ Likewise, but on a different theory, a third person whose property has been appropriated by a corporate officer may sue the officer to recover it or for damages.¹⁵ Thus, the president of a bank who has converted a deposit is personally liable to the depositor, and he may be sued upon an implied promise for money had and received.¹⁶

Directors are liable for actual misfeasance in appropriating corporate funds to their personal use, where that was the legal effect of their acts no matter by what name they were called.¹⁷ An outgoing treasurer cannot retain corporate property to pay its debts as voted by the corporation.¹⁸ So corporate officers cannot give away corporate assets.¹⁹ Thus, a director who gives part of the capital of the solvent corporation to another director is liable in an action at law to the corporation for wasting its assets.²⁰

§ 2506. Effect of officer owning all or most of the stock. If an officer is the owner of all the stock of a corporation, it seems that he may use the corporate assets as he sees fit,²¹ and there can be no misappropriation of corporate assets by him;²² but if there is even one share of stock outstanding he cannot use the corporate assets to pay his individual debts without the consent of the holder of such one share of stock.²³ Directors or other officers who misappropriate funds are liable to the corporation just the same as if they had taken the money or property of an individual, notwithstanding they owned substantially all of the stock.²⁴

If the president of a corporation, although he owns a large part of the corporate stock, takes property of the corporation for his

Mass. 391, 115 N. E. 488; *Atlantic City & S. Gas & Fuel Co. v. Johnson*, 81 N. J. Eq. 351, 514, 88 Atl. 163.

¹³ *Goodbody v. Delaney*, 82 N. J. Eq. 140, 91 Atl. 724.

¹⁴ See §§ 2579-2583, *infra*.

¹⁵ See §§ 2539-2541, *infra*.

¹⁶ *Weems v. Melton*, 47 Okla. 706, 150 Pac. 720.

¹⁷ *Bowers v. Male*, 186 N. Y. 28, 78 N. E. 577.

¹⁸ *Seven Star Grange, No. 73, Patrons of Husbandry v. Ferguson*, 98 Me. 176, 56 Atl. 648.

¹⁹ *Rankin v. Bates County Inv. Co.*, 238 Mo. 399, 141 S. W. 1118.

²⁰ *Hazard v. Wright*, 201 N. Y. 399, 94 N. E. 855, rev'g 138 N. Y. App. Div. 441, 122 N. Y. Supp. 837.

²¹ *Central Mfg. Co. v. Montgomery*, 144 Mo. App. 494, 129 S. W. 460.

²² *Central Mfg. Co. v. Montgomery*, 144 Mo. App. 494, 129 S. W. 460.

²³ *Central Mfg. Co. v. Montgomery*, 144 Mo. App. 494, 129 S. W. 460.

²⁴ *Saranac & L. P. E. Co. v. Arnold*, 167 N. Y. 368, 60 N. E. 647, rev'g 41 N. Y. App. Div. 482, 58 N. Y. Supp. 710. See also *Great Western Min. & Mfg. Co. v. Harris' Estate*, 111 Fed. 38; *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153, 69 Pac. 77,

individual use without paying for it, the law raises an implied promise on his part to pay the company what it is reasonably worth.²⁵

§ 2507. Consent or ratification. If all the stockholders of a corporation consent, and it is not detrimental to creditors, officers may appropriate corporate assets.²⁶ It follows that if there are no stockholders except the directors and officers, the latter may, of course, by unanimous consent, give away corporate property, where the rights of creditors are not impaired.²⁷ However, stockholders cannot be said to ratify misappropriations by corporate officers where they had no knowledge thereof.²⁸ Moreover, the direct or indirect misappropriation of corporate assets to the individual use or benefit of corporate officers is incapable of being authorized or ratified by a vote or any act or omission of a majority, less than the whole, of the stockholders.²⁹ In other words, the ratification by a majority of the stockholders of a misappropriation of corpo-

64 Pac. 692; *Hicks v. Steel*, 142 Mich. 292, 4 L. R. A. (N. S.) 279, 105 N. W. 767; *Luther v. C. J. Luther Co.*, 118 Wis. 112, 99 Am. St. Rep. 977, 94 N. W. 69.

²⁵ *Henry B. Worthington v. Worthington*, 100 N. Y. App. Div. 332, 91 N. Y. Supp. 443.

²⁶ *Jorndt v. Reuter Hub & Spoke Co.*, 112 Mo. App. 341, 87 S. W. 29.

Where all the real stockholders and a majority of the directors agree to a particular appropriation of the corporate funds, and that leaves the corporation still solvent, no one can complain. *Watts v. Gordon*, 127 Tenn. 96, 153 S. W. 483.

²⁷ *Jorndt v. Reuter Hub & Spoke Co.*, 112 Mo. App. 341, 87 S. W. 29.

Thus, if the corporate officers are the only stockholders, and they allowed all the officers to get their fuel from the cast-off products of the foundry, the corporation cannot recover the value of the stuff taken by the president as a defense to his claim for salary, on the theory of a tortious conversion. *Jorndt v. Reuter Hub & Spoke Co.*, 112 Mo. App. 341, 87 S. W. 29.

²⁸ *Von Arnim v. American Tube Works*, 188 Mass. 515, 74 N. E. 680.

Mere silence by a stockholder is not a ratification of a misappropriation of corporate funds, where he had no knowledge of the misappropriation. *Von Arnim v. American Tube Works*, 188 Mass. 515, 74 N. E. 680.

²⁹ *Pollitz v. Wabash R. Co.*, 207 N. Y. 113, 100 N. E. 721; *Continental Securities Co. v. Belmont*, 206 N. Y. 7, 15, 18, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914 A 777, 99 N. E. 138, 83 N. Y. Misc. 340, 144 N. Y. Supp. 801; *Bagshaw v. Eastern Union Ry. Co.*, 7 Hare 114. To same effect, *McConnell v. Combination Mining & Milling Co.*, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194.

"It is well settled that a misappropriation of the funds of a corporation cannot be ratified as against the rights of creditors by all the stockholders of the corporation, and that no such ratification, even by all but one of the stockholders, would be binding upon the corporation itself. *Continental Securities Co. v. Belmont*, 206 N. Y. 7, 18, 99 N. E. 138, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914 A

rate funds does not bind a dissenting minority stockholder.³⁰ Thus it is held that "nothing less than the unanimous action of the whole body of stockholders can authorize the use of the corporate credit for the benefit of an individual" and "nothing short of the unanimous action of the whole body can ratify such action after it is done."³¹

§ 2508. Benefit to officer as immaterial. A bank teller who aids the cashier in taking the funds of the bank for the use of the cashier, under the directions of the cashier, is liable to the bank where he acted with knowledge, although he received none of the money.³²

§ 2509. Illustrations of rules—In general. Of course, the treasurer must account for moneys received,³³ as much as the cashier of a bank.³⁴ So the president of a company may be required to account for corporate funds which have been misappropriated by him.³⁵ The misappropriation may take the form of speculations with corporate funds.³⁶ If the treasurer unlawfully carries the funds of the corporation into another state, he cannot relieve himself from liability by turning them over to a successor, where the

777; *Pollitz v. Wabash R. R. Co.*, 207 N. Y. 113, 127, 100 N. E. 721." *E. Moch Co. v. Security Bank of New York*, 176 N. Y. App. Div. 842, 163 N. Y. Supp. 277.

³⁰ *Von Arnim v. American Tube Works*, 188 Mass. 515, 74 N. E. 680; *Theobald v. United States Rubber Co.*, 83 N. Y. Misc. 627, 146 N. Y. Supp. 597.

³¹ *Gross Iron Ore Co. v. Paille*, 132 Minn. 160, 156 N. W. 268.

³² *Hobart v. Dovell*, 38 N. J. Eq. 553, 563.

³³ *Muhlhauser v. Cleveland Hospital for Women & Children*, 21 Ohio Cir. Ct. 88, 11 Ohio Cir. Dec. 391; *Equitable Savings & Loan Ass'n v. Roland*, 198 Pa. 643, 48 Atl. 866.

³⁴ The cashier of a bank is liable to creditors where he uses corporate funds to buy his own stock, and a statute forbids banks to purchase their own stock. (*United Securities Co. v. Ostenberg*, 60 Colo. 249, 152

Pac. 1163), but this ruling is more properly based on the ground of doing an ultra vires act.

³⁵ *Red Bud Realty Co. v. South*, 96 Ark. 281, 131 S. W. 340.

The president of an insurance company has been held personally liable to policyholders for moneys paid out of the corporate funds to a newly elected manager for a list of the policyholders in a moribund company which shortly after went into the hands of a receiver, where such payment was in connection with and induced by a large increase of salary to the president. *Moulton v. Field*, 179 Fed. 673, aff'g 166 Fed. 607.

One who is the president and superintendent of a company cannot charge it with his expenses for dinner and entertainments to prospective purchasers of stocks. *Eber v. Alaska Mildred Gold Min. Co.*, 167 Fed. 456.

³⁶ *Redmond v. Dickerson*, 9 N. J. Eq. 507, 59 Am. Dec. 418.

latter was elected at a stockholders' meeting illegally held in such other state instead of the state of incorporation.³⁷

On the same theory, a salary whether fair or not, voted by the directors to one of their number, is unlawful, and he may be compelled to account therefor where he took part in the proceedings and his vote was essential to the adoption of the resolution.³⁸ This question is more fully considered in a subsequent chapter relating to compensation of officers.³⁹ But a secretary of a corporation to whom a salary is unlawfully paid is not liable for misappropriation where he is not a director and was not connected in any way with the fraudulent misappropriation.⁴⁰

It has been held that the seller of shares of stock to the treasurer of the corporation is not charged with notice that the treasurer is misappropriating corporate funds, where he gives in payment a check signed by him as treasurer of the corporation.⁴¹

§ 2510. — Sale or transfer of corporate assets. A sale without authority makes the officer who made the sale personally liable.⁴² Thus, the directors are personally liable to the corporation for a diversion where they wrongfully transferred all its assets to a consolidated corporation.⁴³ If the president of a corporation sells property constituting the only assets of the corporation, and thereafter obtains a cancellation of the purchase price mortgage so as to leave the corporation with practically no assets, he is personally liable for the purchase price.⁴⁴ So a treasurer who distributes corporate moneys to himself and certain other stockholders who owned practically all of the stock of the corporation, is liable therefor to the corporation, where no dividend had been declared nor distribution au-

³⁷ *Kent v. Honsinger*, 167 Fed. 619.

³⁸ *Martin v. Santa Cruz Water Storage Co.*, 4 Ariz. 171, 36 Pac. 36; *Wickersham v. Crittenden*, 106 Cal. 327, 39 Pac. 602; *McConnell v. Combination Mining & Milling Co.*, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 104.

³⁹ *Infra*, Chap. 43.

⁴⁰ *McConnell v. Combination Mining & Milling Co.*, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194, *aff'd* 31 Mont. 563, 79 Pac. 248.

⁴¹ *Fillebrown v. Hayward*, 190 Mass. 472, 77 N. E. 45.

⁴² The president of a corporation

cannot sell its treasury stock without authority from the board of directors, without rendering himself liable to account for the proceeds, and the amount thereof may properly be set off against an indebtedness of the corporation to him. *In re Utica Nat. Brewing Co.*, 154 N. Y. 268, 48 N. E. 521.

⁴³ *Alabama Fidelity Mortgage & Bond Co. v. Dubberly*, — Ala. —, 73 So. 911.

⁴⁴ *Brinckerhoff v. Roosevelt*, 143 Fed. 478.

thorized by the board of directors.⁴⁵ There is a diversion where directors of an insolvent corporation, on selling its property, convert to their own uses capital stock of the purchasing company which was received in part payment.⁴⁶ Thus, where, on selling all the property of an insolvent corporation, the directors receive in part payment stock of the purchasing corporation, and they convert it to their personal uses by taking the stock in their own name, they are liable to their corporation for the value of the stock at the time it was taken.⁴⁷

§ 2511. — **Stock transactions.** The subject of the misappropriation is often shares of stock.⁴⁸ Stockholders may hold corporate officers individually liable where they cause a large amount of stock to be issued to themselves upon a consideration grossly inadequate, if not wholly valueless.⁴⁹ Where directors cause shares of stock to be issued and delivered to themselves through a circuitous channel and upon a grossly inadequate consideration, there is such a fraud and misappropriation as to make the directors personally liable.⁵⁰ So the manager of a corporation, who has by agreement cancelled part of the stock owned by him and had new certificates issued to him as manager of the corporation for its benefit, is liable to the corporation for the misappropriation of the proceeds of such stock.⁵¹ Purchases of corporate stock by corporate officers with corporate assets makes such officers trustees of the stock for the benefit of the corporation.⁵²

§ 2512. — **Payment of personal debts of officers.** Directors or other corporate officers have no authority to use corporate funds to pay their private debts;⁵³ and it is immaterial that a majority of

⁴⁵ Cheat Valley R. Co. v. Humes, 211 Pa. 287, 60 Atl. 908.

⁴⁶ Folsom v. Smith, 113 Me. 83, 92 Atl. 1003.

⁴⁷ Folsom v. Smith, 113 Me. 83, 92 Atl. 1003.

⁴⁸ A manager of a corporation may make a valid gift of shares which he owns to the corporation, and a misappropriation thereof later will render him liable. Wheeler v. Mineral Farm Consol. Min. Co., 31 Colo. 110, 71 Pac. 1101.

⁴⁹ Pollitz v. Wabash R. Co., 207 N. Y. 113, 100 N. E. 721.

⁵⁰ Pollitz v. Wabash R. Co., 207 N. Y. 113, 100 N. E. 721, 150 N. Y. App. Div. 715, 135 N. Y. Supp. 789.

⁵¹ Wheeler v. Mineral Farm Consol. Min. Co., 31 Colo. 110, 71 Pac. 1101.

⁵² Barker v. Montana Gold, Silver, Platinum & Tellurium Min. Co., 35 Mont. 351, 89 Pac. 66.

⁵³ "The rule that an agent cannot use the property of his principal to pay his own debt applies to agents of every grade. The director of a corporation is no more exempt from this rule than the humblest agent in its service." Kenyon Realty Co. v.

the directors knew of such use and consented thereto, since a contract which directors have no power to make cannot be ratified by them.⁵⁴ Thus payment of attorney's fees from corporate funds for services to the directors individually may be recovered from the directors by the corporation.⁵⁵ So the president and general manager is liable to the corporation where he pays attorneys for services rendered to him as an individual.⁵⁶ The expenses of defending such a suit are not chargeable to the corporation notwithstanding the company is made a nominal defendant.⁵⁷ The act of directors in hiring lawyers to act for or defend themselves personally, and paying them out of the corporate assets is, of course, a breach of duty for which the corporation may recover.⁵⁸ But there is no diversion where the directors lawfully spend money to employ counsel to appear and act for the corporation in defending suits brought by stockholders, acting solely for their own interests, to set aside a reorganization of the corporation.⁵⁹

§ 2513. — Excessive salaries. The diversion may take the shape of excessive salaries voted and paid to themselves or others by the officers in power, for which they are liable to the corporation at least as to the excess.⁶⁰ Thus, the manager of a bankrupt company is liable for the amount of salary received by him in excess of a fair compensation for services rendered.⁶¹ The misappropriation may

National Deposit Bank, 140 Ky. 133, 31 L. R. A. (N. S.) 169, 130 S. W. 965.

⁵⁴ *Kenyon Realty Co. v. National Deposit Bank*, 140 Ky. 133, 31 L. R. A. (N. S.) 169, 130 S. W. 965.

⁵⁵ *Percy v. Millaudon*, 3 La. 568, 8 Mart. N. S. (La.) 68; *Hooker, Corser & Mitchell Co. v. Hooker*, 88 Vt. 335, 92 Atl. 443.

Rule also applies to other officers. *Wickersham v. Crittenden*, 106 Cal. 329, 39 Pac. 603.

⁵⁶ *Chabot & Richard Co. v. Chabot*, 109 Me. 403, 84 Atl. 892.

⁵⁷ *McConnell v. Combination Mining & Milling Co.*, 31 Mont. 563, 79 Pac. 248.

⁵⁸ *Hooker, Corser & Mitchell Co. v. Hooker*, 88 Vt. 335, 92 Atl. 443.

⁵⁹ *Corey v. Independent Ice Co.*, 226 Mass. 391, 115 N. E. 488.

⁶⁰ *United States. Wight v. Heu-*

blein, 238 Fed. 321; *Harrison v. Thomas*, 112 Fed. 22.

Indiana. Green v. Felton, 42 Ind. App. 675, 84 N. E. 166.

Maryland. Matthews v. Headley Chocolate Co., 100 Atl. 645.

Minnesota. Green v. National Advertising & Amusement Co., 162 N. W. 1056.

New Jersey. Lillard v. Oil, Paint & Drug Co., 70 N. J. Eq. 197, 58 Atl. 188, 56 Atl. 254.

New York. Tilton v. Gans, 90 Misc. 84, 152 N. Y. Supp. 981, aff'd 168 App. Div. 908, 910, 152 N. Y. Supp. 1146; *A. & M. Robbins v. Hill*, 81 Misc. 441, 142 N. Y. Supp. 637; *Miller v. Crown Perfumery Co.*, 57 Misc. 383, 109 N. Y. Supp. 760.

⁶¹ *Atherton v. Emerson*, 199 Mass. 199, 85 N. E. 530.

consist of payments by directors to themselves of money as additional salary, where excessive, although disguised as a dividend.⁶³ So directors cannot vote themselves stock bonuses for certain acts where they have received pay for such acts.⁶³

An interesting case, decided in 1917 by the Court of Appeals of Maryland, involved the right of a corporation to recover from directors and other officers the amount of excessive salaries paid out by the directors. The facts were somewhat peculiar, in that, after directors had voted and paid themselves excessive salaries, one of them sold a controlling interest in the corporation to a third person after which, a new board having been elected, the corporation itself filed a bill against the former directors to recover from them the amount paid as salaries so far as excessive. The main question involved was whether the corporation itself could sue—it being admitted that minority stockholders could have sued—by reason of the fact that the holder of the controlling interest purchased it from one of the directors against whom recovery was sought. The court held that the rule that stockholders who become such after excessive salaries are voted and paid to officers, cannot recover the excess as against the directors, was applicable; but that a recovery might be had in the name of the corporation for the benefit of minority stockholders, to the extent “of the proportions of the sum recovered due such minority stockholders, if any, as are not barred by laches, limitations, acquiescence, or other way sufficient to bar them in equity, and anything recovered should be directed to be paid to them by the corporation.”⁶⁴

§ 2514. — Freezing out former partner. This claim of misappropriation of corporate funds often arises in case of a dispute arising from the incorporation of a trading partnership followed by the death or incapacity of one of the members and the adoption by the others of measures to limit the dividends of the inactive stockholder to what they conceive he ought to have.⁶⁵ In such cases, if the di-

⁶³ Godley v. Crandall & Godley Co., 153 N. Y. App. Div. 697, 139 N. Y. Supp. 236.

⁶³ Central Consumers' Wine & Liquor Co. v. Madden (N. J. Ch.), 68 Atl. 777.

Gifts of stock to each director as a reward for selling stock are fraudulent where they had received commis-

sions as agents for such sales. Central Consumers' Wine & Liquor Co. v. Madden (N. J. Ch.), 68 Atl. 777.

⁶⁴ Matthews v. Headley Chocolate Co., 130 Md. 523, 100 Atl. 645.

⁶⁵ See Godley v. Crandall & Godley Co., 212 N. Y. 121, L. R. A. 1915 D 632, 105 N. E. 818.

It seems that the appropriation of

rectors distribute the surplus earnings among themselves and certain employee stockholders under the guise of additional salaries but upon the uniform basis of a certain per cent. of the capital stock held by each, and not according to the services rendered the corporation by the distributees, the directors are personally liable to the corporation and to its stockholders for the misappropriation.⁶⁶

§ 2515. Payment of debts. There is no unlawful diversion of corporate funds, so far as the corporation itself is concerned, merely because directors pay a particular corporate debt,⁶⁷ even if thereby they save themselves as guarantors.⁶⁸ So directors are not responsible for paying a just debt notwithstanding the corporation was insolvent at the time, but if the payment was an unlawful preference the remedy is against the creditor.⁶⁹ But the corporation may sue its vice president for paying out corporate funds to one who he knew was not entitled to receive them.⁷⁰

§ 2516. Remedies for conversion. If a corporate officer misappropriates corporate funds and then invests them for himself personally, equity regards such investment as made for the benefit of the corporation and will enforce the trust resulting in favor of the corporation.⁷¹ If a corporate officer invests its funds in stock of the company, the corporation has the option either to hold the stock as its own or to hold the officer personally liable.⁷²

§ 2517. Extent of liability. Where all the directors either join or consent to a misappropriation of corporate funds, each is liable for the entire amount diverted, without regard to the degree of

the business and good-will of a corporation by majority officers, in an attempt to freeze out minority interests, makes them liable to account to such minority stockholders for the reasonable value of such good-will. *Godley v. Crandall & Godley Co.*, 153 N. Y. App. Div. 697, 139 N. Y. Supp. 236.

⁶⁶ *Godley v. Crandall & Godley Co.*, 212 N. Y. 121, L. R. A. 1915 D 632, 105 N. E. 818.

⁶⁷ See *Manhattan Fire Ins. Co. City of New York v. Fox*, 74 N. Y. App. Div. 271, 77 N. Y. Supp. 657, aff'd

without opinion in 177 N. Y. 576, 69 N. E. 1126.

⁶⁸ *Folsom v. Smith*, 113 Me. 83, 92 Atl. 1003.

⁶⁹ *Wait v. McKee*, 95 Ark. 124, 128 S. W. 1028.

⁷⁰ *Mutual Life Ins. Co. v. Granniss*, 60 N. Y. Misc. 187, 112 N. Y. Supp. 1074. But see same case in 57 N. Y. Misc. 174, 107 N. Y. Supp. 926.

⁷¹ *Red Bud Realty Co. v. South*, 96 Ark. 281, 131 S. W. 340.

⁷² *Dacovich v. Canizas*, 152 Ala. 287, 44 So. 473.

dereliction of which each is guilty.⁷³ In a proper case, interest is recoverable.⁷⁴ If directors unlawfully and knowingly receive money in excess of what is due, they are liable for interest in a suit to recover such moneys.⁷⁵ Thus, the treasurer is liable to the corporation for interest on corporate money used by him for personal purposes for more than a year, notwithstanding such use created an overdraft in a bank.⁷⁶

§ 2518. Question as one for jury. Generally the question whether there actually was a misappropriation is one of fact for the jury.⁷⁷

XXVII. LIABILITY OF OFFICERS ON CORPORATE CONTRACTS OR FOR DEBTS
OF THE CORPORATION

§ 2519. General considerations. The principles governing the liability of agents to third persons, as set forth in leading textbooks on the law of agency,⁷⁸ apply equally well where third persons attempt to hold officers or agents personally liable on corporate contracts executed by them. Hence, reference should be made thereto for a more extended discussion of the law applicable to this subject.

§ 2520. Authorized contract for disclosed principal. If a corporate officer makes an authorized contract in the name of the corporation, so as to bind the corporation, the contract is with the corporation only, and the other party to the contract cannot hold the officer personally liable, where there is no statute creating such a liability, unless the contract is so worded or signed as to make the officer liable. If he contracts in the name of the corporation, or in

⁷³ Cooper v. Hill, 94 Fed. 582, 587.

⁷⁴ Rogers Hardware Co. v. Rogers, 10 Dom. L. R. (Can.) 541.

Where a treasurer draws corporate funds from the bank and uses them for a period of more than a year, the withdrawing of the funds constituting an overdraft at the bank and being used for private purposes, he may be charged with interest on the money. Oregon Gold Min. Co. v. Schmidt, 22 Ky. L. Rep. 1330, 60 S. W. 530.

When directors or other officers of a corporation have misappropriated its funds, they are liable for interest

on the amount from the date of the misappropriation, as damages. Cooper v. Hill, 94 Fed. 582.

⁷⁵ Marvel v. Endicott, 85 N. J. Eq. 52, 95 Atl. 361, aff'g 81 N. J. Eq. 378, 87 Atl. 230.

⁷⁶ Oregon Gold Min. Co. v. Schmidt, 22 Ky. L. Rep. 1330, 60 S. W. 530.

⁷⁷ Saranac & L. P. R. Co. v. Arnold, 167 N. Y. 368, 60 N. E. 647, rev'g 41 N. Y. App. Div. 482, 58 N. Y. Supp. 710.

⁷⁸ See 1 Mechem, Agency (2nd Ed.), §§ 1356-1450; 2 Clark & Skyles, Agency, §§ 524-542.

his own name as officer or agent, with the understanding on the part of both parties that the contract is with the corporation, he is clearly not personally liable, if the contract is within his authority, or is ratified by the corporation.⁷⁹ This proposition is too elementary to require citation of authorities, and is supported by the governing rule relating to agencies in general.⁸⁰ Liability for corporate debts does not rest upon corporate officers personally.⁸¹

"Corporators and officers of corporations acting in good faith within the limits of its legitimate corporate powers ought not to be, and will not be, held liable for its contract, in the absence of a statute making them so, although it turns out in its future operations, and as the result thereof, that it is wholly unable to meet them."⁸²

§ 2521. Personal liability expressly agreed upon. Of course, a corporate officer may make himself personally liable on a corporate contract or for a corporate debt by an express agreement.⁸³ Thus, an officer may make himself personally liable on a corporate contract by guaranteeing its performance.⁸⁴ So directors may bind themselves individually to pay corporate taxes.⁸⁵ And the other party to a contract may hold the officer liable for services rendered

⁷⁹ **Alabama.** *Sampson v. Fox*, 109 Ala. 662, 670, 55 Am. St. Rep. 950, 19 So. 896.

Connecticut. *Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 429.

Illinois. *McCormick v. Seeberger*, 73 Ill. App. 87, aff'd 178 Ill. 404, 53 N. E. 340, writ of error dismissed 175 U. S. 274, 44 L. Ed. 161; *Fisk v. Carbonized Stone Co.*, 67 Ill. App. 327.

Massachusetts. *Mann v. Chandler*, 9 Mass. 335.

Rhode Island. *Pease v. Francis*, 25 R. I. 226, 55 Atl. 686.

Vermont. *Hall v. Huntoon*, 17 Vt. 244, 44 Am. Dec. 332.

England. *Ferguson v. Wilson*, 2 Ch. App. 77.

And see the valuable note on personal liability of officers of corporations to third persons in 48 Am. St. Rep. 913, 916.

⁸⁰ See 2 Clark & Skyles, Agency, § 564.

⁸¹ *Tishomingo Elec. Light & Power Co. v. Burton*, 6 Indian T. 445, 98 S. W. 154; *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370, 91 N. W. 376; *Tilley v. Coykendall*, 172 N. Y. 587, 65 N. E. 574.

⁸² *Shoun v. Armstrong* (Tenn. Ch. App.), 59 S. W. 790.

⁸³ *Buffalo Loan, Trust & Safe Deposit Co. v. Carstensen*, 107 N. Y. App. Div. 128, 94 N. Y. Supp. 907, aff'd without opinion in 186 N. Y. 608, 79 N. E. 1101.

⁸⁴ *J. L. Mott Iron Works v. Clark*, 87 S. C. 199, 69 S. E. 227, where president of corporation wrote: "I will see that you are protected in any dealings that you may have with this corporation," and signed it "W. A. Clark, Presd't."

⁸⁵ *State of New Jersey v. Limburg*, 54 N. Y. Misc. 404, 105 N. Y. Supp. 1016.

the corporation where the officer agrees to pay him himself if he will continue work.⁸⁶ An agreement by corporate officers, by separate instrument, to be jointly bound on obligations of the corporation, in consideration of loans to the corporation, cannot be construed as an indorsement of notes in a state where the Negotiable Instruments Law has been enacted, since it requires an indorsement to be made on the instrument or on an attached paper.⁸⁷

§ 2522. Personal liability as undisclosed agent for corporation. The rule that where an agent enters into a contract in his own name for an undisclosed principal, the other party to the contract may hold the agent personally liable⁸⁸ applies equally well to corporate officers or agents.⁸⁹ If an officer or agent of a corporation enters into a contract without disclosing the fact that he is acting for the corporation, or otherwise than individually, the other party may, at his election, either hold the corporation on the contract, or hold the officer personally liable, but he cannot hold both.⁹⁰ The other party to the contract may elect to sue the corporation where it has accepted the benefits of the contract.⁹¹

This rule does not apply, however, unless the agent expressly binds himself, where the party dealing with him has knowledge of the agency or of circumstances which, if inquired into, would have disclosed the principal.⁹² Thus, where the president of an incorpo-

⁸⁶ See *Anderson v. Dailey*, 25 Colo. App. 175, 136 Pac. 461.

⁸⁷ *First Nat. Bank of Louisville v. Doherty*, 156 Ky. 386, 161 S. W. 211.

⁸⁸ See 2 *Clark & Skyles, Agency*, § 568.

⁸⁹ *Indiana. Polk v. Haworth*, 48 Ind. App. 32, 95 N. E. 332.

Massachusetts. Chelmsford Foundry Co. v. Shepard, 206 Mass. 102, 92 N. E. 75.

New Hampshire. Hilliard v. Upper Coos R. R., 77 N. H. 129, 88 Atl. 993.

New York. Donohue v. Watson, 72 Misc. 56, 128 N. Y. Supp. 1089; *Cook v. Williams*, 85 N. Y. Supp. 1123.

Vermont. Curtis v. Watson, 64 Vt. 336, 25 Atl. 478.

Where a contract is made by a corporate officer with one who understands in the transaction that he is

dealing with the officer as an individual and is unaware of the interest of the corporation, the officer becomes bound personally. *Cook v. Williams*, 85 N. Y. Supp. 1123.

⁹⁰ *Neely v. State*, 60 Ark. 66, 27 L. R. A. 503, 46 Am. St. Rep. 148, 28 S. W. 800; *Holt v. Ross*, 54 N. Y. 472, 13 Am. Rep. 615.

⁹¹ *Nesbitt v. Cherry Creek Irrigation Co.*, 38 Nev. 150, 145 Pac. 929.

Where one deals with property which he holds as an officer or agent of the corporation or in trust, and signs individually, but is acting as agent in reference to the property, the corporation is bound. *Fountain v. West Lumber Co.*, 161 N. C. 35, 76 S. E. 533.

⁹² 2 *Clark & Skyles, Agency*, § 568d.

rated university, without expressly binding himself, requested an architect to prepare plans and specifications for a university building, the latter being aware of circumstances which, if inquired into, would have shown that the contract was for the university, the president is not personally liable.⁹³

§ 2523. Liability in case of pretended but nonexistent corporation. This principle of individual liability also applies where a person enters into a contract in the name of a pretended corporation, or of an association which, in attempting to organize, has not so far complied with the law as to acquire a *de facto* corporate existence, or the power to commence business and enter into contracts,⁹⁴ or in the name of a foreign corporation which has not complied with the statutes of the state prescribing conditions precedent to the right to do business therein.⁹⁵ In Illinois a statute expressly imposes personal liability upon officers who contract in the name of a pretended corporation.⁹⁶

Closely akin to this principle is the rule that where the business for which a body is incorporated is not within the classes of business enumerated in the statute authorizing the creation of corporations, the incorporators are liable as partners.⁹⁷

§ 2524. Liability where corporation *de jure* not yet authorized to do business. In Illinois it is held that where a corporation (in this case a national bank) executed a lease before it was authorized to do business, the directors are liable upon the implied warranty of their authority to act on behalf of the corporation, where they knew of their want of authority while the other party to the contract had no such knowledge.⁹⁸

⁹³ *Johnson v. Armstrong*, 83 Tex. 325, 29 Am. St. Rep. 648, 18 S. W. 594.

⁹⁴ *Lewis v. Tilton*, 64 Iowa 220, 52 Am. Rep. 436, 19 N. W. 911; *Farmers' Co-operative Trust Co. v. Floyd*, 47 Ohio St. 525, 12 L. R. A. 346, 21 Am. St. Rep. 846, 26 N. E. 110; *Bartholomew v. Bentley*, 15 Ohio 659, 45 Am. Dec. 596; *Lasher v. Stimson*, 145 Pa. St. 30, 23 Atl. 552. Compare *Seeberger v. McCormick*, 178 Ill. 404, 53 N. E. 340 writ of error dismissed 175 U. S. 574, 44 L. Ed. 161.

Rules as to personal liability of pro-

motors on their contracts, see §§ 158, 159, vol. 1.

⁹⁵ *Infra*, chapter on Foreign Corporations.

⁹⁶ To authorize a recovery, plaintiff must prove that defendant acted as officer, that there was no such corporation, and that such officer contracted in the name of the corporation. *Title Guaranty & Surety Co. v. Turnes*, 182 Ill. App. 23.

⁹⁷ See § 281, vol. 1, and also *Staacke v. Routledge*, — Tex. Civ. App. —, 175 S. W. 444.

⁹⁸ *Seeberger v. McCormick*, 178 Ill.

§ 2525. Personal liability where officer exceeds his authority—
General rule. The rule of agency that if an agent acts without or in excess of his authority, so that his principal is not bound, he will himself be liable, provided the other party did not know of his want of authority,⁹⁹ applies equally well to corporate officers and agents. If an officer enters into a contract for and in the name of the corporation, but in excess of his authority, and the contract is not ratified by the corporation, the other party not having knowledge of his want of authority, he is personally liable, in some jurisdictions, on the contract itself, or in an action of assumpsit, on the theory of an implied warranty of authority, and, in other jurisdictions, in an action on the case for false warranty of authority.¹ However, it has

404, 53 N. E. 340, aff'g 73 Ill. App. 87, writ of error dismissed 175 U. S. 274, 44 L. Ed. 161.

⁹⁹ 1 Mechem, Agency (2nd Ed.), § 1363 et seq.; 2 Clark & Skyles, Agency, § 577 et seq.

¹ **Arkansas.** Dale v. Donaldson Lumber Co., 48 Ark. 188, 3 Am. St. Rep. 224, 2 S. W. 703.

California. Wallace v. Bentley, 77 Cal. 19, 11 Am. St. Rep. 231, 18 Pac. 788; Farmers' & Mechanics' Bank v. Colby, 64 Cal. 352, 28 Pac. 118.

Illinois. Frankland v. Johnson, 147 Ill. 520, 37 Am. St. Rep. 234, 35 N. E. 480.

Maryland. Keener v. Harrod, 2 Md. 63, 56 Am. Dec. 706.

Massachusetts. Jefts v. York, 10 Cush. 392.

Michigan. Solomon v. Penoyer, 89 Mich. 11, 50 N. W. 644; Knickerbocker v. Wilcox, 83 Mich. 200, 21 Am. St. Rep. 595, 47 N. W. 123.

New Hampshire. Weare v. Gove, 44 N. H. 196.

New York. White v. Madison, 26 N. Y. 117; Walker v. Bank of State of New York, 9 N. Y. 582; Nellegan v. Campbell, 65 Hun 622, 20 N. Y. Supp. 234.

Ohio. Farmers' Co-operative Trust Co. v. Floyd, 47 Ohio St. 525, 12 L. R. A. 346, 21 Am. St. Rep. 846.

Pennsylvania. Lasher v. Stimson, 145 Pa. St. 30, 23 Atl. 552.

South Dakota. Small v. Elliott, 12 S. D. 570, 76 Am. St. Rep. 630, 82 N. W. 92.

West Virginia. Danser v. Dorr, 72 W. Va. 430, 78 S. E. 367.

Wisconsin. McCurdy v. Rogers, 21 Wis. 197, 91 Am. Dec. 468.

England. Collen v. Wright, 8 El. & Bl. 647, 7 El. & Cl. 301; Cherry v. Colonial Bank of Australasia, L. R. 3 P. C. 24.

If the president indorses a note in the name of the corporation without authority, he cannot charge the company with the amount he paid on the note. Triplett v. Fauver, 103 Va. 123, 48 S. E. 875.

So where a corporate officer holds himself out as acting for a corporation, although not possessing authority in fact, his agreement to repay money which was paid to the corporation for an option to purchase its land upon the surrender of the option does not constitute a promise to answer for the debt of another, within the meaning of the statute of frauds. The officer, therefore, renders himself personally liable by such agreement. The court said: "It is well settled that an agent purporting to act for and bind a principal whom he has no

been held that where two persons sign a note in behalf of the corporation by subscribing the corporate name together with their names and titles, and then indorse the note as individuals, they cannot be held individually liable as makers although they had no authority to sign the note for the corporation, for the reason that the contract, i. e., the note, was not drawn so as to make the alleged agents a primary contracting party thereto.²

§ 2526. — Where other party to contract has knowledge, or is chargeable with knowledge, of want of power. There is no personal liability where the other party to the contract has knowledge, or is chargeable with knowledge, of the want of authority of the officer.³

§ 2527. — Where contract ratified by corporation. If the officer acted in excess of his authority, but the contract is validated by its ratification by the corporation, then the officer is not personally liable thereon.⁴ Thus, if persons execute a note for a corporation with knowledge that they have no authority to do so, but the corporation becomes liable on the note because of ratification or estoppel, the former cannot thereafter be held liable in an action for deceit.⁵

§ 2528. — Where there is mutual mistake of law as to authority. So far as agents in general are concerned, it has been said that

authority to bind, and who does not thereby become bound, is liable, not on the contract which he attempts to make, but for breach of implied warranty, or in tort, to the extent of any damages resulting to the other party from his misrepresentation of authority. In order to establish the individual liability of the person thus purporting to act as agent, it is not essential to show that his express or implied representations as to authority were intentionally false. If one who in fact has no authority to represent another as principal assumes to make a binding contract as agent in behalf of such principal with another, who is not charged with knowledge of such want of authority, he renders himself liable in damages to the other party to the assumed contract. And this principle is applicable to officers

or corporations acting in excess of their authority." *Groeltz v. Armstrong*, 125 Iowa 39, 99 N. W. 128.

² *McDonald v. Luckenbach*, 170 Fed. 434, rev'g 164 Fed. 296, and discussing question at length.

³ *McDonald v. Luckenbach*, 170 Fed. 434; *Sourwine v. McRoy Clay Works*, 42 Ind. App. 358, 85 N. E. 782. See generally 2 Clark & Skyles, Agency, § 582a.

⁴ See *Moody & Meckelburg Co. v. Trustees of M. E. Church of Port Washington*, 99 Wis. 49, 74 N. W. 572, applying rule to minister of church. See generally 2 Clark & Skyles, Agency, § 584.

⁵ *Chieppo v. Chieppo*, 88 Conn. 233, 90 Atl. 940. To same effect, see *Shawmut Commercial Paper Co. v. Auerbach*, 214 Mass. 363, 101 N. E. 1000.

"where all the facts and circumstances surrounding the case are known to both the agent and third party, but there is a mutual mistake as to a matter of law—as the principal's liability or the legal effect of the agent's written authority—the agent cannot be held personally responsible by reason of the mere fact that the principal cannot be held, unless the agent by some apt expression guarantees the contract or assumes it himself."⁶ This rule has been applied to corporate officers.⁷

§ 2529. — **Remedy as on contract or on tort.** There is some conflict of opinion, in case of agencies in general, in such a case, as to whether the liability is based on the contract or is for deceit or breach of warranty of authority.⁸ In Virginia, it was held that a corporate officer cannot be held personally liable on a corporate contract merely because he misrepresented his authority to make the contract for the company.⁹

Justice Prentice states the better rule in a late Connecticut case as follows: "It does not, however, follow that officers of a corporation who, acting in excess of their authority, assume to obligate it by contracts executed by them in the name of the corporation may not incur personal liability. On the contrary, they, under certain circumstances, may. The liability thus incurred, however, is not one which is created by the contract, but is collateral to it. * * * They will render themselves liable for tortious conduct if they knowingly or carelessly assume to bind the corporation without authority, or misrepresent or conceal the true state of their authority, and thus falsely lead others to repose in it. * * * The liabil-

⁶ 2 Clark & Skyles, Agency, § 582b.

⁷ Sourwine v. McRoy Clay Works, 42 Ind. App. 358, 85 N. E. 782. See also Seeberger v. McCormick, 178 Ill. 404, 53 N. E. 340, aff'g 73 Ill. App. 87, writ of error dismissed 175 U. S. 274, 44 L. Ed. 161; Standard Underground Cable Co. v. Southern Independent Tel. Co., — Tex. Civ. App. —, 134 S. W. 429.

⁸ See 2 Clark & Skyles, Agency, § 585b-d.

⁹ "This case was tried on the rejected theory that if the contract did not bind the principal because of lack

of authority in the agent to make it, the agent himself was personally liable thereon. The objection to such procedure is not technical, but substantial. The action is on the contract, and if that be void, a recovery thereon cannot be had against the agent on the assumption that ultimately he may be held answerable to the plaintiff (not upon contract, but in a special action on the case) upon the implied undertaking that he possessed the authority which he assumed to exercise." Lancaster v. Stokes, 119 Va. 149, 89 S. E. 85.

ity does not flow from the obligation of the contract, but from the wrong, and rests upon that foundation solely."¹⁰

§ 2530. Personal liability where contract ultra vires. There is some conflict of opinion as to whether corporate officers are ever personally liable to persons contracting with them as representatives of the corporation merely because the contract is ultra vires.¹¹ Liability is held to exist in some decisions where an officer enters into a contract for the corporation which is not binding upon it because ultra vires, the other party not having knowledge of this fact, nor being chargeable with knowledge.¹²

Thus, it is held that a corporate officer who executes an accommodation note in the name of the corporation, payable to himself individually, and then transfers it, is personally liable thereon although the note is void as to the corporation.¹³

In a Tennessee case the court, after stating that corporate officers are, generally speaking, not personally liable on corporate contracts, said: "But, if they exercise ultra vires powers, powers not vested in the corporation as a matter of law, although they appear to be given in the face of its charter, to make a contract with a party, or to destroy a legal contract coming within the purview of the rightful powers of the corporation made in its name; or if, exercising these ultra vires powers, they destroy the capacity of the corporation to meet the contract; or if, asserting these unauthorized powers, they

¹⁰ *Jacobs v. Williams*, 85 Conn. 215, Ann. Cas. 1913 B 900, 82 Atl. 202.

This rule is supported in *Hall v. Crandall*, 29 Cal. 567, 89 Am. Dec. 64; *Hancock v. Yunker*, 83 Ill. 208.

¹¹ See opinion of the late A. C. Freeman as expressed in note in 48 Am. St. Rep. 913, 915, and see also note in 26 Harvard Law Rev. 542, discussing this question.

¹² *United States*. See *Mandeville v. Courtright*, 142 Fed. 97, 6 L. R. A. (N. S.) 1003, with note.

Illinois. See *Seeberger v. McCormick*, 178 Ill. 404, 53 N. E. 340, aff'g 73 Ill. App. 87, writ of error dismissed 175 U. S. 274, 44 L. Ed. 161.

Michigan. *Knickerbocker v. Wilcox*, 83 Mich. 200, 21 Am. St. Rep. 595, 47 N. W. 123.

South Dakota. *Small v. Elliott*, 12

S. D. 570, 76 Am. St. Rep. 630, 82 N. W. 92.

Texas. *Staaacke v. Routledge*, — Tex. Civ. App. —, 175 S. W. 444.

England. *Weeks v. Propert*, L. R. 8 C. P. 427; *Richardson v. Williamson*, L. R. 6 Q. B. 276.

¹³ *Luden v. Enterprise Lumber Co.*, 146 Ga. 284, L. R. A. 1917 C 485, 91 S. E. 102. But see *B. J. Wolfe & Sons v. McKeon*, 1 Ala. App. 421, 57 So. 63.

But in *Illinois* it is held that if the officer discloses for whom he is acting he is not personally liable upon an indorsement on a note made by him in the name of the corporation, where the indorsement is ultra vires the corporation, as for instance where the indorsement is for accommodation. *Piser v. Serota*, 182 Ill. App. 390.

refuse to exercise its legitimate powers to enable it to meet its contract,—another and a different question is presented. In the cases just instanced the writer is of opinion that they are liable.”¹⁴

On the other hand, other decisions, seemingly supported by the better reasoning, hold that the officer is not personally liable in such a case.¹⁵ Thus, where notes were issued by a bank, it was held in Kentucky that the board of directors were not personally liable thereon to the holder of the notes merely because the issuance of such notes by them was ultra vires, on the theory that the creditor is chargeable with notice of the terms of the charter showing that the bank had no such power, and therefore the rule is not applicable because the want of authority was presumed to be known to the person dealing with the officer.¹⁶

The reason, says the Kansas court, is that, “where there is no wrong imputable to the agent, no action will lie against him: not on the contract, for the contract was not his, nor for any wrong of act or omission, for he is guilty of none. * * * A misrepresentation as to a matter of law is not such a one as will cast a personal liability on the agent, and that on the ground that each party is bound to know the law.”¹⁷

¹⁴Shoun v. Armstrong (Tenn. Ch. App.), 59 S. W. 790.

¹⁵United States. Holt v. Winfield Bank, 25 Fed. 812.

Alabama. B. J. Wolfe & Sons v. McKeon, 2 Ala. App. 421, 57 So. 63, decided on ground of mutual mistake of law.

Iowa. Thilmany v. Iowa Paper Bag Co., 108 Iowa 357, 75 Am. St. Rep. 259, 79 N. W. 261; Frost Mfg. Co. v. Foster, 76 Iowa 535, 41 N. W. 212.

Kansas. Abeles v. Cochran, 22 Kan. 405, 31 Am. Rep. 194.

Kentucky. Sandford v. McArthur, 18 B. Mon. 411.

Missouri. Humphrey v. Jones, 71 Mo. 62.

Tennessee. Hermitage Hotel Co. v. Dyer, 125 Tenn. 302, 142 S. W. 1117. Compare Woodward v. Beasley, 2 Tenn. Ch. App. 339.

England. Eaglesfield v. Marquis of Londonderry, 4 Ch. Div. 693.

In Iowa it is held that if a corporate officer makes a contract beyond

the powers of the corporation to make, but within his powers if within the powers of the corporation, he is not personally liable thereon. Thilmany v. Iowa Paper Bag Co., 108 Iowa 357, 75 Am. St. Rep. 259, 79 N. W. 261.

The theory of these decisions is that where a person enters into a contract with the officers of a corporation, intending a contract with the corporation, and the contract does not bind the corporation because, as a matter of law, and on the face of it, it is not within the powers of the corporation, the person so contracting is chargeable, as well as the officers, with notice of the want of power on the part of the corporation, and in such a case he cannot hold the officers personally liable.

¹⁶Sandford v. McArthur, 18 B. Mon. (Ky.) 411.

¹⁷Abeles v. Cochran, 22 Kan. 405, 31 Am. Rep. 194.

In any event, an officer is not bound on a contract merely because it is *ultra vires*, where the circumstances are such that the other party may nevertheless enforce the contract against the corporation.¹⁸ So the fact that at other times, with other persons, the directors have done business not authorized by the charter, does not of itself make the directors personally liable to an individual who has done business with them.¹⁹

Whether *ultra vires* acts confer a cause of action in favor of the corporation or its stockholders, on the theory of mismanagement,²⁰ and whether a creditor other than the one with whom an *ultra vires* contract is made can hold the officers personally liable for entering into other *ultra vires* contracts,²¹ is considered elsewhere.

§ 2531. Liability as dependent upon how officers sign contract—In general. Whether corporate officers or agents are liable individually on written contracts signed with their names, with the name of the corporation or alone, and with or without the addition of their title, has been considered in a preceding chapter.²² The tendency of the later decisions,²³ as already noted, is to absolve the individuals from liability unless the writing shows an intent to be bound individually, and to permit parol evidence to show the surrounding circumstances.

§ 2532. — Construction in favor of officer. Ordinarily, courts do not favor a construction of a writing that will make a corporate officer personally liable where the intent to bind him personally does not clearly appear.²⁴

§ 2533. Contractual liability of directors as between each other. In one case, the seven directors, finding the corporate assets less than the liabilities, undertook to make up the deficit by having two of them execute their note to the corporation, the others agreeing to pay their pro rata share and stipulating that the note might be paid

¹⁸ *Bird v. Daggett*, 97 Mass. 494; *Linkauf v. Lombard*, 137 N. Y. 417, 20 L. R. A. 48, 33 Am. St. Rep. 743, 33 N. E. 472.

¹⁹ *Dietrich v. Rothenberger*, 25 Ky. L. Rep. 338, 75 S. W. 271.

²⁰ See §§ 2434-2441, *supra*.

²¹ See § 2584, *infra*.

²² See §§ 1441-1486, *supra*.

²³ See *Jacobs v. Williams*, 85 Conn.

215, Ann. Cas. 1913 B 900, 82 Atl. 202, where contract signed with name of corporation, after which was "James S. Williams, Prest. Lewis W. Ripley, Secy.," was held not to bind individuals.

²⁴ See *Davis v. Cress*, 214 Mass. 379. 101 N. E. 1081, construction of letter as part of contract.

out of the earnings of the company. It was held that the agreement was not against public policy, and that the makers were not bound to insist upon the payment of the note out of the earnings but could themselves pay it and demand contribution from the others.²⁵

XXVIII. LIABILITY OF OFFICERS TO THIRD PERSONS FOR TORTS

§ 2534. Scope of subdivision. This subdivision is intended to include the question of liability of corporate officers to third persons, who may or may not be creditors of the corporation, for damages resulting to the third person himself from torts committed by, or participated in by, the corporate officers. It does not include the question as to the right of creditors of the corporation to recover for torts of corporate officers where the injury is primarily to the corporation and it affects the creditor only as it affects all the creditors through the injury to the corporation to whom they look for payment of their debts.²⁶ This subdivision is intended to treat of torts of the corporation and its officers as causing a direct loss to third persons—it being wholly immaterial whether such third persons are creditors or are stockholders or have no relation to the corporation. In this class of cases, the injured person in effect says, “I have been injured by a wrong done by the corporation; the corporation can act only by officers or agents and hence I should be entitled to recover from the officers or agents who are the wrongdoers.” The theory is simple but the courts have often confused the right of one injured—generally a creditor—to sue offending officers for a tort committed by them or in which they participated, where the resulting injury is primarily to the corporation and is an injury to the person suing only in so far as it decreases the assets of the corporation to which he must look for his debt or claim. In the latter case, whether the suit is by a person individually and merely for his own benefit, or whether it is brought by him in behalf of all others in the same position, such as other creditors or stockholders, the suit is primarily for a tort suffered by the corporation, and is governed by the rules laid down elsewhere.²⁷

The dividing line is whether the cause of action is one which is purely personal, in which no other claimant or creditor of the cor-

²⁵ *Crane v. Bayley*, 126 Mich. 323, 85 N. W. 874, 8 Det. L. N. 39.

²⁶ See §§ 2569-2590.

²⁷ The liability of directors and other officers of banks and other cor-

porations to depositors or other creditors for loss due to their mismanagement of the corporation is considered in § 2574 et seq., infra.

poration has an interest, or whether the cause of action is one in favor of creditors in general and which may be availed by "any" one creditor either suing alone (as it is sometimes held he may) or as a representative of all the creditors.²⁸ In the one case the only liability is to the particular person injured, who may or may not be a creditor of the corporation, as in case of an action for deceit,²⁹ while in the other case the liability is to all creditors of the corporation without regard to any personal dealings between such officers and such creditors. If there is a special damage to the creditor suing, not common to other creditors, i. e., an injury to the individual creditor which is not an injury to the corporation, he may sue at law *ex delicto* for the tort.

§ 2535. Statement of general rule. It is thoroughly well settled that a man is personally liable for all torts committed by him, consisting in misfeasance—as fraud, conversion, acts done negligently, etc.—notwithstanding he may have acted as the agent or under directions of another. And this is true to the full extent as to torts committed by the officers or agents of a corporation in the management of its affairs. The fact that the circumstances are such as to render the corporation liable is altogether immaterial. The person injured may hold either liable, and generally he may hold both as joint tortfeasors. Corporate officers are liable for their torts, although committed when acting officially.³⁰ They are liable

²⁸ Liability of corporate officers to creditors is to be looked at from two different standpoints. In the one case the wrongful act or omission of such officers may be a single act or omission operating directly on a particular creditor so as to make such officers liable jointly with the corporation as tortfeasors. This class of cases is illustrated by those cases where officers have made false representations which were relied upon and induced a third person to extend credit to the corporation. On the other hand, the liability to creditors, independent of statute, may be a general liability extending to all creditors by reason of some wrongful act causing loss to creditors of the corporation as a class. *Cameron v. First Nat. Bank*, — Tex.

Civ. App. —, 194 S. W. 469.

A wrong done by corporate officers which affects the credit of the company and the creditors generally is not a wrong to them as individuals, and they cannot maintain an action as for a tort. *Priest v. White*, 89 Mo. 609, 1 S. W. 361.

²⁹ See *Killen v. Barnes*, 106 Wis. 546, 82 N. W. 536.

³⁰ *California*. *Vujacich v. Southern Commercial Co.*, 21 Cal. App. 439, 132 Pac. 80.

Indiana. *Hartzler v. Goshen Churn & Ladder Co.*, 55 Ind. App. 455, 104 N. E. 34.

Michigan. *Weber v. Weber*, 47 Mich. 569, 11 N. W. 389.

New Jersey. *Cowley v. Smyth*, 46 N. J. L. 380, 50 Am. Rep. 432.

for their torts regardless of whether the corporation is liable;³¹ but it has been held that there can be no recovery *ex delicto* where the injured person has waived the right to hold the corporation *ex delicto* for the same act, by treating a conversion of property as a sale.³²

The rules governing liability of agents in general, to third persons, for their torts, as laid down in textbooks on the law of Agency, are almost invariably applicable to the liability of corporate officers to third persons for their torts, where a wrong against the third person rather than the corporation; and hence reference should be made, in connection with what is said herein, to standard works on the law of Agency.³³

It is no defense to such an action that the corporation is in the hands of a receiver and that hence the receiver should sue, since the cause of action is not one which passes to a receiver.³⁴

It has been held that a shareholder cannot sue the president personally for refusal to countersign a certificate of stock, on the theory that the refusal is considered an act of nonfeasance rather than misfeasance; but it is submitted that there is no good authority for this holding.³⁵

§ 2536. Participation in tort as essential to liability. Generally there is no question as to liability of corporate officers for torts, provided the officer was so connected with the tort as to bring

New York. *Chenango Bridge Co. v. Paige*, 83 N. Y. 178, 38 Am. Rep. 407; *Morgan v. Skiddy*, 62 N. Y. 319.

Tennessee. *Nunnally v. Southern Iron Co.*, 94 Tenn. 397, 28 L. R. A. 421, 29 S. W. 361.

In a federal case, the court, speaking with reference to corporate officers, said: "The general rule that agents are not excused from liability for their wrongs or torts because while performing the wrongful acts they are acting for and in the service of another cannot be gainsaid." *Glucose Sugar Refining Co. v. St. Louis Syrup & Preserving Co.*, 135 Fed. 540.

It is no defense that the corporation also is liable. *Peck v. Cooper*, 112

Ill. 192, 194, 54 Am. Rep. 231.

One who is the treasurer and a director of a corporation is personally liable to a stockholder for maliciously and unjustifiably inducing the corporation not to declare dividends. *Lee v. Fisk*, 222 Mass. 418, 109 N. E. 833.

³¹ *Hill v. Tualatin Academy and Pacific University*, 61 Ore. 190, 121 Pac. 901.

³² *Birdsell Mfg. Co. v. Oglevee*, 187 Ill. 149, 58 N. E. 231.

³³ See 1 *Mechem, Agency* (2nd Ed.), §§ 1451-1487; *Clark & Skyles, Agency*, §§ 594-606.

³⁴ *Houston v. Thornton*, 122 N. C. 365, 65 Am. St. Rep. 699, 29 S. E. 827.

³⁵ *Cooley v. Curran*, 54 N. Y. Misc. 572, 104 N. Y. Supp. 751.

him within the rule. If the tort is committed by the officer sought to be held liable, then of course no question arises. So if he is one of several officers or agents, all of whom actively participate in the tort, there is no question as to his liability. The question often arises, however, where a tort is committed by a corporation and it is sought to hold liable an officer who was not the main wrongdoer or who did not actively participate at all in the wrongdoing. In such a case, it seems impossible to lay down any governing rule further than that the test seems to be whether the officer ordered, or participated in, the alleged wrongful act, i. e., whether he would be individually liable if there was no corporation and he was acting merely as agent for a private person.³⁶ The mere fact that a person is a director or other officer in a corporation does not necessarily render him liable for the torts of the corporation or its agents.³⁷ Officers of a corporation "are not held liable for the negligence of the corporation merely because of their official relation to it, but because of some wrongful or negligent act by such officer amounting to a breach of duty which resulted in an injury. * * * To make an officer of a corporation liable for the negligence of the corporation there must have been upon his part such a breach of duty as contributed to, or helped to bring about, the injury; that is to say, he must be a participant in the wrongful act."³⁸ Some knowledge and participation, actual or implied, must be brought home to him.³⁹ Thus, a president who gives orders may be liable for injuries resulting from their execution, but if he merely transmits an order

³⁶ *Mayer v. Thompson-Hutchison Bldg. Co.*, 104 Ala. 611, 28 L. R. A. 433, 53 Am. St. Rep. 88, 16 So. 620.

³⁷ *Peck v. Cooper*, 8 Ill. App. 408, aff'd 112 Ill. 192, 54 Am. Rep. 231; *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80.

With respect to the corporate president it has been said: "He is not personally liable because of his official capacity, any more than are the directors or stockholders, for torts committed by the corporation, in the absence of personal participation in the tortious act. As an agent, he is not liable for the acts of misfeasance or nonfeasance of his subordinate agents or employees." *Folwell v.*

Miller, 145 Fed. 495, 10 L. R. A. (N. S.) 332, 7 Ann. Cas. 426.

To escape liability for a tort on the ground that the party charged was acting for a corporation, he must show the existence of at least a *de facto* corporation. *Von Lengerke v. New York*, 150 N. Y. App. Div. 98, 134 N. Y. Supp. 832.

³⁸ *Aubrey's Adm'r v. Stimson*, 160 Ky. 563, L. R. A. 1915 C 874, 169 S. W. 991.

³⁹ See *Elizabeth v. American Nicholson Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000; *Fanning v. Osborne*, 102 N. Y. 441, 7 N. E. 307; *Arthur v. Griswold*, 55 N. Y. 400.

of the corporation to a servant he is not liable for injuries resulting therefrom.⁴⁰

So if the managing agent of a company neglects to instruct his workmen as to boundaries, and they trespass, he is not liable for trespass, although he may be liable for negligence.⁴¹ It also follows that where the plant of a company was under the charge of its general manager whose duty it was to inspect the boiler causing the injury, and the president had no notice of the condition of the boiler nor was it his duty to inspect it, the latter is not liable for injuries resulting from an explosion of the boiler,⁴² although if the president had also been the general manager then he would have been liable, where the injury resulted from failure to inspect.⁴³

The superior or managing officer of a corporation cannot be held liable for the misconduct of a subordinate servant or employee unless the act is done with his consent or under his order or direction.⁴⁴ And it has been said that "it may be stated as a rule of universal application that a director of a corporation is not liable for any tort of other subordinate agents in which he did not participate."⁴⁵ If a director, manager, or other agent of a corporation, although in the name of the corporation, himself commands the commission of a tort by a subordinate agent of the corporation, the former is personally liable.⁴⁶ Negligence in not obtaining knowledge of the acts of executive officers or agents may render directors liable, it has been held,⁴⁷ although mere nonfeasance in this respect is held, in some jurisdictions, not to warrant a recovery.⁴⁸

A director cannot escape liability for acts done pursuant to his vote in the board of directors by claiming that the acts were authorized by the board and not by him personally.⁴⁹ So, also, it has been

⁴⁰ *Hewett v. Swift*, 3 Allen (Mass.) 420.

⁴¹ *Bath v. Caton*, 37 Mich. 199.

⁴² *Aubrey's Adm'r v. Stimson*, 160 Ky. 563, L. R. A. 1915 C 874, 169 S. W. 991.

⁴³ *Murray v. Cowherd*, 148 Ky. 591, 40 L. R. A. (N. S.) 617, 147 S. W. 6.

⁴⁴ *Kansas City v. Dickey*, 76 Mo. App. 437.

⁴⁵ *Pelton v. Gold Hill Canal Co.*, 72 Ore. 353, 142 Pac. 769, holding direc-

tors not liable for conversion by general manager of wheat stored with company.

⁴⁶ *National Cash-Register Co. v. Le-land*, 94 Fed. 502, 508, which discusses the question at length.

⁴⁷ *United Society v. Underwood*, 9 Bush (Ky.) 609, 15 Am. Rep. 731.

⁴⁸ See § 2558, *infra*.

⁴⁹ *National Cash-Register Co. v. Le-land*, 94 Fed. 502, 509.

held, generally, that executive officers of a corporation who induce it to enter upon a wrongful course of action become subject to personal liability.⁵⁰

In a recent Michigan case, an employee was burned while using an inflammable stove polish manufactured by her employer. She sued both the corporation and the manager thereof. He claimed that he was not liable because he had not participated in the tort. Conceding that to be the general rule, the following instruction was approved: "You can only find against Mr. Crosby if it appears and you find it is a fact that he had knowledge of the dangerous character of this compound, and that he was actively promoting the manufacture and sale of this compound, as an officer with authority in the corporation."⁵¹

And in a Montana case it was held that the directors of a corporation are personally responsible for a death or other injury caused by an explosion of gunpowder unlawfully stored by the corporation, although they may have had no knowledge thereof, if they could have had such knowledge by the exercise of ordinary care and diligence.⁵² So a director and president of an omnibus company, who issues an order to drivers to exclude all colored persons, is personally liable for the ejection and personal injury of a colored person in executing the order.⁵³ The president of a corporation, knowing the facts, who asks skilful lawyers to prepare a trust mortgage conveying the legal rights of his corporation, is not personally liable for the resulting damage because the words describing the property erroneously include the surface of the land which the com-

⁵⁰ *Saxlehner v. Eisner*, 140 Fed. 938.

⁵¹ *Wines v. Crosby & Co.*, 169 Mich. 210, 39 L. R. A. (N. S.) 901, Ann. Cas. 1913 D 1055, 135 N. W. 96.

⁵² *Cameron v. Kenyon-Connell Commercial Co.*, 22 Mont. 312, 44 L. R. A. 508, 74 Am. St. Rep. 602, 56 Pac. 358. See also *Nunnally v. Southern Iron Co.*, 94 Tenn. 397, 28 L. R. A. 421, 29 S. W. 361.

In this case, the directors dealing in the sale of explosives in a mining country, intrusted the management to one of their number, and a nuisance was created by storing a large amount

of explosives in city limits near other buildings. It was held that the directors were all liable for the death of a person killed by an explosion of the powder, although some of the directors had no knowledge of the negligent acts, where they did not exercise reasonable diligence in the control and supervision of the corporate business. *Cameron v. Kenyon-Connell Commercial Co.*, 22 Mont. 312, 44 L. R. A. 508, 74 Am. St. Rep. 602, 56 Pac. 358.

⁵³ *Peck v. Cooper*, 112 Ill. 192, 54 Am. Rep. 231.

pany does not in fact own, where he did not employ the lawyers and is not responsible for them as his agents.⁵⁴ And directors who merely employ one to give a fireworks exhibition on the corporate grounds are not personally liable for the negligent acts of the exhibitor.⁵⁵

§ 2537. Liability as joint and several. Liability of officers for torts, where they act together, is joint and several.⁵⁶ The rule is the same as in case of any other tort, and is so elementary as not to require further consideration, except to state that one director is not always liable merely because another director who has committed a tort is liable. For instance, where part of the directors had no knowledge of any misappropriation of moneys held by the corporation as the proceeds of a sale as a commission merchant, and no fair opportunity to discover it, they cannot be held individually liable although other directors are liable.⁵⁷

§ 2538. Assault. Of course, the corporate officer who actually commits an assault is liable therefor.⁵⁸ And where the president of a corporation gave orders to the drivers of vehicle of the company to exclude colored persons from traveling therein, he was held liable to a colored person who was forcibly ejected from one of such vehicles.⁵⁹

§ 2539. Conversion—In general. So an officer or agent of a corporation is liable for conversion of property belonging to a third person, notwithstanding that, in disposing of it or otherwise dealing with it, he was acting for the corporation; ⁶⁰ since "any person who, however innocently, obtains possession of the goods of a person who

⁵⁴ Slater Trust Co. v. Gardiner, 183 Fed. 268, where suit was brought by bondholders who were misled by the description of the property and suffered loss because thereof.

⁵⁵ Bianki v. Greater American Exposition, 3 Neb. (Unoff.) 656, 92 N. W. 615.

⁵⁶ Cone v. United Fruit Growers' Ass'n, 171 N. C. 530, 88 S. E. 860; Solomon v. Bates, 118 N. C. 311, 24 S. E. 478.

⁵⁷ Cone v. United Fruit Growers' Ass'n, 171 N. C. 530, 88 S. E. 860.

⁵⁸ See Brokaw v. New Jersey R. & Transp. Co., 32 N. J. L. 328, 90 Am. Dec. 659.

⁵⁹ Peck v. Cooper, 112 Ill. 192, 54 Am. Rep. 231.

⁶⁰ California. Swim v. Wilson, 90 Cal. 126, 13 L. R. A. 605, 25 Am. St. Rep. 110, 27 Pac. 33. See also Vujcich v. Southern Commercial Co., 21 Cal. App. 439, 132 Pac. 80.

Kentucky. United Society v. Underwood, 9 Bush 609, 15 Am. Rep. 731.

Maine. Kimball v. Billings, 55 Me. 147, 92 Am. Dec. 581.

has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion."⁶¹ Thus a corporate officer is jointly liable with the corporation where, acting as agent of a third person, he paid over to his corporation negotiable paper belonging to the principal, although he retained none of the fruits of his wrong.⁶²

§ 2540. — Funds held in trust by the corporation. A general manager is liable for wilfully applying private funds, in the hands of the corporation, to the debts of the corporation.⁶³ So knowingly permitting funds belonging to another to be appropriated to the use of the corporation, makes the directors personally liable.⁶⁴ And directors are liable for the misapplication of funds held in trust by the corporation, where they knew, or ought to have known, thereof.⁶⁵ So a director of a business corporation who presumably had knowledge that it was receiving deposits of money for safe-keeping, and that it was being misappropriated, is personally liable where he acquiesced therein.⁶⁶ Directors who mingle money collected for another with the funds of the corporation, in violation of the instruc-

Michigan. *Hempfling v. Burr*, 59 Mich. 294, 26 N. W. 496.

New York. *Sprights v. Hawley*, 39 N. Y. 441, 100 Am. Dec. 452; *Passaic Falls Throwing Co. v. Villeneuve-Pohl Corporation*, 169 App. Div. 727, 155 N. Y. Supp. 669; *McCrea v. McClenahan*, 131 App. Div. 247, 115 N. Y. Supp. 720.

Liability of agents in general for conversion, see 1 *Mechem, Agency* (2nd Ed.), § 1457.

Officers are liable for conversion of property of another corporation. *Bluefields S. S. Co. v. Lala Ferreras Cangelosi S. S. Co.*, 133 La. 424, 434, 63 So. 96.

A corporate officer who is guilty of misappropriating the funds of a stranger for the benefit of his corporation may be held liable personally for such wrongful acts. *Sweet v. Montpelier Sav. Bank & Trust Co.*, 69 Kan. 641, 77 Pac. 538.

If the injury is solely to the creditor

suing, as in case where the corporate officers convert property belonging to complainant and appropriate the proceeds to the use of the corporation, the creditor may sue the officers in his own name, and if the corporation is insolvent need not join as defendants either the corporation or receiver. *Virginia-Carolina Chemical Co. v. Floyd*, 158 N. C. 455, 74 S. E. 465.

⁶¹ *Hollins v. Fowler*, L. R. 7 H. L. 757.

⁶² *Messer-Moore Insurance & Real Estate Co. v. Trotwood Park Land Co.*, 170 Ala. 473, Ann. Cas. 1912 D 718, 54 So. 228.

⁶³ *Rauch v. Brunswick*, 155 Mo. App. 367, 137 S. W. 67.

⁶⁴ *McCollom v. Dollar*, — Tex. Civ. App. —, 176 S. W. 876.

⁶⁵ *Dollar v. Lockney Supply Co.*, — Tex. Civ. App. —, 164 S. W. 1076.

⁶⁶ *Vujacich v. Southern Commercial Co.*, 21 Cal. App. 439, 132 Pac. 80.

tions of the owner, or who knowingly permit their subordinates to do so, whereby the fund is lost, are personally liable therefor.⁶⁷

§ 2541. — Misapplication of proceeds of goods consigned for sale.

When the proceeds of a sale of goods consigned to a corporation to be sold on commission, have been intentionally misapplied, the officers in control of the fund who have knowingly participated in the wrong are individually liable.⁶⁸ So where directors knowingly appropriated the proceeds of cotton owned by a third person and held by the corporation, or knowingly permitted the corporation to do so, or if they are chargeable with knowledge of such appropriation, they and the corporation were held to be jointly and severally liable for the loss.⁶⁹

§ 2542. Fraud or deceit—In general. A corporate officer or agent is personally liable for damages caused by his fraud or deceit, to the person directly injured thereby.⁷⁰ Thus, a corporate officer who transfers to a creditor worthless securities in payment of a debt is personally liable to the creditor for the fraud practiced.⁷¹ So directors are personally liable for issuing bonds falsely reciting that they are first mortgage bonds.⁷² However, if recovery is sought on

⁶⁷ Sweet v. Montpelier Sav. Bank & Trust Co., 73 Kan. 47, 52, 84 Pac. 542, 544; Dollar v. Lockney Supply Co., — Tex. Civ. App. —, 164 S. W. 1076.

⁶⁸ Cone v. United Fruit Growers' Ass'n, 171 N. C. 530, 88 S. E. 860.

⁶⁹ Dollar v. Lockney Supply Co., — Tex. Civ. App. —, 164 S. W. 1076.

⁷⁰ United States. Slater Trust Co. v. Randolph-Macon Coal Co., 166 Fed. 171.

Michigan. Getchell v. Dusenbury, 145 Mich. 197, 108 N. W. 723, 13 Det. L. N. 511.

New Jersey. Vreeland v. New Jersey Stone Co., 29 N. J. Eq. 188, aff'd 29 N. J. Eq. 651.

New York. O'Beirne v. Bullis, 158 N. Y. 466, 53 N. E. 211, false statement that bonds covered certain timber lands.

Ohio. Cable v. Bowlus, 21 Ohio Cir. Ct. 53, 11 Ohio Cir. Dec. 526.

"No one should be permitted to escape personal liability for fraud practiced by himself, or in connection with others, upon another, in his or their official character of president, director, or secretary of a private corporation, upon the ground that they were acting for the corporation. To claim exemption on the ground of official responsibility, or that the fraud was committed for the benefit of the corporation, is equivalent to claiming that the corporation is liable for the fraud of its officers, and the officers themselves not liable." Bank of Atchison County v. Byers, 139 Mo. 627, 659, 41 S. W. 325.

⁷¹ Donovan v. Purtell, 216 Ill. 629, 1 L. R. A. (N. S.) 176, 75 N. E. 334, aff'g 119 Ill. App. 116.

⁷² Bank of Atchison County v. Byers, 139 Mo. 627, 41 S. W. 325; Clark v. Edgar, 84 Mo. 106, 54 Am. Rep. 84, aff'g 12 Mo. App. 345.

the ground of fraud, all the necessary elements going to make up fraud at common law or under a statute defining fraud, must appear,⁷³ including reliance on the false statement⁷⁴ and injury therefrom.⁷⁵ Negligence does not necessarily preclude the existence of fraud.⁷⁶

A refusal to transfer stock to the name of a purchaser is not necessarily, nor even prima facie, fraudulent, and the purchaser cannot sue the directors therefor on the ground that he was thereby prevented from reselling the stock before the insolvency of the corporation.⁷⁷

In a case in New Jersey, directors of a savings bank were held personally liable to a depositor, where the bank afterwards became insolvent, where they authorized the publication in a newspaper of an advertisement of the bank in which, preceding the names of the directors, the catch line "Directors and Stockholders Personally Responsible," was contained, and the depositor relied thereon.⁷⁸

Fraud in procuring subscriptions to stock, or in inducing a purchase thereof, as actionable in general, has been fully discussed in a preceding volume.⁷⁹

§ 2543. — Issuance of spurious certificates of stock. Officers who sign and issue fictitious or invalid certificates of stock are liable, on the ground of fraud and deceit, to purchasers or pledgees who are injured thereby.⁸⁰

⁷³ Hart v. Evanson, 14 N. D. 570, 3 L. R. A. (N. S.) 438, 105 N. W. 942, where statute defined deceit.

⁷⁴ See, as to transfers of capital stock, § 624, vol. 2.

⁷⁵ See, as to subscriptions to or transfers of capital stock, § 626, vol. 2.

⁷⁶ Bell v. James, 128 N. Y. App. Div. 241, 112 N. Y. Supp. 750, aff'd 198 N. Y. 513, 92 N. E. 1078.

⁷⁷ Penfold v. Charlevoix Sav. Bank, 140 Mich. 126, 103 N. W. 572.

⁷⁸ Westervelt v. Demarest, 46 N. J. L. 37, 50 Am. Rep. 400.

⁷⁹ See §§ 610-636, vol. 2.

⁸⁰ Windram v. French, 151 Mass. 547, 8 L. R. A. 750, 24 N. E. 914; Bruff v. Mall, 36 N. Y. 200.

"There is no doubt that, by thus

authenticating and issuing the certificates, the defendants made certain representations which accompanied them, and which, like the offer in a letter of credit, addressed themselves to whoever should purchase those certificates thereafter, whoever he might be. * * * The scope of these representations is matter of construction. They certainly went to the point that the stock was not spurious, and that it was not invalid by reason of the fraudulent or known acts or omissions of the officers in question. In view of the word 'non-assessable,' they went further." Windram v. French, 151 Mass. 547, 550, 8 L. R. A. 750, 24 N. E. 914.

§ 2544. Fraudulent representations as to financial condition of company—In general. False statements, made by or under the authority of directors or other corporate officers, as creating personal liability on the part of such officers, may be classified as follows: First, where the statement is in an official report made to some public officer, and falsity thereof creates liability because a statute so expressly provides. This phase of the subject is considered in a subsequent subdivision,⁸¹ and is further referred to in a subsequent chapter in this volume.⁸² Second, false statements not contained in official reports but also expressly made a ground of liability by statute, also treated of hereafter.⁸³ Third, false statements forbidden by statute but where the statute creates no liability. Fourth, false statements as to which no provision is made by statute, and where the general rules as to fraud are applicable. The last two are the ones considered herein.

Under the general rule that an agent is as much responsible as his principal for fraud perpetrated on a third person, in which the agent participated, false representations as to the financial condition of the corporation, made by corporate officers, makes the officers participating therein or consenting thereto liable to persons who are injured by reliance thereon,⁸⁴ at least if the officer sought

⁸¹ See § 2643, *infra*.

⁸² See *infra*, chapter on Reports.

⁸³ See § 2643, *infra*.

⁸⁴ **United States.** *Brady v. Evans*, 78 Fed. 558.

Connecticut. *Salmon v. Richardson*, 30 Conn. 360, 79 Am. Dec. 255.

Georgia. *Schley v. Dixon*, 24 Ga. 273, 71 Am. Dec. 121.

Illinois. *Delano v. Case*, 121 Ill. 247, 2 Am. St. Rep. 81, 12 N. E. 676.

Iowa. *Hubbard v. Weare*, 79 Iowa 678, 44 N. W. 915.

Kentucky. *Pieratt v. Young*, 20 Ky. L. Rep. 1815, 49 S. W. 964.

Massachusetts. *Hedden v. Griffin*, 136 Mass. 229, 49 Am. Rep. 25.

Michigan. *Weber v. Weber*, 47 Mich. 569, 11 N. W. 389.

Missouri. *Bank of Atchison County v. Byers*, 139 Mo. 627, 41 S. W. 325; *Clark v. Edgar*, 84 Mo. 106, 54 Am. Rep. 84.

Nebraska. *Gerner v. Mosher*, 58

Neb. 135, 46 L. R. A. 248, 78 N. W. 384.

New Hampshire. *Hammond v. Hussey*, 51 N. H. 40, 12 Am. Rep. 41.

New Jersey. *Cowley v. Smyth*, 46 N. J. L. 380, 50 Am. Rep. 432; *Westervelt v. Demarest*, 46 N. J. L. 37, 50 Am. Rep. 400; *Vreeland v. New Jersey Stone Co.*, 29 N. J. Eq. 188.

New York. *Morgan v. Skiddy*, 62 N. Y. 319; *Rives v. Bartlett*, 156 App. Div. 552, 141 N. Y. Supp. 561.

North Carolina. *Houston v. Thornton*, 122 N. C. 365, 65 Am. St. Rep. 699, 29 S. E. 827; *Solomon v. Bates*, 118 N. C. 311, 54 Am. St. Rep. 725, 24 S. E. 478; *Tate v. Bates*, 118 N. C. 287, 54 Am. St. Rep. 719, 24 S. E. 482.

Pennsylvania. *Kroeger v. Pitcairn*, 101 Pa. St. 311, 47 Am. Rep. 718.

Texas. *Seale v. Baker*, 70 Tex. 283, 8 Am. St. Rep. 592, 7 S. W. 742.

West Virginia. *Zinn v. Mendel*, 9 W. Va. 580.

to be held liable had knowledge of the falsity of such representations.⁸⁵

As said by Justice Gose in a late Washington case, "a stockholder or officer of a corporation is no more immune for his false representations which result in a loss to one who relied upon the representations than any other individual. In other words, the rules of common honesty and common sense apply alike to all persons, without regard to the capacity in which they act."⁸⁶ It is immaterial that the representations were made to the general public and not to any particular person,⁸⁷ or that the statements were not made voluntarily but in a report which was required by statute to be filed,⁸⁸ or that the officers were acting solely for the corporation and were not personally benefited by the fraud.⁸⁹ Furthermore it is immaterial that the statement was not published at the time the stock was purchased, where it was filed in a public office.⁹⁰ But there is a distinction to be noted where the report or certificate is not addressed to nor intended for the public.⁹¹ And in Missouri, it is held that a statement of financial condition which the secretary of state may require to be made to him "is in no sense a statement made by the directors with intent to induce persons to deposit their

England. *Weir v. Barnett*, 3 Exch. Div. 32; *Richardson v. Williamson*, L. R. 6 Q. B. 276.

False representations as to financial condition of corporation as actionable in general, see § 614 et seq., vol. 2.

⁸⁵ See § 2546, *infra*.

⁸⁶ *Barnard Mfg. Co. v. Ralston Milling Co.*, 71 Wash. 659, 129 Pac. 389.

⁸⁷ *Seale v. Baker*, 70 Tex. 283, 290, 8 Am. St. Rep. 592, 7 S. W. 742.

The purpose of reports is for the information of the stockholders and the general public. There are no personal representations made to particular persons. If one of the public reads the report, and relies upon it in purchasing stock or depositing money in a bank, and is deceived, his action at common law is based upon the deceit thus practiced upon him as a member of the public. *Mason v. Moore*, 73 Ohio St. 275, 4 L. R. A. (N. S.) 597, 4 Ann. Cas. 240, 76 N. E. 932.

But it has been held that oral statements as to the soundness of a bank,

made by its trustees, as individuals, to third persons, but not intended to come to the knowledge of the sureties on the bond of the treasurer nor to induce them to sign, does not give a cause of action for deceit to the sureties against such trustees. *Savings Bank v. Albee*, 63 N. H. 152, 56 Am. Rep. 501.

⁸⁸ *Gerner v. Mosher*, 58 Neb. 135, 46 L. R. A. 244, 78 N. W. 384. *Contra*, *Utley v. Hill*, 155 Mo. 232, 49 L. R. A. 323, 78 Am. St. Rep. 569, 55 S. W. 1091.

⁸⁹ See cases cited in note 84, *supra*.

⁹⁰ *Warfield v. Clark*, 118 Iowa 69, 91 N. W. 833.

⁹¹ *Hunnewell v. Duxbury*, 154 Mass. 286, 13 L. R. A. 733, 28 N. E. 267.

Of course, statements made in the articles of association, to the secretary of state to procure a corporate charter, cannot be relied on, since not made to procure credit. *McKee v. Rudd*, 222 Mo. 344, 133 Am. St. Rep. 529, 121 S. W. 312.

money in the bank, and therefore a common-law action of deceit cannot be predicated upon it."⁹²

This general rule applies equally well whether the representation is oral or written, except where the statute of frauds requires the representation to be in writing,⁹³ or whether the statement is contained in a prospectus, report, certificate, letter or what not, or whether in a paper required by statute to be filed,⁹⁴ provided it was seen and relied on by the person claimed to be injured thereby.⁹⁵

Furthermore, this rule applies equally well in favor of persons who extend credit to the corporation in reliance on such statements,⁹⁶ including purchasers of bonds,⁹⁷ to depositors in a bank who make a deposit or refrain from withdrawing their deposit in reliance thereon,⁹⁸ to persons who purchase stock in the corporation in reli-

⁹² *Utley v. Hill*, 155 Mo. 232, 49 L. R. A. 328, 78 Am. St. Rep. 569, 55 S. W. 1091.

⁹³ *McKinney v. Whiting*, 8 Allen (Mass.) 207.

In some jurisdictions, under the statute of frauds, fraudulent representations are not actionable unless in writing. *Hicks v. Steel*, 142 Mich. 292, 4 L. R. A. (N. S.) 279, 105 N. W. 767.

⁹⁴ *Gerner v. Mosher*, 58 Neb. 135, 46 L. R. A. 244, 78 N. W. 384.

Compare *Webb v. Rockefeller*, 195 Mo. 57, 6 L. R. A. (N. S.) 872 with note, 93 S. W. 772, where liability of "incorporators" is considered, where they make false statements as to capital stock paid in, in the articles of association required to be filed.

⁹⁵ If the prospective stockholder does not rely on the false representations of the officer, but makes an independent investigation, then of course the false representations are not actionable. *Hooker v. Midland Steel Co.*, 215 Ill. 444, 106 Am. St. Rep. 170, 74 N. E. 445, aff'g 117 Ill. App. 441.

⁹⁶ Thus it has been said that "the general rule that mere negligent mismanagement of the business of a corporation by which the corporation and its creditors suffer loss will not

render the directors liable to creditors cannot be extended to relieve directors of liability from representations sanctioned by them for the purpose of inducing, and by which another is induced, to loan money to the corporation. It seems to us that the distinction between the two cases is obvious." *Cameron v. First Nat. Bank*, —Tex. Civ. App. —, 194 S. W. 469.

If an officer falsely represents the amount of the capital stock of the corporation actually subscribed, and thereby induces a person to sell goods to it, resulting in a loss, he is liable up to the difference between the stock subscribed and the amount represented as subscribed. *Barnard Mfg. Co. v. Ralston Milling Co.*, 71 Wash. 659, 129 Pac. 389.

⁹⁷ See cases cited *infra*, this section.

⁹⁸ *Seale v. Baker*, 70 Tex. 283, 8 Am. St. Rep. 592, 7 S. W. 742.

Depositors induced to make deposits in a bank or like company by fraudulent representations and concealments of the directors may hold them personally liable for damages suffered through the subsequent insolvency of the company. *Warner v. James*, 88 N. Y. App. Div. 567, 85 N. Y. Supp. 153.

A depositor in a bank is a creditor

ance upon such statements,⁹⁹ including purchasers of stock from third persons instead of the corporation,¹ to persons taking out in-

of the bank. As such he has a right to sue the directors or other officers of the bank under any conditions when the other creditors may sue, and in some jurisdictions, at least, his rights in that respect are greater than those of other creditors.

⁹⁹ If the directors of a corporation make false and fraudulent representations in a prospectus, report, or otherwise, and thereby induce the public to subscribe for or purchase shares of its stock, they are all equally liable in an action for deceit to any person who subscribes for or purchases shares in reliance on the representations, and is thereby injured. This rule is supported by the following cases:

United States. *Tyler v. Savage*, 143 U. S. 79, 36 L. Ed. 82.

Indiana. *Dorsey Mach. Co. v. McCaffrey*, 139 Ind. 545, 47 Am. St. Rep. 290, 38 N. E. 208.

Iowa. *Hinkley v. Sac Oil & Pipe Line Co.*, 132 Iowa 396, 119 Am. St. Rep. 564, 107 N. W. 629; *Hubbard v. Weare*, 79 Iowa 678, 44 N. W. 915.

Missouri. *Hornblower v. Crandall*, 7 Mo. App. 220, 78 Mo. 581.

Nebraska. *Gerner v. Mosher*, 58 Neb. 135, 46 L. R. A. 244, 78 N. W. 384.

New Jersey. *Vreeland v. New Jersey Stone Co.*, 29 N. J. Eq. 188.

New York. *Brewster v. Hatch*, 122 N. Y. 349, 19 Am. St. Rep. 498, 25 N. E. 505; *Miller v. Barber*, 66 N. Y. 558; *Morgan v. Skiddy*, 62 N. Y. 325; *Rives v. Bargett*, 156 App. Div. 552, 141 N. Y. Supp. 561; *Squiers v. Thompson*, 73 App. Div. 552, 76 N. Y. Supp. 734, 11 N. Y. Ann. Cas. 160, aff'd without opinion in 172 N. Y. 652, 65 N. E. 1122.

Vermont. *Paddock v. Fletcher*, 42 Vt. 389.

West Virginia. *Cox v. National Coal & Oil Inv. Co.*, 61 W. Va. 291, 56 S. E. 494.

England. *Derry v. Peek*, 14 App. Cas. 337; *Clarke v. Dickson*, 6 Cr. B. (N. S.) 453; *Bagshaw v. Seymour*, 18 C. B. 903; *Bedford v. Bagshaw*, 4 Hurl. & N. 538; *Watson v. Earl of Charlemont*, 12 Q. B. 856.

The liability to persons who become stockholders on the faith of false statements by an officer of the corporation, whether the statements are oral, printed, contained in a public announcement or made directly to the prospective stockholder, or contained in a report, certificate or notice required to be filed as a public paper, are, it seems, governed by the same rules as are applicable to one who extends credit to the corporation and becomes a creditor on the faith of such statements.

¹ One who purchases stock, although from a third person, in an insurance company, is entitled to rely on statements of assets and liabilities made by the company as required by statute, and where the statement is false he may sue the secretary who signed it for damages caused by the fraudulent statements therein. *Warfield v. Clark*, 118 Iowa 69, 91 N. W. 833. To same effect, *Hindman v. First Nat. Bank of Louisville, Kentucky*, 98 Fed. 562, 569, 48 L. R. A. 210.

But, on the other hand, there are cases holding that where a false prospectus was issued to sell treasury stock, directors are not liable to one who, in reliance thereon, purchased stock from an individual and in which the corporation had no interest. *Cheney v. Dickinson*, 172 Fed. 109, 28 L. R. A. (N. S.) 359. This case is supported by the decisions in *Greene v. Mercantile Trust Co.*, 60 N.

surance in an insurance company in reliance on such representations,² to one induced to loan money to a stockholder upon the security of stock in the corporation,³ and to persons induced to become sureties on the bond of a corporate officer in reliance upon such a report, which concealed the past dishonesty of the officer.⁴

The rule has also been applied to false representations as to financial condition to induce plaintiff to become an agent of the company.⁵ So where directors, by misrepresenting the value, induce a stockholder to sell them his stock, they are liable to the seller for the damages sustained by him.⁶

However, if misrepresentations are relied upon, they must be such as are actionable within the general rules governing fraudulent statements as laid down in textbooks on the subject of fraud.⁷ Thus, bondholders cannot hold corporate officers personally liable because they represented that the scheme would finance out, when they ought to have known it would not do so, since a mere matter of opinion.⁸ So, a prediction of future insolvency of the corporation, and the like, are not actionable although inducing a stockholder to sell his stock.⁹

The fact that the parties to a contract for the sale of stock are co-directors does not necessarily preclude liability for false representations as to the stock.¹⁰

If conspiracy in putting out false statements by directors as to

Y. Misc. 189, 111 N. Y. Supp. 802, and *Peek v. Gurney*, 7 Eng. Rul. Cas. 527. Compare *Hindman v. First Nat. Bank of Louisville*, 112 Fed. 931, 941, 57 L. R. A. 108, explaining *Peek v. Gurney*, *supra*.

² *Salmon v. Richardson*, 30 Conn. 360, 79 Am. Dec. 255.

³ *Merchants' Nat. Bank of Hillsboro v. Thoms*, 28 Cinc. L. Bul. (Ohio) 164.

⁴ *Graves v. Lebanon Nat. Bank*, 10 Bush (Ky.) 23, 19 Am. Rep. 50.

⁵ *Alder v. Crozier*, — Utah —, 168 Pac. 83.

⁶ *Taggart v. Francis Draz & Co.*, 166 N. Y. App. Div. 381, 150 N. Y. Supp. 41.

⁷ *Boulden v. Stilwell*, 100 Md. 543, 1 L. R. A. (N. S.) 258, 60 Atl. 609; *Ray County Sav. Bank v. Hutton*, 224 Mo. 42, 123 S. W. 47; *Lane v. Fenn*,

65 N. Y. Misc. 336, 120 N. Y. Supp. 237; *Goodwin v. Daniel* (Tex. Civ. App.), 93 S. W. 534.

⁸ *Vokes v. Eaton*, 119 Ky. 913, 27 Ky. L. Rep. 358, 85 S. W. 174. See, generally, as to expression of opinion as fraud, § 618, vol. 2.

⁹ *Boulden v. Stilwell*, 100 Md. 543, 60 Atl. 609.

¹⁰ *George v. Ford*, 36 App. Cas. (D. C.) 315; *Halsell v. First Nat. Bank of Muskogee*, 48 Okla. 535, L. R. A. 1916 B 697 with note, 150 Pac. 489; *Morrison v. Snow*, 26 Utah 247, 72 Pac. 924. See also *Snider v. McAtee*, 165 Mo. App. 260, 147 S. W. 136, *aff'd* — Mo. —, 178 S. W. 484. But see *Perry v. Pearson*, 135 Ill. 218, 25 N. E. 636; *Boulden v. Stilwell*, 100 Md. 543, 1 L. R. A. (N. S.) 258, 60 Atl. 609.

the corporate affairs is relied on, whereby plaintiff was induced to purchase stock, both conspiracy and fraud must be shown.¹¹

The liability of promoters for issuing false prospectuses has been stated in a preceding volume.¹²

§ 2545. — Concealment as fraud. Fraud may be committed by the suppression of the truth as well as by falsehood.¹³ Thus, concealment in the prospectus of the fact that the majority of the stock had been gratuitously appropriated by the board of directors is such fraud as to render the directors liable for damages.¹⁴ But concealment of the fact that a declared dividend was to be paid from capital has been held not to render a director liable to one who purchased stock under the belief that the dividend represented net earnings.¹⁵

§ 2546. — Knowledge of falsity of statements and intention to deceive. The question of knowledge and intent, as elements of fraud, is one concerning which considerable difficulty has been experienced, so far as fraud in general is involved.¹⁶ The rule as to knowledge of falsity and intention to deceive as necessary elements of fraud, as applied to subscriptions to capital stock in general, has been stated in a preceding volume.¹⁷ So far as the rule which applies to the liability of corporate officers is concerned, the decisions are more or less conflicting and not altogether clear.¹⁸ The rule has been stated by one writer on the subject of corporations as follows: "In some jurisdictions it is held that, to sustain an action against the directors or other officers of a corporation for false representations made by them in a published statement or prospectus, or otherwise, it is necessary to show an actual fraudulent intent, as distinguished from

¹¹ *Bell v. James*, 128 App. Div. 241, 112 N. Y. Supp. 750, 198 N. Y. 513, 92 N. E. 1078.

¹² See § 166, vol. 1.

¹³ For general rules as to concealment as fraud, see textbooks on the subject of fraud. As applied to subscriptions to capital stock in general, see § 621, vol. 2.

¹⁴ *Hinkley v. Sac Oil & Pipe Line Co.*, 132 Iowa 396, 119 Am. St. Rep. 564, 107 N. W. 629.

¹⁵ *Ottinger v. Bennett*, 144 N. Y. App. Div. 525, 129 N. Y. Supp. 819.

¹⁶ See 12^d Ruling Case Law, topic "Fraud and Deceit." § 82 et seq. and also textbooks on fraud.

¹⁷ See § 623, vol. 2.

¹⁸ See *Boddy v. Henry*, 113 Iowa 462, 53 L. R. A. 769, 85 N. W. 771.

In some cases, principally where directors are sought to be held liable, the officers sued did not personally make the statement but merely signed the statement, prospectus, report or certificate, upon the faith of data prepared and compiled by executive officers or agents, without actual knowledge of its truth or falsity, and the question then arises as to whether they are liable.

mere negligence, and that it is necessary, therefore, that they shall have known that the representations were false. But in other jurisdictions they are liable, without any actual fraudulent intent, if they made the representations recklessly and without any knowledge as to their truth or falsity, or if, although they may have believed them to be true, they ought to have known, and by the exercise of the ordinary care and diligence which it was their duty to use might have known, that they were false."¹⁹ This rule as stated is not strictly correct. It is true that some of the decisions seem to require knowledge of the falsity in order to make officers liable,²⁰ and hold that there is no liability if the representation, although false, was made in good faith and in the honest belief of its truth; and that other decisions go further and hold officers liable if they had knowledge "or ought to have known" of the falsity of the statements.²¹

¹⁹ See 3 Clark & Marshall, Corporations, § 745.

²⁰ Iowa. Warfield v. Clark, 118 Iowa 69, 91 N. W. 833. Compare Hubbard v. Weare, 79 Iowa 678, 44 N. W. 915.

Missouri. Utley v. Hill, 155 Mo. 232, 49 L. R. A. 323, 78 Am. St. Rep. 569, 55 S. W. 1091.

New Jersey. Cowley v. Smyth, 46 N. J. L. 380, 50 Am. Rep. 432.

New York. Kountze v. Kennedy, 147 N. Y. 124, 29 L. R. A. 360, 49 Am. St. Rep. 651, 41 N. E. 414. But see Taylor v. Thomas, 124 N. Y. App. Div. 53, 108 N. Y. Supp. 454.

Ohio. Mason v. Moore, 73 Ohio St. 275, 4 L. R. A. (N. S.) 597, 4 Ann. Cas. 240, 76 N. E. 932.

England. Derry v. Peek, 14 App. Cas. 337; Weir v. Bell, 3 Exch. Div. 238.

A director of a corporation is not liable for representations, false in fact, but not known by him to be so, made in a published statement or circular of the company, on which his name appears as one of a number of directors. Wakeman v. Dalley, 51 N. Y. 27, 10 Am. Rep. 551.

If the statement as to the condition of the corporation, given by officers to a prospective purchaser of stock,

is secured from the company's book-keeper and an expert accountant, there is no actionable deceit in the absence of any actual fraudulent intent. Worthington v. Herrmann, 89 N. Y. App. Div. 627, 88 N. Y. Supp. 76, aff'd 180 N. Y. 559, 73 N. E. 1134.

Necessity for under National Bank Act, see Thomas v. Taylor, 224 U. S. 73, 56 L. Ed. 673, and also § 2471, supra.

²¹ United States. See Chesbrough v. Woodworth, 221 Fed. 912, as to admissibility and sufficiency of evidence.

California. Macdonald v. De Fremery, 168 Cal. 189, 142 Pac. 73.

Michigan. Smalley v. McGraw, 148 Mich. 384, 112 N. W. 915, 111 N. W. 1093.

Nebraska. Gerner v. Mosher, 58 Neb. 135, 46 L. R. A. 244, 78 N. W. 384. See also Stuart v. Bank of Staplehurst, 57 Neb. 569, 78 N. W. 298.

North Carolina. Houston v. Thornton, 122 N. C. 365, 65 Am. St. Rep. 699, 29 S. E. 827; Solomon v. Bates, 118 N. C. 311, 54 Am. St. Rep. 725, 24 S. E. 478; Tate v. Bates, 118 N. C. 287, 54 Am. St. Rep. 719, 24 S. E. 482; Hauser v. Tate, 85 N. C. 81, 39 Am. Rep. 689.

Texas. Kinkler v. Junica, 84 Tex.

These statements, however, are not necessarily conflicting, although they may so appear on their face. In other words, a decision that an officer must have knowledge of the falsity may mean that he must have either actual or implied knowledge, i. e., that he need not have actual knowledge if he ought to have known of the falsity; and there is no doubt that in all jurisdictions misrepresentation is actionable although not known to be false by the officer sought to be held liable, where the representation is made recklessly without knowing whether

116, 19 S. W. 359; *Seale v. Baker*, 70 Tex. 283, 8 Am. St. Rep. 592, 7 S. W. 742; *Collins v. Chipman*, 41 Tex. Civ. App. 563, 95 S. W. 666.

In Texas, the directors of a bank are personally liable, at the suit of a depositor, for damages sustained by reason of the insolvency of the corporation, where the depositor was induced to place or leave his money in the bank solely by false representations of solvency made to the public by the directors, who ought to have known, and by the use of the ordinary care and diligence which it was their duty to use might have known, that such representations were false, and that they are so liable, whether the representations were made with intent to defraud or not. *Seale v. Baker*, 70 Tex. 283, 8 Am. St. Rep. 592, 7 S. W. 742.

Under ordinary circumstances, directors are chargeable with notice of false statements in annual statements of the corporation made to obtain credit, although not shown to have had actual notice, especially where the falsity consists in including as assets accounts which were outlawed or were against bankrupts or were otherwise uncollectible and which by general commercial custom should not be included in a financial statement as assets. *Cameron v. First Nat. Bank*, — Tex. Civ. App. —, 194 S. W. 469.

"Whatever may be the rule in other jurisdictions, we think it is well settled by the decisions of our Su-

preme Court that directors of a corporation are liable for false statements of the solvency of the corporation negligently made or sanctioned by them for the purpose of inducing others to extend credit to the corporation." *Cameron v. First Nat. Bank*, — Tex. Civ. App. —, 194 S. W. 469.

In a North Carolina case it was held that the directors of a corporation are liable in tort to a person injured by being induced to purchase stock therein by false published statements as to the financial condition of the corporation, although they may not have participated in or known of the statements, if the publication thereof was the result of their negligence and inattention in the management of the corporation. *Houston v. Thornton*, 122 N. C. 365, 65 Am. St. Rep. 699, 29 S. F. 827. And see *Solomon v. Bates*, 118 N. C. 311, 54 Am. St. Rep. 725, 24 S. E. 478; *Tate v. Bates*, 118 N. C. 287, 54 Am. St. Rep. 719.

A director who becomes such with knowledge of the insolvency of the corporation at its inception, in order to facilitate sales of stock because of his wealth and business success, is personally liable for the damages sustained by one purchasing stock in reliance on false statements, circulars and reports as to the financial condition of the company, which would have been known of by the director had he exercised due care as director. *Childs v. White*, 158 N. Y. App. Div. 1, 142 N. Y. Supp. 732.

the statement was true or false, and not caring what the fact might be. In some cases, the officer is held liable where he knew the statements to be false, or where, "the facts being susceptible of knowledge, he represented as of his own knowledge that they were true, when in fact he had no such knowledge."²² In other cases, it seems to be held that knowledge will be conclusively imputed to the officers.²³ Fraudulent intent may, in some cases, be inferred from the falsity of the statements contained in a prospectus.²⁴

It is said in an Iowa case, where this question is ably discussed at some length, that the officers "will be presumed to have known that which it was their duty to know," and "before making representations as to the condition of the company as inducements to take stock therein or extend credit thereto, it is their duty to use reasonable diligence to know that the representations are true, and they will be presumed to have used such diligence, and to possess the knowledge which its exercise would bring to them."²⁵ In a later case in that state, where the secretary of an insurance company was sought to be held liable to one who purchased on reliance upon a report signed by the secretary, the court gave an instruction stating that defendant was charged with knowledge of the true condition of the company, and if the statement was false, knowledge of the falsity should be imputed to defendant. The Supreme Court, in disapproving of the instruction, said: "This action is founded on active and conscious misrepresentation as to the condition of the company, and can only be sustained by proof of intentional fraud. It cannot be predicated on negligence, however gross [citing cases]. And for this reason testimony that the defendant was acting under the advice of counsel and of the auditor of state was competent and material, as was also his own testimony as to his intent."²⁶ In Missouri, the president of a corporation executed a mortgage and signed bonds, as

²² *Cole v. Cassidy*, 138 Mass. 437, 52 Am. Rep. 284.

"If they did not know its condition, then they knew of such lack of knowledge on their part. Then their statement, made as if from personal knowledge, is equally fraudulent as though intentionally falsely made." *Churchill v. St. George Development Co.*, 174 N. Y. App. Div. 1, 160 N. Y. Supp. 357.

²³ See *Prewitt v. Trimble*, 92 Ky.

176, 36 Am. St. Rep. 586, 17 S. W. 356. See also *Mamerow v. National Lead Co.*, 206 Ill. 626, 99 Am. St. Rep. 196 69 N. E. 504, but which was decided on another point.

²⁴ *Downey v. Finucane*, 205 N. Y. 251, 265, 40 L. R. A. (N. S.) 307, 98 N. E. 391.

²⁵ *Hubbard v. Weare*, 79 Iowa 678, 44 N. W. 915.

²⁶ *Warfield v. Clark*, 118 Iowa 69, 91 N. W. 833.

president. The mortgage recited that the corporation had title to the land mortgaged when in fact it had none. He had no actual knowledge as to the title to the lands, and merely glanced at the mortgage when he executed it, without reading it. It was held that nevertheless he was personally liable to bondholders sustaining loss in purchasing bonds relying in part on the statement in the mortgage as to the title to the mortgaged property.²⁷ In Ohio, where action was brought by a purchaser of stock in a national bank against the directors of such bank alleging damage by reason of the fact that he had purchased in reliance on the statements of the bank, alleged to have been false, as to its resources and liabilities, made to the Comptroller of the Currency, the report having been attested by the directors and having been published as directed by the statute, the following charge to the jury was sustained: "It must appear by a preponderance of the evidence, that at the time of the attesting and publication of said report, that the directors so attesting this report, or who assented to and directed the publication of the same, did so knowing the report to be false, or, under such circumstances as will warrant the jury in finding by a preponderance of the evidence, that such directors, by the exercise of ordinary care and prudence would have known that said report was false in some one or more of the particulars set forth in the petition." In that case, it was held that there must be proof of intentional fraud or else of want of ordinary care.²⁸ It was held that the secretary of a corporation who acts solely for the company in selling corporate stock is not personally liable for false representations to the purchaser that the corporation was legally organized, where he had no personal knowledge of the defect in the corporate organization.²⁹

"The tendency of the courts, both in this country and in England," it is said, "is to hold promoters and directors of companies to a very strict accountability for the accuracy of their representations, made with a view to inducing strangers to the enterprise to invest therein, and to refuse to extend immunity for false state-

²⁷ *Lynch v. Southern Mining, Land & Lumber Co.*, 135 Mo. App. 672, 117 S. W. 624.

²⁸ *Mason v. Moore*, 73 Ohio St. 275, 4 L. R. A. (N. S.) 597, 4 Ann. Cas. 240, 76 N. E. 932.

²⁹ "It appears affirmatively that at the time he had no personal knowledge of the defect in the corporate

organization. This being true he could not have acted with mala fides. Under such circumstances an agent who professes to act only for a disclosed principal is not personally liable although it shall be made to appear that his representations were in fact untrue." *Maine v. Midland Inv. Co.*, 132 Iowa 272, 109 N. W. 801.

ments because the person making them believed them to be true, if in fact they were false.”³⁰

§ 2547. — **Liability as dependent on participation of officer sought to be held liable.** Closely akin to the question of knowledge and intent, referred to in the preceding section, is the question of liability for fraud as dependent upon the participation therein of the officer sought to be held liable. Of course, if the false representations are made directly by a particular officer, no difficulty is experienced in determining his liability in ordinary cases. Thus, the secretary of a corporation is personally liable to the purchaser of stock in the corporation for false representations as to the condition of the company, relied upon by the purchaser to his injury.³¹ So where the president and treasurer of a corporation knowingly made false statements for public circulation as to the payment of cash dividends, and authorized brokers to falsely state to prospective purchasers that net earnings were more than one per cent. per month, one purchasing stock in reliance thereon and who is injured thereby may recover damages of such officers in an action of deceit.³² And an agent selling stock of a corporation is liable for fraudulent representations in making the sale.³³ It is not necessary that directors, sought to be held liable, personally make false representations to plaintiff, but it is sufficient that they approve thereof.³⁴ Generally it may be said that if directors even sanction false statements, prospectuses, reports, or certificates, they are liable. It is settled in New York, it is said, “that a director who knowingly issues or sanctions the circulation of a false prospectus containing untrue statements of material facts, the natural tendency of which is to deceive and mislead the community and induce the public to purchase the stock, is responsible to those who are injured thereby.”³⁵ So in Texas it is held that directors who have sanctioned the long-continued method of borrowing money for the company on the faith of yearly financial statements, are responsible for the truth of the statements so sanctioned

³⁰ *Bystrom v. Villard*, 175 N. Y. App. Div. 433, 162 N. Y. Supp. 100.

³¹ *Maine v. Midland Inv. Co.*, 132 Iowa 272, 109 N. W. 801; *Warfield v. Clark*, 118 Iowa 69, 91 N. W. 833.

Rule applied to reports made by officers of insurance companies. *Warfield v. Clark*, 118 Iowa 69, 91 N. W. 833.

³² *Keeler v. Dunham*, 114 N. Y. App. Div. 94, 99 N. Y. Supp. 669.

³³ *Wentworth v. Moore*, 71 Wash. 396, 128 Pac. 634.

³⁴ *Myerhoff v. Tinslar*, 175 Ill. App. 29, 43.

³⁵ *Charles Lehman-Charley v. Bartlett*, 135 N. Y. App. Div. 674, 120 N. Y. Supp. 501.

by them.³⁶ So in Alabama, it is held that one induced to purchase stock by reason of false reports as to the prosperity of the corporation which were sent out "or authorized" by its directors, and by the unauthorized declaration of dividends, may sue the directors for the damages suffered.³⁷ And it has been held that a director who at various times held the office of secretary, vice president and treasurer, and who knew or had means of knowing what appeared upon the corporate books, is liable for the value of goods sold the corporation by one who extended credit on the faith of false statements in such books.³⁸

On the other hand, a director or other corporate officer is not liable for false statements made by another officer in which the former did not participate nor authorize nor sanction. The fraud must be brought home to him individually.³⁹ The mere fact of being a di-

³⁶ *Cameron v. First Nat. Bank*, — Tex. Civ. App. —, 194 S. W. 469.

"The statute provides that 'the directors shall have general management of the affairs of the corporation.' R. S. art. 1159. The borrowing of money in conducting the business of the company and the means and methods by which the necessary loans could be obtained were certainly affairs of the corporation committed by the statute to the management of the directors, and the evidence in this case shows that the appellants so considered them as they yearly discussed and passed upon the financial statements issued for the purpose of obtaining credit. It goes without saying that the issuance of such statements under the names of the directors of the company would not be regarded by those to whom they were habitually sent as statements sanctioned and approved only by the subordinate employees who prepared them, and appellants must have known that it could not be so regarded. It is true that the directors were agents of the corporation, but an agent is as much responsible as his principal for fraud perpetrated on another in which he participated. We think it clear, upon both principle and authority, that

having accepted the position and exercised the duties of directors, and having sanctioned the long-continued method of borrowing money for the company on the faith of yearly financial statements, appellants must be held responsible for the truth of the statements so sanctioned by them. Whatever may be the rule in other jurisdictions, we think it is settled by the decisions of our Supreme Court that directors of a corporation are liable for false statements of the solvency of the corporation negligently made or sanctioned by them for the purpose of inducing others to extend credit to the corporation." *Cameron v. First Nat. Bank of Galveston*, — Tex. Civ. App. —, 194 S. W. 469.

³⁷ *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897.

³⁸ *Milliken v. Richelieu Co.*, 175 N. Y. App. Div. 579, 162 N. Y. Supp. 561.

³⁹ *Arthur v. Griswold*, 55 N. Y. 400; *Wakeman v. Dalley*, 51 N. Y. 27, 10 Am. Rep. 551; *McFarland v. Carlsbad Hot Springs Sanitarium Co.*, 68 Ore. 530, Ann. Cas. 1915 C 555, 137 Pac. 209; *Weir v. Barnett*, 3 Exch. Div. 32. Compare *Houston v. Thornton*, 122 N. C. 365, 65 Am. St. Rep. 699, 29 S. E. 827.

rector is not per se sufficient to render one liable for false representations of the active managers of a corporation or for like representations of an agent employed to market the stock.⁴⁰ Likewise, a director is not liable for misrepresentations contained in a prospectus issued by his co-directors without his knowledge or consent.⁴¹ So one director is not necessarily liable for false representations of certain other directors acting as an executive committee.⁴² The mere fact that a person is the president of a corporation does not of itself make him personally liable for misrepresentations made by other directors to purchasers of corporate bonds as to their value.⁴³ Thus, if the report, alleged to be false, is signed by only a part of the corporate officers, then those not signing are ordinarily not liable for false statements in the report.⁴⁴ So directors of a corporation are not personally liable for false representations made by brokers employed on behalf of the corporation, not authorized or participated in by them.⁴⁵ The fact that one's name is on the outside of a prospectus as a director does not show that he issued or circulated it.⁴⁶ The president of a corporation who merely signs a letter prepared by another and incloses papers furnished by the latter does not make statements in such papers his own so as to make him personally liable where such statements are false.⁴⁷

In a North Carolina case, it was held that the directors of a corporation are liable for negligently and through want of attention allowing the publication of false statements of the financial condition

⁴⁰ See *Downey v. Finucane*, 205 N. Y. 251, 259, 40 L. R. A. (N. S.) 307, 98 N. E. 391.

⁴¹ See *Rives v. Bartlett*, 215 N. Y. 33, 109 N. E. 83, rev'g 156 N. Y. App. Div. 552, 141 N. Y. Supp. 561, explaining *Downey v. Finucane*, 205 N. Y. 251, 40 L. R. A. (N. S.) 307, 98 N. E. 391, as a case where director had been constituted and acted as agent for other directors.

Directors or other officers who had no part in the issuance or circulation of the prospectus are not liable. *McFarland v. Carlsbad Hot Springs Sanitarium Co.*, 68 Ore. 530, Ann. Cas. 1915 C 555, 137 Pac. 209.

⁴² *L. D. Garrett Co. v. McComb*, 58 N. Y. App. Div. 419, 68 N. Y. Supp. 996.

Fraud of the executive committee of a board of directors in issuing a false prospectus does not make personally liable therefor those directors who were not members of the committee and who had no knowledge of the issuance of the prospectus. *Ottmann v. Blaugas Co. of Cuba*, 171 N. Y. App. Div. 197, 157 N. Y. Supp. 413.

⁴³ *Horn v. Abbott*, 100 Neb. 403, 160 N. W. 104.

⁴⁴ *Gerner v. Mosher*, 53 Neb. 135, 46 L. R. A. 244, 78 N. W. 384.

⁴⁵ *Arthur v. Griswold*, 55 N. Y. 400; *Weir v. Barnett*, 3 Exch. Div. 32.

⁴⁶ *McFarland v. Carlsbad Hot Springs Sanitarium Co.*, 68 Ore. 530, Ann. Cas. 1915 C 555, 137 Pac. 209.

⁴⁷ *Ray County Sav. Bank v. Hutton*, 224 Mo. 42, 123 S. W. 47.

of the corporation, by which persons are induced to purchase stock of the corporation, and are thereby injured; and that the liability extends to nonresident directors who take no part in issuing the false statements, but who are guilty of mere negligence in not giving attention to the management of the corporation. The liability was based, not on the ground of participation in the fraud, but on the ground of negligence.⁴⁸ And in Texas it was held that a director cannot escape liability on the ground that he resided in a distant state, to the knowledge of the person loaning the money.⁴⁹

⁴⁸ *Houston v. Thornton*, 122 N. C. 365, 65 Am. St. Rep. 699, 29 S. E. 827.

⁴⁹ *Cameron v. First Nat. Bank*, — Tex. Civ. App. —, 194 S. W. 469.

In this case the following instruction was given: "The court erred in failing and refusing to give in charge to the jury this defendant's special requested charge, which reads as follows, to wit: 'If you believe from the evidence that the stockholders of the Slayden-Kirksey Woolen Mill knew at the time of the election of W. J. Slayden as a director thereof from year to year from 1902 to 1911, inclusive, that said W. J. Slayden did not reside at Waco, but at a point, or points, remote from Waco, and that said W. J. Slayden was so situated that he could not personally discharge the duties of a director, and that he would not do so, and you further believe from the evidence that said W. J. Slayden did not attend directors' or stockholders' meetings after the year 1902, and that he did not participate, or profess to participate, in the management of said mill by the active directors thereof; and if you further believe that he did not participate in the preparation of the financial statement of said mill for the year 1909, and that he did not personally authorize the presentation of the same, as a basis for credit, and if you further find that he did not know of the presentation of the same to this plaintiff by S. F. Kirksey, Jr., or authorize or participate in the same, and

if you further believe from the evidence that the plaintiff, through its managing officers, had notice that said Slayden did not live at Waco, and that the same or any other facts known to them, if any, was sufficient to put them, as reasonably prudent men, on inquiry as to the residence of said Slayden, and his nonparticipation in the active management of said mill — then you will find for the defendant W. J. Slayden on all the issues presented to you for determination by the court in the charge submitted to you herein.' The court said: "It is wholly immaterial where appellant Slayden resided. He accepted and continued to exercise the duties and responsibilities of director of the corporation, and knowingly allowed himself to be held out to the public, including appellee, as one of the governing officers of the corporation, and the mere fact that appellee knew that he resided in New York would not authorize a finding that it was negligent in relying upon the assumption that he sanctioned the issuance of the financial statement made under his name and with the apparent approval of all of the directors. It is apparent, as contended by appellee, that the jury might have found every fact stated in the charge to be true, and yet said appellant would be liable upon the facts found by the jury, as there would have been no inconsistency in the two findings, and the refusal of the charge could not there-

The fact that directors knew of other transactions of its manager which were fraudulent, but did not discharge him, does not, it seems, make them personally liable for his fraud where they did not participate in it or have any knowledge of it.⁵⁰

A party cannot be held liable for misrepresentation as a director where he was not such at the time the misrepresentation was made.⁵¹ Thus, a director cannot be held liable for false representations contained in the articles of association, which were made before he became a director.⁵²

§ 2548. — Contracting debt or receiving deposits with knowledge of insolvency. It is fraud for officers of a bank to permit a deposit when they know, or ought to know, that it is insolvent,⁵³ since the

fore be held prejudicial to the appellant." *Cameron v. First Nat. Bank of Galveston*, — Tex. Civ. App. —, 194 S. W. 469.

⁵⁰ *Northern Codfish Co. v. Stiberg*, 96 Wash. 126, 164 Pac. 750.

⁵¹ *Warner v. Thompson*, 104 N. Y. App. Div. 630, 93 N. Y. Supp. 1152.

A complaint against directors for making false representations by which plaintiff was induced to buy stock should show that the defendants named were directors or were in some way responsible for the false representations. *Viner v. James*, 92 N. Y. App. Div. 542, 87 N. Y. Supp. 257.

⁵² *Mabey v. Adams*, 3 Bosw. (N. Y.) 346.

⁵³ *Delano v. Case*, 121 Ill. 247, 2 Am. St. Rep. 81, 12 N. E. 676; *Wolfe v. Simmons*, 75 Miss. 539, 23 So. 586; *Cassidy v. Uhlmann*, 170 N. Y. 505, 63 N. E. 554, aff'g 54 N. Y. App. Div. 205, 66 N. Y. Supp. 670; *Miller v. Howard*, 95 Tenn. 407, 32 S. W. 305.

A general depositor may sue directors for permitting the bank to be held out to the public as solvent when in fact it was at the time insolvent. *Delano v. Case*, 121 Ill. 247, 2 Am. St. Rep. 81, 12 N. E. 676, aff'g 17 Ill. App. 531.

So directors of a bank are liable to

creditors who become such at a time when the bank is insolvent but they hold it out at the same time as worthy of credit and appropriate its assets to their own advantage. *Wolfe v. Simmons*, 75 Miss. 539, 23 So. 586.

Where deposits were alleged to have been received by a bank director, with knowledge, after the bank had become insolvent, the lower court gave instruction that there could not be recovery unless defendant director was guilty of bad faith "amounting to fraud." The court refused a request to charge that if the officers permitted deposits when aware of the insolvency of the bank, that this was fraud. The instruction and refusal were held erroneous. *Nathan v. Uhlmann*, 101 N. Y. App. Div. 388, 92 N. Y. Supp. 13.

But it has been held that directors are not personally liable because they conceal from creditors the financial embarrassment of the bank, where not such as to imperatively demand suspension. *Robinson v. Hall*, 59 Fed. 648, 650, rev'd on other grounds 63 Fed. 222.

That director may testify as to his belief as to the solvency of a bank when deposits were received, see *Cassidy v. Uhlmann*, 163 N. Y. 380, 79

fact that a bank keeps its doors open and transacts business is a continuing assertion of its solvency; and depositors may hold the bank officers who are responsible for, or actively participate in, keeping the bank open, for the damages sustained thereby. Thus, they may hold a single director liable, where he had knowledge of the insolvency, according to what is deemed the better authorities;⁵⁴ although in one case in North Dakota it was held that the mere fact that a director who knows that the bank is insolvent, takes no steps to close the bank, or announce its insolvency, does not make him liable for deceit to persons extending credit after the bank became insolvent, on the assumption that it was solvent.⁵⁵

Moreover, liability therefor is often expressly imposed by statute.⁵⁶ In Minnesota, where a statute makes a felony the acceptance of deposits by bank officers when they know, or ought to know, that the bank is insolvent, it is held that directors are personally liable to depositors for deposits made when they knew that the bank was insolvent, and that the liability is not limited to the officer who actually accepts and receives the deposits.⁵⁷

But the purchase of goods for an insolvent company by its manager does not make him personally liable for the price although he knew of the insolvency.⁵⁸

§ 2549. — Declaration of unearned dividend. The creation of a fictitious market value for stock, by the declaration of an unearned dividend for the purpose of enabling the directors to dispose of their stock at the inflated value, is an actionable fraud upon any purchaser of the stock.⁵⁹

Am. St. Rep. 596, 57 N. E. 620, rev'g on this ground 27 N. Y. App. Div. 80, 50 N. Y. Supp. 318.

⁵⁴ *Cassidy v. Uhlmann*, 170 N. Y. 505, 63 N. E. 554.

⁵⁵ *Hart v. Evanson*, 14 N. D. 570, 3 L. R. A. (N. S.) 438, 105 N. W. 942, holding that two of the essential elements of actionable deceit, i. e., wilful misrepresentation, and intent thereby to induce another person to alter his position, were absent; and that duty, if any, to disclose the insolvency, was one, owing only to the corporation and not to third persons.

⁵⁶ *Dodge v. Mastin*, 17 Fed. 660;

Forbes v. Mohr, 69 Kan. 342, 76 Pac. 827; *Utley v. Hill*, 155 Mo. 232, 49 L. R. A. 323, 78 Am. St. Rep. 569, 55 S. W. 1091; *Cummings v. Winn*, 89 Mo. 51, 14 S. W. 512; *Eads v. Orcott*, 79 Mo. App. 511; *Fischer v. Tamm*, 13 Mo. App. 108; *Cummings v. Spaunhorst*, 5 Mo. App. 21. See also § 2646, *infra*.

⁵⁷ *Baxter v. Coughlin*, 70 Minn. 1, 72 N. W. 797.

⁵⁸ *North American Smelting Co. v. Temple*, 12 Pa. Super. Ct. 99.

⁵⁹ *Zimmern v. Blount*, 238 Fed. 740, 744. See also *Chesbrough v. Woodworth*, 195 Fed. 875, 883.

§ 2550. — **Wrongful declaration of only small dividend and increase of salaries.** Where the acts of corporate officers in declaring only a small dividend and at the same time increasing their salaries was wrongful, and was done for the purpose of inducing a stockholder to sell them his stock for less than it was worth, which he did, such acts are a fraud on the stockholder and he may recover from such officers the damage sustained by him in selling his stock to them.⁶⁰ Such an action is not one by a stockholder for the benefit of all the stockholders but is one by a stockholder individually.⁶¹

§ 2551. — **False representations as to goods sold.** In a case decided in Washington, a blasting powder company issued circulars misrepresenting the safety of the powder. One who purchased the powder was injured by a premature explosion of it. The corporation had no general manager. It was held that directors of the company were liable therefor on the theory that they "were presumed to have been actively engaged in managing the affairs of the company" and that "the act of the company in issuing the circular was also in law the personal act of these trustees in so far as such act constituted the wrong, resulting in" the injury.⁶²

§ 2552. — **Effect of statute requiring report fixing penalty for false report, as fine and imprisonment.** In one case it was held that, inasmuch as the statute fixed the penalty for a false report at fine or imprisonment, therefore no other penalty could be enforced and the directors could not be held liable for deceit in making the report.⁶³

§ 2553. — **Measure of damages.** In case of a stockholder who purchases stock in reliance upon a false statement, the measure of damages is the difference between the market value of the stock at the time of purchase and what it would have been worth if the condition of the company had been as represented.⁶⁴ If a prospectus is published in the name of and under the sanction of the directors, but only the general manager knew of the falsity of the representations therein, the liability of the directors other than the manager,

⁶⁰ Von Au v. Magenheimer, 126 N. Y. App. Div. 257, 110 N. Y. Supp. 629, aff'd without opinion 196 N. Y. 510, 89 N. E. 1114.

⁶¹ Von Au v. Magenheimer, 126 N. Y. App. Div. 257, 110 N. Y. Supp. 629, aff'd without opinion 196 N. Y. 510, 89 N. E. 1114.

⁶² Marsh v. Usk Hardware Co., 73 Wash. 543, 132 Pac. 241.

⁶³ Utley v. Hill, 155 Mo. 232, 49 L. R. A. 323, 78 Am. St. Rep. 569, 55 S. W. 1091.

⁶⁴ Warfield v. Clark, 118 Iowa 69, 91 N. W. 833.

to a stockholder who purchased stock in reliance thereon, is limited to compensation for the actual damages resulting from their misconduct, and cannot be extended to a requirement that they return the entire investment as in case of intentional fraud.⁶⁵

§ 2554. — Remedies for fraud. Where plaintiff has been induced to become a stockholder by the false representations of officers of the corporation, it is the rule in England that he may sue in equity, and that equity exercises a concurrent jurisdiction in such cases;⁶⁶ and this rule has been followed in this country.⁶⁷ Fraud practiced upon individual shareholders, to induce them to purchase stock, gives a right of action to be asserted by them individually rather than by an action in behalf of all the stockholders.⁶⁸ If it is claimed that plaintiff purchased stock based on the fraudulent representations of the controlling officer of the corporation, and that the stock was thereafter made worthless by such officer manipulating the assets, the stockholder has at least three remedies, viz.: (1) rescission of the stock subscription and recovery of the money paid for the stock, (2) action ex delicto against the officer for the damages resulting from the fraud, (3) suit in equity in behalf of all the stockholders to charge the officer with the profits fraudulently obtained and for an accounting.⁶⁹

Where all the visible definite assets of a corporation have been sold by the receiver, and further dividends depend wholly upon the contingent result of litigation which, even if successful, would add assets the value of which would be incapable of definite ascertainment, a creditor is not obliged to wait, before suing corporate officers individually for fraud, until the final result of such suits, nor are the damages to be lessened by the amount of such possible further dividends.⁷⁰

The remedies of a subscriber to or purchaser of capital stock of the corporation, in case of fraud, has already been stated.⁷¹

⁶⁵ *Lyon v. James*, 97 N. Y. App. Div. 385, 90 N. Y. Supp. 28, aff'd 181 N. Y. 512, 73 N. E. 1126.

⁶⁶ *Hill v. Lane*, L. R. 11 Eq. 215; *Peek v. Gurney*, L. R. 6 H. L. 377.

⁶⁷ *Squiers v. Thompson*, 73 N. Y. App. Div. 552, 76 N. Y. Supp. 734, aff'd without opinion in 172 N. Y. 652, 65 N. E. 1122. To same effect,

Kilbourne v. Sunderland, 130 U. S. 505, 32 L. Ed. 1005.

⁶⁸ *Moneur v. Ideal Mfg. Co.*, 31 Dom. L. R. (Can.) 465.

⁶⁹ *Heckendorn v. Romadka*, 138 Wis. 416, 120 N. W. 257.

⁷⁰ *Cameron v. First Nat. Bank*, — Tex. Civ. App. —, 194 S. W. 469.

⁷¹ See §§ 627-629, vol. 2.

§ 2555. **Infringement.** Corporate officers, in a proper case, are liable for infringement of a patent, copyright, or trade-mark or trade name;⁷³ although, at least so far as patents are concerned, some of the decisions are far from being clear as to exactly what they intend to hold. In some cases, in a suit in equity, it seems to be held that an officer of a corporation cannot be held liable where the corporation is solvent and a decree against it will give adequate relief, where the officer has done nothing except in his official capacity.⁷³ On the other hand, corporate officers who actually participate in the adoption and use by the corporation of an infringing device have been held personally liable.⁷⁴ And, managing officers who are heavy stockholders and have the entire management of the corporation have been held liable for the infringement of trade-marks where instigated and controlled by them.⁷⁵ In relation to infringement of patents, a federal court has said that "the general principles determining this liability are in no wise peculiar to the patent law, but are equally applicable to all torts;" and it expressly held that "a director of a corporation, who, as director, by vote or otherwise, specifically commands the subordinate agents of the corporation to engage in the manufacture and sale of an infringing article, is liable individually in an action at law for damages brought by the owner of the patent so infringed. As with other infringers, it is immaterial whether the director knew or was ignorant that the article manufactured and sold did infringe a patent."⁷⁶

In any event, the mere fact that one is a director or other officer of the infringing company does not make him personally liable,⁷⁷

⁷³ *Cahoone Barnet Mfg. Co. v. Rubber & Celluloid Harness Co.*, 45 Fed. 582; *National Car-Brake Shoe Co. v. Terre Haute Car & Manufacturing Co.*, 19 Fed. 514. Contra, *Cazier v. Mackie-Lovejoy Mfg. Co.*, 138 Fed. 654, rev'd on other grounds 157 Fed. 88; *United Nickel Co. v. Worthington*, 13 Fed. 392.

⁷³ *Loomis-Manning Filter Co. v. Manhattan Filter Co.*, 117 Fed. 325; *Bowers v. Atlantic, G. & P. Co.*, 104 Fed. 887, followed in *Farmers' Mfg. Co. v. Spruks Mfg. Co.*, 119 Fed. 594.

⁷⁴ *Peters v. Union Biscuit Co.*, 120 Fed. 679, 686; *Fauber v. Springfield Drop-Forging Co.*, 98 Fed. 119.

Corporate officers may be personally

charged with the infringement of trade-marks in transacting the corporate business where they have full power to act in all matters affecting the corporate interests and the directors are practically without voice in the corporate management. *Saxlehner v. Eisner*, 147 Fed. 189. Compare *Brennan & Co. v. Dowagiac Mfg. Co.*, 162 Fed. 472, where damages reduced to one dollar as to corporate officials who infringed only as officials.

⁷⁵ *Saxlehner v. Eisner*, 140 Fed. 938, aff'd 147 Fed. 189.

⁷⁶ *National Cash-Register Co. v. Leland*, 94 Fed. 502, 507, 511, where question is discussed at length.

⁷⁷ *Reis v. Rosenfeld*, 204 Fed. 282;

especially where the infringement was contrary to his express instructions and without his knowledge.⁷⁸ However, if individuals organize a corporation for the sole purpose of enabling them as individuals to carry on, in corporate form, a side line or business, in which they could as individuals have the entire management and direction, but in which they would not be responsible beyond their stock, they may be joined with the corporation as defendants in an infringement suit.⁷⁹

§ 2556. Libel. In like manner, officers of a corporation are personally liable for a libel if they participate in its publication, although merely as officers.⁸⁰ There is no liability, however, if the officer does not participate in the libel.⁸¹ Thus, the president of a corporation is not liable for a libel published in a newspaper owned by the company where he did not personally participate therein.⁸² However, the general manager of a newspaper who controls its policy is liable for a libel printed therein;⁸³ and a general manager who knows a libel is to be published but takes no steps to stop it is personally liable.⁸⁴

It is said by Justice Marshall, in a Wisconsin case, that "the law is well settled that the managing editor of a newspaper is equally liable with the proprietor and publisher for the consequences, in a civil action, for the publication of a libelous article; and this is so whether he knows of the publication or not, for it is his business to know, and mere want of knowledge constitutes no defense."⁸⁵ Sub-

Hutter v. DeQ. Bottle Stopper Co., 128 Fed. 283.

Directors are not rendered liable by signing a paper agreeing to save harmless from infringement suits purchasers who had previously bought the infringing devices. *American Bank Protection Co. v. Electric Protection Co.*, 181 Fed. 350, 373.

⁷⁸ *Stuart v. Smith*, 68 Fed. 189.

⁷⁹ *Crown Cork & Seal Co. of Baltimore City v. Brooklyn Bottle Stopper Co.*, 172 Fed. 225, 233.

⁸⁰ *Belo v. Fuller*, 84 Tex. 450, 31 Am. St. Rep. 75, 19 S. W. 616.

⁸¹ The secretary of a corporation cannot be charged with liability for the publication of a libel merely because, at the request of the general

manager of the corporation, he permitted the latter to take a memorandum which was in his custody as secretary, and which was, without his consent or knowledge, so used by the general manager as to be made the basis of the libelous article. *Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 43 L. Ed. 543.

⁸² *Folwell v. Miller*, 145 Fed. 495, 10 L. R. A. (N. S.) 332, 7 Ann. Cas. 455.

⁸³ *Danville Press Co. v. Harrison*, 99 Ill. App. 244.

⁸⁴ *Keller v. American Bottlers' Pub. Co.*, 140 N. Y. App. Div. 311, 125 N. Y. Supp. 212.

⁸⁵ *Smith v. Utley*, 92 Wis. 133, 35 L. R. A. 620, 65 N. W. 744.

stituting the words "general manager" for "managing editor" this would seem to be the rule as to all corporations, under ordinary circumstances. And it was held in a later Wisconsin case that directors of a newspaper who had caused the publication of many violent articles in opposing a street franchise for a street railroad company were liable for a libel in pursuance of such policy, although it was not shown that they counseled or advised the specific libel.⁸⁶ The rule is stated in the latter case that if it be shown that officers "in any way aided, assisted, or advised its publication or circulation, or that their duties as officers or agents of the concern were of such a character as to charge them with the performance of functions concerning the publication and circulation of the paper, such duties being of such nature that the law implies that such officer or agent knew or ought to have known of the publication, they are liable, and cannot defend on the ground merely that they did not know about the libel until after it was published."⁸⁷

§ 2557. Malicious prosecution. A person cannot escape personal liability for malicious prosecution merely because he acted as an officer of a corporation and not as an individual in his private capacity.⁸⁸

§ 2558. Negligence. As to liability of agents in general for negligence, there is considerable conflict in the authorities, due to the courts drawing a distinction between acts of nonfeasance and acts of misfeasance or malfeasance.⁸⁹ There is a sharp conflict in the authorities both as to whether an agent or servant is liable to a third person for nonfeasance, and as to what is nonfeasance within the rule.⁹⁰ One line of cases holds that there is no liability for nonfeasance; another line of cases repudiates the distinction between nonfeasance and misfeasance and holds agents liable for what is termed nonfeasance as well as misfeasance; and still another line of cases holds the performance of duties negligently, as distinguished from a total failure to perform, to be misfeasance rather than nonfeasance. This is too broad a subject for a thorough consideration in

⁸⁶ Pfister v. Sentinel Co., 108 Wis. 572, 84 N. W. 887.

Stewart, 167 Ind. 544, 79 N. E. 490.

⁸⁹ See generally 1 Mechem, Agency (2nd Ed.), § 1460.

⁸⁷ Pfister v. Sentinel Co., 108 Wis. 572, 84 N. W. 887.

⁹⁰ See Ward v. Pullman Car Corporation, 131 Ky. 142, 25 L. R. A. (N. S.) 343 with note, 114 S. W. 754.

⁸⁸ Murphy v. Eidlitz, 113 N. Y. App. Div. 659, 99 N. Y. Supp. 950. See also Farmers' Mut. Fire Ins. Ass'n v.

this work, but the general rules should be sought in leading textbooks on the law of Agency.⁹¹

As applied to corporate officers, it has been held that they are not liable for nonfeasance;⁹² that they are liable for nonfeasance;⁹³ and that negligence in actually performing duties is misfeasance rather than nonfeasance.⁹⁴ It is submitted that, sooner or later, the rule of nonliability for nonfeasance will be entirely discarded.

⁹¹ See 1 Mechem, Agency (2nd Ed.), §§ 1464-1481; 2 Clark & Skyles, Agency, §§ 594-596. See also note in 25 L. R. A. (N. S.) 343, on "Liability of an agent or servant to third persons for his own negligence or nonfeasance." See also note in 28 L. R. A. 433, reviewing this question, as applicable to agents generally, at length. See further, on this subject, 48 Am. St. Rep. note, p. 923 et seq., 22 Am. St. Rep. note, p. 512 et seq.

⁹² *O'Neil v. Young & Sons' Seed & Plant Co.*, 58 Mo. App. 628, 634.

An officer or agent of a corporation is not liable, it is held in Nebraska, to third persons "for mere failure to perform some duty which the corporation may have owed them." *Penney v. Bryant*, 70 Neb. 127, 96 N. W. 1033.

In New York, on this theory, a committee appointed by the board of directors, who were in charge of the erection of a grand stand which fell, injuring plaintiff, were held not personally liable for their negligence in constructing the stand. *Van Antwerp v. Linton*, 89 Hun (N. Y.) 417.

⁹³ In Alabama, for instance, this distinction between nonfeasance and misfeasance is abolished by the common sense rule that "the mere relation of agency does not exempt a person from liability for any injury to third persons, resulting from his neglect of duty, for which he would otherwise be liable." *Mayer v. Thompson-Hutchison Bldg. Co.*, 104 Ala. 611, 28 L. R. A. 433, 53 Am. St. Rep. 88, 16 So. 620, where manager of corporation held personally liable for

negligent failure to erect a scaffold which was needed to protect persons near the walls.

In Kentucky, see § 2536, *supra*.

⁹⁴ Another line of cases hold that the rule that the directors and other officers of a corporation are liable to third persons for torts does not apply when the alleged tort consists in mere nonfeasance, if the nonfeasance is nothing more than a failure to perform the duty which the officer or agent owes, as such, to the corporation, but it does apply if the officer or agent enters upon the performance of his duties, and by nonfeasance therein performs those duties in such a negligent manner as to cause injury to third persons, on the theory that in such a case there is something more than mere nonfeasance—there is misfeasance. *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437; *Greenberg v. Whitcomb Lumber Co.*, 90 Wis. 225, 28 L. R. A. 438, 48 Am. St. Rep. 911, 63 N. W. 93.

If an officer or superintendent of a corporation directs an employee of the corporation to work at a machine which he knows to be defective and dangerous, he will be personally liable if the employee is injured. *Greenberg v. Whitcomb Lumber Co.*, 90 Wis. 225, 28 L. R. A. 439, 48 Am. St. Rep. 911, 63 N. W. 93, in which case the court, while recognizing the distinction between nonfeasance and misfeasance, said: "It was Semple's duty to have had this machine safe. His neglect to do so was nonfeasance. But that alone would not have harmed the

Nonfeasance, where a creditor sues and the injury is primarily to the corporation, involves a somewhat similar question as to which there is also a conflict.⁹⁵

§ 2559. Nuisance. The directors and other officers of a corporation are also liable personally for a nuisance erected or maintained or consented to by them, although acting for the corporation.⁹⁷ To the same effect, where officers of a corporation were convicted for the maintenance of a nuisance, and fined, the court said: "The officers of the company are jointly responsible for the business. It is not necessary to conviction that they should have been actually engaged in work upon the premises. The work is carried on by employees. The directors and officers are the persons primarily responsible, and therefore the proper ones to be prosecuted."⁹⁸

§ 2560. Trespass. An officer of a corporation is personally liable for a trespass committed by him, or under his direction, upon the land or goods of another, although he may have acted for the corporation.⁹⁹ Thus, the general manager of a corporation is liable for trespasses on adjoining property by placing mine tailings thereon, where he had knowledge of the continuing trespass although not actually trespassing himself.¹

§ 2561. Unlawful detention. It has been held that a vice president of a corporation is not liable personally, in an action to recover possession of land and for damages in the way of rents and profits, for alleged unlawful detention, where he disclaimed possession or any interest in the land, and there was no wanton or malicious entry, especially where the action was in the nature of an action on an

plaintiff, if he had not set him to work upon it. To set him to work upon this defective and dangerous machine, knowing it to be dangerous, was doing improperly an act which one might lawfully do in a proper manner—It was misfeasance."

⁹⁵ See §§ 2574-2576, *supra*.

⁹⁷ *Cameron v. Kenyon-Connell Commercial Co.*, 22 Mont. 312, 74 Am. St. Rep. 602; *Nunnally v. Southern Iron Co.*, 94 Tenn. 397, 28 L. R. A. 421, 29 S. W. 361; *Karns v. Allen*, 135 Wis. 48, 15 Ann. Cas. 543, 115 N. W. 357.

⁹⁸ *People v. Detroit White Lead*

Works, 82 Mich. 471, 9 L. R. A. 722, 46 N. W. 735.

⁹⁹ *Favorite v. Cottrill*, 62 Mo. App. 119; *Bates v. Van Pelt*, 1 Tex. Civ. App. 185, 20 S. W. 949; *Lytle Logging & Mercantile Co. v. Humptulips Driving Co.*, 60 Wash. 559, 111 Pac. 774.

Compare *Bath v. Caton*, 37 Mich. 199. Application of rule to agents generally, see 1 *Mechem, Agency* (2nd Ed.), §§ 1455, 1456.

¹ *Robinson v. Moark-Nemo Consol. Min. Co.*, 178 Mo. App. 531, 163 S. W. 885.

implied contract because rents and profits were set up as the measure of damages.²

§ 2562. Liability over where judgment recovered against corporation for tort of officer. Directors are liable to the corporation where they publish a libel to gratify their own personal ends, and a judgment is recovered against the corporation because thereof.³

XXIX. TRANSACTIONS WITH, AND LIABILITIES OF OFFICERS TO,
STOCKHOLDERS

§ 2563. In general. It has already been noted that there is some conflict of opinion as to how far directors or other corporate officers may be said to be trustees for individual stockholders.⁴ The only question to be considered in this subdivision is one which grows out of this conflict, as to whether directors or other corporate officers may take advantage of their superior knowledge gained as such officers, in purchasing stock from stockholders, without disclosing their knowledge to the stockholder.

§ 2564. Purchase of stock by officer from stockholder—In general. The decisions present a square conflict of opinion as to the duty of a director in purchasing stock from a stockholder.⁵ To go further back, it would seem that the dividing line is whether directors are to be deemed trustees for individual stockholders so far as their stock in the corporation is concerned.⁶

The rule laid down by one class of decisions is that "while directors occupy a trust relation to the corporation which they direct, their duty does not apply to the stockholder in the sale and purchase of stock. Dealing in its own stock is not a corporate function. In buying or selling stock, directors may trade like an outsider, provided they do not affirmatively act or speak wrongfully, or intentionally conceal facts with reference to it. There is also the qualification that no other relation of trust exists between the parties."⁷ This is the

² *Wootton Land & Fuel Co. v. John*, 60 Colo. 305, 153 Pac. 686.

³ *Hill v. Murphy*, 212 Mass. 1, 40 L. R. A. (N. S.) 1102 with note, Ann. Cas. 1913 C 374 with note, 98 N. E. 781.

⁴ See § 2270, *supra*.

⁵ For valuable notes on this subject, see 8 Mich. Law Rev. 267, 81 Cent. Law J. 256, 67 Cent. Law J. 452, L. R. A. 1916 B 708.

⁶ See § 2270, *supra*.

⁷ *Shaw v. Cole Mfg. Co.*, 132 Tenn. 210, 177 S. W. 479.

rule in Arizona,⁸ Illinois,⁹ Indiana,¹⁰ Louisiana (semble),¹¹ Michigan,¹² Missouri (semble),¹³ New Jersey,¹⁴ New York (semble),¹⁵ Pennsylvania,¹⁶ Tennessee,¹⁷ Utah,¹⁸ Washington,¹⁹ the federal courts (semble),²⁰ England²¹ and Canada.²²

The other line of cases hold that directors are trustees for indi-

⁸ *Steinfeld v. Nielsen*, 15 Ariz. 424, 139 Pac. 879. For former appeal, see 12 Ariz. 381, 100 Pac. 1094, where contrary was held. That the court, on the later appeal, misconceived the cases holding officers liable, as all being based on special facts, is the view of Justice Ladd in *Dawson v. National Life Ins. Co. of America*, 176 Iowa 362, L. R. A. 1916 E 878, 157 N. W. 929, and is undoubtedly correct.

⁹ *Hooker v. Midland Steel Co.*, 215 Ill. 444, 106 Am. St. Rep. 170, 74 N. E. 445, aff'g 117 Ill. App. 441.

A director does not, says the Supreme Court of Illinois, sustain the relation of trustee "to an individual stockholder with respect to his stock, over which he has no control whatever, but he may deal with an individual stockholder and purchase his stock practically on the same terms as a stranger. In the absence of actual fraud, such a purchase will not be set aside for a mere failure to disclose any information the director may have affecting the value of the stock." *Hooker v. Midland Steel Co.*, 215 Ill. 444, 106 Am. St. Rep. 170, 74 N. E. 445.

"Officers of a corporation may purchase the stock of stockholders on the same terms and as freely as they might purchase of a stranger." *Bawden v. Taylor*, 254 Ill. 464, 98 N. E. 941, following *Hooker v. Midland Steel Co.*, 215 Ill. 444, 106 Am. St. Rep. 170, 74 N. E. 445.

¹⁰ *Tippecanoe County Comr's v. Reynolds*, 44 Ind. 509, 15 Am. Rep. 245.

¹¹ *In re Shreveport Nat. Bank*, 118 La. 664, 43 So. 270.

¹² In Michigan it is held that directors do not stand in a fiduciary position "when dealing with other stockholders for the purchase or sale of stock. In the purchase and sale of stock between stockholders, there must be some actual misrepresentation in order to constitute fraud. Mere silence is not sufficient. The books of the corporation are open to all the stockholders alike, and each may inform himself of the condition of the company." *Walsh v. Goulden*, 130 Mich. 531, 90 N. W. 406, 9 Det. L. N. 145.

¹³ *Wann v. Scullin*, 210 Mo. 429, 109 S. W. 688.

¹⁴ *Crowell v. Jackson*, 53 N. J. L. 656, 23 Atl. 426.

¹⁵ See *Carpenter v. Danforth*, 19 Abb. Pr. (N. Y.) 225, 52 Barb. (N. Y.) 581. But see *Von Au v. Magenheim*, 126 N. Y. App. Div. 257, 110 N. Y. Supp. 629.

¹⁶ See *Krumbhaar v. Griffiths*, 151 Pa. St. 223, 25 Atl. 64. Compare *Rafferty v. Donnelly*, 197 Pa. 423, 47 Atl. 202.

¹⁷ *Shaw v. Cole Mfg. Co.*, 132 Tenn. 210, L. R. A. 1916 B 706 with note, 177 S. W. 479; *Deaderick v. Wilson*, 67 Tenn. 108.

¹⁸ *Haarstick v. Fox*, 9 Utah 110, 33 Pac. 251.

¹⁹ *O'Neile v. Ternes*, 32 Wash. 528, 73 Pac. 692.

²⁰ See *Gillett v. Bowen*, 23 Fed. 625; *Grant v. Attrill*, 11 Fed. 469.

²¹ *Percival v. Wright*, [1902] 2 Ch. 421.

²² *Allen v. Hyatt*, 17 Dom. L. R. (Can.) 7; *Gadsden v. Bennetto*, 5 Dom. L. R. (Can.) 529, rev'd on other grounds 9 Dom. L. R. (Can.) 719.

vidual stockholders in so far as their stock is concerned,²³ and that they cannot purchase stock from a stockholder without giving him the benefit of any official knowledge they possess which may increase the value of the stock. This is rule in Georgia,²⁴ Iowa,²⁵ Kansas,²⁶ Nebraska²⁷ and West Virginia.²⁸

Of course, decisions based on positive and intentional misrepresentation of material facts have nothing to do with the question under consideration.²⁹

§ 2565. — Purchase from co-director. In any event the rule forbidding a purchase without a full disclosure does not apply where a director purchases from a co-director who has general charge of the business,³⁰ although if one officer acts as special agent of another the rule is otherwise.³¹

§ 2566. — Where officer makes himself agent of seller. Sometimes the invalidity of the purchase of stock is made to depend upon the fact that the director or other officer, in the particular transaction, made himself the agent of the seller, or professed to be aiding the stockholder in selling his stock and really acted as his agent in making the sale.³² Even if, under some circumstances, directors may deal at arm's length with individual stockholders, yet if the directors hold themselves out to individual stockholders as acting for them in purchasing their stock, to effect a consolidation, on the same footing as they were acting for the company itself, i. e., as agents, a fiduciary relation exists.³³ A fortiori, if a committee is appointed

²³ See also § 2270, supra.

²⁴ *Oliver v. Oliver*, 118 Ga. 362, 45 S. E. 232.

²⁵ *Dawson v. National Life Ins. Co. of America*, 176 Iowa 362, L. R. A. 1916 E 378, 157 N. W. 929, wherein Justice Ladd, at great length, reviews the decisions in an able and valuable opinion.

²⁶ *Stewart v. Harris*, 69 Kan. 498, 66 L. R. A. 261, 105 Am. St. Rep. 178, 2 Ann. Cas. 873, 77 Pac. 277.

²⁷ *Jacquith v. Mason*, 99 Neb. 509, 156 N. W. 1041.

²⁸ In West Virginia, the rule is laid down that a director or other corporate officer, in purchasing stock from a stockholder, "is bound at his peril to withhold no fact known to

him and unknown to the stockholder affecting the value of the stock." *Poolè v. Camden*, — W. Va. —, 92 S. E. 454.

²⁹ False representations as tort, see §§ 2544-2554, supra.

³⁰ *Perry v. Pearson*, 135 Ill. 218, 25 N. E. 636. To same effect, *Steinfeld v. Nielsen*, 12 Ariz. 381, 100 Pac. 1094.

³¹ *Mulvane v. O'Brien*, 58 Kan. 463, 49 Pac. 607.

³² *Mulvane v. O'Brien*, 58 Kan. 463, 49 Pac. 607; *Fisher v. Budlong*, 10 R. I. 525, where sale was secretly made to third person but for president; *Allen v. Hyatt*, 17 Dom. L. R. (Can.) 7.

³³ *Allen v. Hyatt*, 17 Dom. L. R. (Can.) 7.

by the board of directors to dispose of the land of the company and also of its shares of stock held by individuals, they cannot themselves purchase the shares at a profit at prices much below their real value by suppressing the real terms of the offer received for the land of the company.³⁴

§ 2567. — Rule as affected by special circumstances. In any event, there may be special circumstances requiring a director to disclose to a stockholder the general knowledge which he may possess regarding the value of the shares of the company before he purchases any from a stockholder. This is well illustrated in a decision of the Supreme Court of the United States in which Mr. Justice Peckham said: "It is here sought to make defendant responsible for his actions, not alone and simply in his character as a director, but because, in consideration of all the existing circumstances above detailed, it became the duty of the defendant, acting in good faith, to state the facts before making the purchase. That the defendant was a director of the corporation is but one of the facts upon which the liability is asserted, the existence of all the others in addition making such a combination as rendered it the plain duty of the defendant to speak. He was not only a director but he owned three fourths of the shares of its stock, and was, at the time of the purchase of the stock, administrator general of the company, with large powers, and engaged in the negotiations which finally led to the sale of the company's lands * * * to the government at a price which very greatly enhanced the value of the stock. * * * Concealing his identity when procuring the purchase of the stock, by his agent, was in itself strong evidence of fraud."³⁵ Concealment of the fact that the purchasing officer had a contract to sell the stock above its market value to another company which was seeking to obtain control, has been distinguished by holding that such concealment is actionable.³⁶

§ 2568. — Concealment distinguished from false representations. Concealment must be distinguished from actual fraudulent representations.³⁷ It is not fraudulent, it has been held, for an officer of a

³⁴ Gadsden v. Bennetto, 9 Dom. L. R. (Can.) 719, rev'g 5 Dom. L. R. (Can.) 529. Tenn. 210, 177 S. W. 479; Poole v. Camden, — W. Va. —, 92 S. E. 454.

³⁵ Strong v. Repide, 213 U. S. 419, 53 L. Ed. 853, rev'g 6 Philippine 680. ³⁶ Haverland v. Lane, 89 Wash. 557, 154 Pac. 1118. ³⁷ See Black v. Simpson, 94 S. C. 312, 46 L. R. A. (N. S.) 137, 77 S. E.

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corporation to induce a stockholder to sell his stock, without disclosing that the officer was also a stockholder in the purchasing corporation.³⁸

XXX. LIABILITY OF OFFICERS TO CREDITORS OF CORPORATION INDEPENDENTLY OF STATUTE

§ 2569. **General considerations.** Actions by creditors of a corporation against corporate officers are either based on a statute or on the common law. The former are considered hereafter,³⁹ while the latter are treated of herein, except that actions by creditors for a direct tort, where the injury is solely to the creditor, and not to the corporation, are considered in a preceding subdivision along with other torts, since in such case the fact of being a creditor is immaterial except as it shows the injury from the tort.⁴⁰ If the action is brought by a receiver or other like representative, then the rules governing are those where the action is brought by the corporation itself and hence are not considered herein.⁴¹

Of course, if a corporation is solvent, there is no necessity for resorting to the individual liability of officers. It follows that in the class of actions now under discussion it is assumed that the corporation is insolvent. The theory upon which a recovery is allowed is either that the director or other corporate officer is a trustee for the creditors, or that the creditor is entitled to recover as the representative of the corporation for a wrong primarily done to the corporation itself. However, the courts have confused the right to recover by failing to clearly distinguish, in many instances, the right to recover for torts in general as already set forth,⁴² and by unwarranted or unnecessary references to nonfeasance as distinguished from malfeasance or to whether the directors are trustees of the creditors.⁴³ A creditor of a corporation may sue corporate officers, without the aid of any statute, under certain conditions. For instance, if a corporate officer commits a tort against him, such for instance as false representations inducing him to become a creditor,⁴⁴ the creditor may sue the officer, but in such a case the action is one for a wrong done to the person suing regardless of whether he is

1023. But see § 2545, *supra*, where it is held that concealment may be fraudulent.

³⁸ *Wann v. Scullin*, 210 Mo. 429, 109 S. W. 688.

³⁹ See §§ 2591-2669, *infra*.

⁴⁰ See §§ 2534-2562, *supra*.

⁴¹ See § 2571, *infra*.

⁴² See §§ 2534-2562, *supra*.

⁴³ See § 2574 et seq., *infra*.

⁴⁴ See § 2544, *supra*.

a creditor or what not. So, upon principle, a creditor may sue, by a regular suit in equity known as a creditor's suit, where a cause of action rests in the corporation which the creditor cannot reach by execution against the corporation, at least where the receiver or other representative refuses to sue. Thus, in Kentucky, it is held that a creditor of the corporation may compel a director to account for profits made by him out of his office.⁴⁵ But if the injury is primarily to the corporation, it is held that the corporation or its assignee is the proper party to sue, rather than a creditor or depositor, unless the corporation or its assignee refuses to sue.⁴⁶

There is no liability, it is held, merely because the act or omission complained of is criminal.⁴⁷

§ 2570. Right to sue as precluded by appointment of receiver. The general rule is that if a receiver has been appointed, creditors cannot sue at common law to recover against corporate officers personally, for an injury which is primarily an injury to the corporation,⁴⁸ unless the receiver refuses to sue or is himself one of the alleged wrongdoers sought to be held liable.⁴⁹

§ 2571. Actions by receiver or other like representative. Is an action brought by a receiver or other like representative to be regarded as an action on behalf of the corporation and its stockholders or on behalf of the creditors, so as to be governed in the one case by the rules relating to liability to the corporation and its stockholders for mismanagement, or in the other case by the rules relating to liability to creditors? As to this question there is little, if any, doubt. While such a person represents both the corporation and also its creditors,⁵⁰ yet ordinarily he may maintain any action against cor-

⁴⁵ *Widrig & Co. v. Newport St. Ry. Co.*, 82 Ky. 511, 6 Ky. L. Rep. 760.

⁴⁶ *Savings Bank of Louisville's Assignee v. Caperton*, 87 Ky. 306, 311, 12 Am. St. Rep. 488, 8 S. W. 885.

⁴⁷ *Hart v. Hanson*, 14 N. D. 570, 3 L. R. A. (N. S.) 438, 105 N. W. 942.

⁴⁸ See *infra*, chapter on Receivers, and see § 2686, *infra*.

⁴⁹ *Hardin v. McKnight*, 107 Miss. 73, 64 So. 965; *Saunders v. Bank of Mecklenburg*, 112 Va. 443, Ann. Cas. 1913 B 982, 71 S. E. 714.

See also § 2571, *infra*, and see *infra*, chapter on Receivers.

Where the corporation is insolvent and in the hands of a receiver, depositors in a bank and stockholders may sue, where the receiver refuses to do so, to enforce the liability of officers of the bank for negligence and mismanagement of the affairs of the bank. *Ellis v. H. P. Gates Mercantile Co.*, 103 Miss. 560, 43 L. R. A. (N. S.) 982, Ann. Cas. 1915 B 526, 60 So. 649.

⁵⁰ See § 2676, *infra*.

porate officers which the corporation could have maintained; and hence decisions holding that a receiver may sue officers for negligence are not authorities in favor of such actions by creditors.⁵¹ If a corporation is insolvent, and an action is brought by a receiver, the right to recover is seldom disputed on the ground that a creditor cannot recover for mismanagement, but generally a recovery is had without any such question being urged.⁵²

General creditors may sue through the receiver to hold the corporate officers individually liable for mismanagement although neither the stockholders nor bondholders are complaining, since the general creditors "have as much right as the stockholders or the bondholders to be protected against the fraud and negligence of the directors."⁵³

§ 2572. Necessity for injury. The rule that loss is necessary to authorize an action against officers individually for mismanagement, as applied to actions by the corporation,⁵⁴ is equally applicable where the action is brought by creditors of the corporation. Thus directors are not personally liable to creditors because they engage in an ultra vires business where no part of the assets are lost by the directors in the business done outside of its corporate powers and the creditors are in no wise prejudiced thereby.⁵⁵ So creditors cannot, it seems, recover from corporate officers because of defects in regard to cash payments for stock to enable it to commence business, where it is not shown that such acts caused any loss to the corporation or brought about its insolvency.⁵⁶ And creditors cannot complain of acts of the directors or other officers, as a diversion or waste of the corporate assets in fraud of creditors, where they transfer the corporate assets to another corporation but receive in lieu thereof property of greater value.⁵⁷

§ 2573. Wrongful act or omission as essential to liability. The directors or other officers of a corporation are not liable to creditors merely because assets of the corporation have been misapplied or lost, without more. The misapplication or loss must have been due to

⁵¹ See *Hun v. Cary*, 82 N. Y. 65, 79, 37 Am. Rep. 546, and also § 2676, *infra*.

⁵² See *New Haven Trust Co. v. Doherty*, 74 Conn. 353, 50 Atl. 887.

⁵³ *Howland v. Corn*, 232 Fed. 35, 43.

⁵⁴ See § 2407, *supra*.

⁵⁵ *Dietrich v. Rothenberger*, 25 Ky.

L. Rep. 338, 75 S. W. 271, holding issuance of "certificate of deposit" not engaging in banking business.

⁵⁶ *Land Title & Trust Co. v. Connolly*, 233 Pa. 1, 81 Atl. 903.

⁵⁷ *Force v. Age-Herald Co.*, 136 Ala. 271, 33 So. 866.

their fraudulent or wilful act, or to culpable negligence or inattention in the performance of their duties.

§ 2574. Liability for nonfeasance or negligence, i. e., mismanagement—In general. Take the case of a director or other corporate officer, and concede that he has been guilty of some act of nonfeasance or negligence which would give the corporation, or stockholders in a proper case, the right to recover against him, the question then arises as to whether, under such circumstances, a creditor of the corporation may enforce liability either suing alone for his own benefit or suing in a representative capacity. In regard to this matter, there is much conflict of opinion, and in addition it is difficult, if not impossible, to determine if there is any difference in the law applicable according to whether the creditor sues in equity to enforce a loss primarily to the corporation, or whether he sues at law to recover damages solely for his own benefit. If there is one question more difficult than another, in regard to the liability of corporate officers, it is this question as to their liability to creditors where the injury is primarily to the corporation itself. The two great causes of confusion are the attempts of some courts to draw a line between nonfeasance and misfeasance, and to deny liability to creditors for the former, and the conflict among the courts as to whether directors are trustees for creditors, as to which reference has already been made.⁵⁸ In no branch of corporate law have the courts so confused the law which should govern as in the decisions relating to the liability of officers to creditors for negligent mismanagement. The situation is this: corporate officers cause loss to the corporation by their negligence in managing it and it becomes insolvent whereupon, generally after the receiver or other representative of the corporation has refused to sue, one or more creditors, either individually, or on behalf of all the creditors, sue the officers for their negligence. The creditors have been injured by the corporation becoming insolvent wholly or in part because of such mismanagement, but the primary injury was to the corporation itself, and it could have sued therefor before it went into the hands of a receiver or other representative, and the receiver or other representative could have sued therefor. Now it would seem too clear for argument that in such a case a creditor may sue and recover in the right of the corporation, in the old-fashioned form of remedy known as a creditor's suit, where the representative refuses to sue, on the theory that the right of the

⁵⁸ See § 2271, *supra*.

corporation to sue was a chose in action which was an equitable asset which may be reached by a creditor's suit.⁵⁹ However, the courts have for the most part wholly disregarded the point as to whether the creditor sued in the right of the corporation or merely as an individual, and have decided the question according to the view of the particular court as to whether directors are trustees for the creditors of the corporation or else have denied the right to recover on the theory of nonfeasance. The rule which should govern this class of actions has been so well stated by Mr. Zane in his treatise on the law of Banks that it is stated here at length as follows: "But the law also recognizes that the capital stock and assets of a corporation constitute the security of the corporation's unsecured creditor, just as the debtor's property is the sole security of the debtor's unsecured creditor; and since the officers of the corporation have no right to absorb or give away this capital stock or assets, where they commit culpable acts which cause loss to the corporation, the creditor can follow by a creditor's bill that capital stock or assets into the hands of any one who is not a purchaser for value, or, if the corporation's property has so passed, may hold those who are guilty of wrongful conduct in disposing of the corporation's property. This is simply the case of following by creditor's bill the assets of the debtor, or, if they cannot be followed, then it is the case of subjecting the debtor's right of action against his wrongly acting agent to creditor's bill."⁶⁰

If the director or other corporate officer is considered merely as an agent, then the question which generally arises is whether a corporate officer is liable to creditors for nonfeasance as distinguished from misfeasance—a question governed by the general rules as to agents.⁶¹ If the director or other corporate officer is considered merely as a trustee, then the question, according to most courts, is whether, conceding he is a trustee for the corporation and its stockholders, he is also a trustee for creditors of the corporation.

In a New Jersey case, the court said that, in such cases where a bank and its depositors were injured, "it is the corporate body itself that primarily has been wronged, and reparation is due immediately

⁵⁹ This question is discussed at length and the same conclusion reached in Zane, Banks and Banking, § 86.

⁶⁰ Zane, Banks and Banking, § 84, stating, however, that the "courts have obscured the subject so much by fuliginous expressions in regard to

bank directors being trustees for the creditors, and the capital stock of a corporation being a trust fund, that it is devious work to find one's way among the cases."

⁶¹ See 2 Clark & Skyles, Agency, § 594 et seq.

to it and not to the depositors. The depositors are but creditors of the corporation, and the moneys in question are not their moneys. It is true that as the directors are alleged to be the delinquent parties who are sought to be charged with the liability to make good the losses in question, these depositors have a footing in court to such redress in this matter, but in such proceeding the corporation, or in case of its insolvency, its receiver, must be a party, for it is in right of such corporate body that such a course of law is alone to be vindicated."⁶² This view is also supported by dicta in a Wisconsin case.⁶³

But an instance of failure to follow the logical rule is found in an Alabama case where, notwithstanding the frame of the bill in equity was that of a common creditors' bill, the court held that directors were not liable to creditors for mismanagement unless amounting to fraud.⁶⁴

Some of the decisions holding that an individual creditor may sue for his sole benefit could well have been decided on the theory that he suffered injury not common to the other creditors, and was therefore entitled to sue just the same as any other person not a creditor.⁶⁵

It is necessary to distinguish suits brought by persons who are both creditors and stockholders, where reliance for recovery is placed mainly, if not entirely, upon their rights as stockholders.⁶⁶

§ 2575. — Minority rule. The minority rule is that creditors of corporations cannot, in general, maintain an action against directors for default in duty owed to the corporation, although the creditors may be thereby injured. In other words, some courts hold that mere creditors of an insolvent bank or other corporation cannot sue, even in equity, to hold the directors or other officers liable for losses due to mere negligence, unless so provided by statute, although a cause of action therefor may exist in favor of the corporation, on the ground that there is no trust relation between the officers and creditors.⁶⁷

⁶² *Chester v. Halliard*, 36 N. J. Eq. 313, 316.

⁶³ *Killen v. Barnes*, 106 Wis. 546, 562, 572, 82 N. W. 536, where the court said, while holding that a creditor could not sue in his own right, that "nevertheless a creditor may maintain an action to enforce such liabilities in the right of the corporation, or of the person in whom such right is vested, if the necessities of the case so require."

See also notes in 45 L. R. A. (N. S.) 421, 3 L. R. A. (N. S.) 438.

⁶⁴ *Wilson v. Stevens*, 129 Ala. 630, 87 Am. St. Rep. 86, 29 So. 678.

⁶⁵ For instance, see *United Society v. Underwood*, 9 Bush (Ky.) 609, 15 Am. Rep. 731.

⁶⁶ See, for instance *Halsey v. Ackerman*, 38 N. J. Eq. 501, 509.

⁶⁷ *Iowa. United States Fidelity & Guaranty Co. v. Corning State Sav. Bank*, 154 Iowa 588, 45 L. R. A. (N.

"The directors are agents or representatives of the entire body of stockholders," said the court in a North Dakota case, "and the relationship between the corporation and the directors is that of principal and agent. The agency of course implies a trust, but the obligations imposed by the trust are solely to the corporation whose agents and trustees they are, and like all other agents they are accountable for their stewardship to their principal alone. Creditors of the corporation are utter strangers to the obligation of the directors to the corporation."⁶⁸ In the latter case, a director, although knowing that his bank was insolvent, took no steps to close it or to announce its insolvency. Plaintiff became a surety on a bond given by the bank to obtain deposits of county funds, without knowing of such insolvency, and later was compelled to pay the bond. He sued the director and sought to recover on the ground, *inter alia*, of negligence of the director. There was no proof of fraud. The court, after stating that directors are not trustees for the creditors, held that mere gross neglect by the director in not attempting to have

S.) 421, 134 N. W. 857, reviewing Iowa cases at length; *Frost Mfg. Co. v. Foster*, 76 Iowa 535, 41 N. W. 212.

Missouri. *Stone v. Rottman*, 183 Mo. 552, 82 S. W. 76; *Union Nat. Bank v. Hill*, 148 Mo. 380, 71 Am. St. Rep. 615, 49 S. W. 1012; *Fusz v. Spaunhorst*, 67 Mo. 256.

New Jersey. *Landis v. Sea Isle City Hotel Co.*, 53 N. J. Eq. 654, 33 Atl. 964; *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775; *Halsey v. Ackerman*, 38 N. J. Eq. 501, 508.

New York. *Moran v. Vreeland*, 81 Misc. 664, 143 N. Y. Supp. 522; *Branch v. Roberts*, 50 Barb. 435.

Oregon. See *Devlin v. Moore*, 64 Ore. 433, 130 Pac. 35.

Tennessee. *Deaderick v. Bank of Commerce*, 100 Tenn. 457, 463, 45 S. W. 786.

West Virginia. *Zinn v. Mendel*, 9 W. Va. 580.

Mismanagement, without actual fraud, does not make directors personally liable to creditors. *Wilson v. Stevens*, 129 Ala. 680, 87 Am. St. Rep. 86, 29 So. 678.

The vice president is not liable to

third persons for negligence or nonfeasance. *Ray County Sav. Bank v. Hutton*, 224 Mo. 42, 123 S. W. 47.

If the corporation is solvent, corporate directors or other officers, according to the Iowa Court, are neither the agents nor trustees of the creditors. "They are not answerable to them, either for the management of the affairs of the company, or the disposition they may make of its property, unless made so either by the provisions of the charter or some general statute. * * * While the corporation is solvent, and continues in business, the creditor has no interest in or lien upon the property by virtue of the fact merely that he is a creditor. * * * The ground of the complaint is that by their mismanagement of its affairs they have reduced it to insolvency. That they are not answerable to the creditors for such mismanagement is clear, both upon principle and authority." *Frost Mfg. Co. v. Foster*, 76 Iowa 535, 41 N. W. 212.

⁶⁸ *Hart v. Evanson*, 14 N. D. 570, 575, 3 L. R. A. (N. S.) 438, 105 N. W. 942.

the bank discontinue business by reason of insolvency, which he had been aware of for at least a year before the execution of the bond, gave no cause of action to the surety who had become a creditor, and said that "for his acts or omissions as a director, he is answerable only as an agent or trustee to his principal, not to third persons. As an individual he owed no legal duty to the public or to the bank's creditors, different from that which every person owes to all others—to refrain from infringing on their rights. This appellant, as an individual director, had no control over the bank. He could only act in conjunction with his fellow directors. The acts of the directorate body of which he was part were not his individual acts. The president and cashier were not his agents, because they were the agents, not of each individual director, but of the board of directors. The act of keeping the bank open was not therefore the act of this appellant. He had no dealings with the plaintiff or his assignors; and he owed them or the public no legal duty to personally denounce the bank, however plain his moral duty to do so may have been."⁶⁹ It was said in a leading case in Missouri, in support of this minority rule, that "there is a marked difference between the duty which the directors of a bank owe to the bank and that which they owe to strangers or creditors. Much of the confusion in the cases will be removed, if they are examined with this distinction kept thoroughly in mind. In some of the cases the two duties have been hopelessly confounded. The relation of a corporation to a depositor is that of debtor and creditor arising from contract. Aside from statutory liability, which creates an individual cause of action in favor of creditors as a class, the directors of a corporation are not liable to creditors for mere nonfeasance."⁷⁰ In another case in Missouri, a creditor, after the assignee for benefit of creditors had refused to sue, brought an action, for himself and all others similarly situated, against bank directors on the ground that the insolvency of the bank was caused by their neglect and mismanagement. The Supreme Court, after reviewing cases upholding a recovery, said: "These decisions all seem to proceed upon the theory that directors of a banking corporation and its creditors occupy towards each other the relation of trustee and cestui que trust, but we are not prepared to adopt this view. * * * Our conclusion is that the relation of defendant bank to plaintiff is that of debtor and creditor, and that for the mere

⁶⁹ Per Justice Engerud in *Hart v. Evanson*, 14 N. D. 570, 3 L. R. A. (N. S.) 438, 105 N. W. 942.

⁷⁰ *Stone v. Rottman*, 183 Mo. 552, 82 S. W. 76.

failure of the bank directors to exercise ordinary diligence and care as such, in the management of the business affairs of the bank, by reason of which the bank became insolvent, they cannot be held responsible at the suit of its general creditors."⁷¹ In Tennessee, a general creditor's bill was brought by depositors in a bank after a demand upon, and a refusal of, the assignee for benefit of creditors of the corporation to sue. The action was based on the failure of the directors to supervise the business whereby an executive officer wrecked the bank. It was held that the "directors of a going corporation, whether able to pay its debts or not, owe no allegiance to" the creditors: that "it is true that the creditors may extend credit upon the faith that the company has assets to pay its debts, and that these assets are prudently managed, yet they are strangers to the directors; they maintain no fiduciary relation between them; there is a lack of privity between the two. * * * A creditor of a going corporation, being thus a mere stranger, we think it clear that he can no more, after the suspension of the corporation by insolvency, either in law or equity, set in motion litigation to hold its directors liable for losses attributable merely to inattention, than could the creditor of any other insolvent debtor maintain a suit against his agent under similar circumstances. In such a case as the one we are dealing with,—that is, loss to the corporation resulting from mere negligence on the part of its directors—a creditor seeking to hold the directors liable for this loss, even in a suit like this, must rest his claim upon some provision of positive law."⁷²

Other cases deny the right to recover where the mismanagement complained of consists of nonfeasance as distinguished from misfeasance. It is often said in the decisions and law books that an agent is responsible to third persons for misfeasance only and not for nonfeasance.⁷³ There is considerable conflict, and much difficulty, however, as to the difference between "nonfeasance" and "misfeasance."⁷⁴ Nonfeasance is often defined as doing nothing, the

⁷¹ *Union Nat. Bank v. Hill*, 148 Mo. 380, 395, 398, 71 Am. St. Rep. 615, 49 S. W. 1012.

⁷² *Deaderick v. Bank*, 100 Tenn. 457, 464, 45 S. W. 786, reviewing former Tennessee cases at some length. Compare *Minton v. Stahlman*, 96 Tenn. 98, 34 S. W. 222; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448; *Shea v. Knoxville & K. R. Co.*, 6 Baxt. (Tenn.) 277;

Hume v. Commercial Bank, 9 Lea (Tenn.) 728; *Moses v. Ocoee Bank*, 1 Lea (Tenn.) 398; *Shea v. Mabry*, 1 Lea (Tenn.) 319.

⁷³ *Bryce v. Southern R. Co.*, 125 Fed. 958, 962; *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437.

⁷⁴ See *Stiewel v. Borman*, 63 Ark. 30, 36, 37 S. W. 404; *Haynes' Adm'rs v. Cincinnati*; *N. O. & T. P. R. Co.*, 145 Ky. 209, Ann. Cas. 1913 B 719,

nonperformance of an act which should be performed, the total omission to do an act.⁷⁵ Misfeasance is the improper doing of an act which the officer, agent or servant might lawfully do, i. e., the performance of his duty to his principal in such a manner as to infringe upon the rights and privileges of third persons. Malfeasance is the doing of an act which the officer, agent or servant ought not to do at all, i. e., an act which is wholly wrongful and unlawful.⁷⁶ For negligent acts, i. e., acts done but done carelessly, the agent is liable to third persons, since such acts are misfeasances. In other words, there is misfeasance where, as to an agent who performs an act which might lawfully be done by the agent, he performs it in an improper manner, whereby injury results to a third person.⁷⁷ For negligence consisting of failure to act, i. e., failure to fulfil a duty owing to the principal, the agent is not liable to third persons, since such omission is nonfeasance. In other words, nonfeasance is a total omission to do an act while misfeasance is culpable negligence in the execution of the act.⁷⁸ So much for the law relating to agents in general. Generally, this distinction, so far as corporate officers are concerned, is applied to direct torts where the relation of creditor is immaterial, and even in such cases the tendency of the courts is to disregard the distinction.⁷⁹

§ 2576. — **Majority rule.** The weight of authority is in favor of permitting a recovery by creditors.⁸⁰ As said by Vice Chancellor

140 S. W. 176; *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437; *Orcutt v. Century Bldg. Co.*, 201 Mo. 424, 8 L. R. A. (N. S.) 929, 99 S. W. 1062; *Carson v. Quinn*, 127 Mo. App. 525, 105 S. W. 1088.

⁷⁵ *Orcutt v. Century Bldg. Co.*, 201 Mo. 424, 8 L. R. A. (N. S.) 929, 99 S. W. 1062.

⁷⁶ *Coite v. Lynes*, 33 Conn. 109; *Bell v. Josselyn*, 5 Gray (Mass.) 309, 63 Am. Dec. 741; *Orcutt v. Century Bldg. Co.*, 201 Mo. 424, 8 L. R. A. (N. S.) 929, 99 S. W. 1062.

⁷⁷ See *Illinois Cent. R. Co. v. Foulks*, 191 Ill. 57, 60 N. E. 890.

⁷⁸ *Gregor v. Cady*, 82 Me. 131, 17 Am. St. Rep. 466, 19 Atl. 108.

⁷⁹ See § 2258, *supra*.

⁸⁰ *United States. Virginia-Carolina Chemical Co. v. Ehrich*, 230 Fed. 1005,

1013; *Foster v. Bank of Abingdon*, 88 Fed. 604; *Trustees Mut. Bldg. Fund & Dollar Sav. Bank v. Bossieux*, 3 Fed. 817.

Alabama. *Bank of St. Marys v. St. John*, 25 Ala. 566.

Colorado. *Nix v. Miller*, 26 Colo. 203, 57 Pac. 1084.

Illinois. *Delano v. Case*, 121 Ill. 247, 2 Am. St. Rep. 81, 12 N. E. 676.

Kentucky. *Savings Bank of Louisville's Assignee v. Caperton*, 87 Ky. 306, 12 Am. St. Rep. 488, 8 S. W. 885.

Maine. *In re Brockway Mfg. Co.*, 89 Me. 121, 56 Am. St. Rep. 401, 35 Atl. 1012.

Mississippi. See *Wolfe v. Simmons*, 75 Miss. 539, 23 So. 586.

New Jersey. *Bird v. Magowan* (N. J. Eq.), 43 Atl. 278.

New York. *Cassidy v. Uhlmann*, 27

Pitney, when on the New Jersey bench, "the insufficiency of the assets of the bank to pay its debts gives the creditors a direct interest in its affairs, and they become the cestuis que trustent of the receiver, entitled to enforce all the rights of the corporation, and to collect its assets of every nature, included in which is the right to claim damages for the negligence of its directors."⁸¹ In Mississippi, it is held that "the relation of the depositors to the bank, growing out of their placing their money with that institution for safe-keeping, and to be at their convenience drawn out for their use, is such that the directors, as the officers charged with the management of the bank, are required to be diligent and careful in conducting the bank's business, and are liable to the depositors for losses sustained by the bank from negligence in performing the duties of their office."⁸² In New York, in one case, the Court of Appeals said that "those who deal with a bank have the right to expect reasonable diligence and good faith at the hands of its directors. If the latter fail in either, they violate a duty which they owe to both stockholders and depositors."⁸³ In North Carolina, it seems to be well settled that a single creditor may sue at law to recover damages resulting from negligence of the directors or other officers.⁸⁴ In Texas, in one

App. Div. 80, 50 N. Y. Supp. 318.
Pennsylvania. Warner v. Hopkins, 111 Pa. St. 328, 56 Am. Rep. 266, 2 Atl. 83.

Virginia. Marshall v. Farmers' & Mechanics' Sav. Bank of Alexander, 85 Va. 676, 2 L. R. A. 534, 17 Am. St. Rep. 84, 8 S. E. 586.

West Virginia. Elliott v. Farmers' Bank of Philippi, 61 W. Va. 641, 57 S. E. 242.

Wisconsin. Gores v. Day, 99 Wis. 276, 74 N. W. 787.

Creditors of an insolvent bank may sue the directors for negligence. Caldwell v. Ryan, 173 Ky. 233, 190 S. W. 1078.

Directors are liable to creditors for losses resulting from gross mismanagement and neglect of the affairs of the corporation, and good faith alone will not excuse them. Anthony v. Jeffress, 172 N. C. 378, 90 S. E. 414.

⁸¹ Campbell v. Watson, 62 N. J. Eq. 396, 50 Atl. 120.

⁸² Ellis v. H. P. Gates Mercantile Co., 103 Miss. 560, 43 L. R. A. (N. S.) 982, Ann. Cas. 1915 B 526, 60 So. 649. In this case the suit was in equity by some of the depositors and stockholders on behalf of all depositors and stockholders, after the receiver had refused to sue.

⁸³ Cassidy v. Uhlmann, 170 N. Y. 505, 517, 63 N. E. 554, which, however, was decided on the ground of constructive fraud in receiving deposits when insolvent.

⁸⁴ Anthony v. Jeffress, 172 N. C. 378, 90 S. E. 414. See also Caldwell v. Bates, 118 N. C. 323, 24 S. E. 481; Solomon v. Bates, 118 N. C. 311, 54 Am. St. Rep. 725, 24 S. E. 478; Tate v. Bates, 118 N. C. 287, 54 Am. St. Rep. 719, 24 S. E. 482.

The negligence of directors cannot be imputed to one selling goods to the company merely because he was a copartner in business with one of the directors; but the bad faith or negli-

case, although the decision was based on liability of officers for false representations, statements are made in accordance with the majority rule.⁸⁵

Some of the courts hold that creditors may sue on the ground that there is a trust relation between the officers and creditors, or a quasi trust relation; but there certainly is no "trust relation," in the proper sense of the term.⁸⁶ The proper view is that the officers become liable to the corporation for the loss sustained by it, and that this liability upon the part of the officers is a part of its assets, which may be enforced in equity, as other equitable assets may be collected, for the purpose of satisfying the claims of creditors.

In some cases, where a suit in equity has been brought by a creditor for himself and on behalf of other creditors, liability of directors for negligence has been held to exist without any consideration of whether such liability can be enforced by creditors rather than the corporation.⁸⁷

§ 2577. — Theory that creditors may sue in equity on behalf of corporation. Even in those jurisdictions where the right of a creditor of a corporation to recover damages or his debt from officers of the company who have been guilty of nonfeasance or negligence, is denied, it is sometimes admitted that, independently of statute, a creditor may sue in such a case as the representative of all the creditors and of the corporation, to recover damages sustained by the company because of the nonfeasance or negligence, provided, if the corporation is in the hands of a receiver or assignee, the right to sue

gence of plaintiff's partner throws on plaintiff the burden of showing that he acted in good faith. *Anthony v. Jeffress*, 172 N. C. 378, 90 S. E. 414.

⁸⁵ "The relation of trustee and cestui que trust exists between them [directors] and the stockholders and creditors." *Seale v. Baker*, 70 Tex. 283, 291, 8 Am. St. Rep. 592, 7 S. W. 742.

⁸⁶ The cases holding that there is no liability for mere nonfeasance, or for negligence as some of the courts put it, are mostly based upon the theory that directors are merely agents of the corporation, owing no duty to the public, and hence not liable to creditors for any omission or negli-

gence, however gross. As to banks, the Illinois Court answered this by saying that "we can not concede that directors of banks are no more than mere servants and agents. They are this it is true, but they are more. They are trustees for the bank, the stockholders and the depositors, and to each they owe duties, for a violation of which, the law will hold them liable." *Delano v. Case*, 17 Ill. App. 531, 536, aff'd 121 Ill. 247, 2 Am. St. Rep. 81, 12 N. E. 676.

⁸⁷ See, for instance, *Marshall v. Farmers' & Mechanics' Sav. Bank of Alexander*, 85 Va. 676, 2 L. R. A. 534, 17 Am. St. Rep. 84, 8 S. E. 586.

in the place of such representative is admitted. This distinction was commented on at length in a Wisconsin case by Justice Marshall, and while stating that "a creditor may maintain an action to enforce such liabilities in the right of the corporation or of the person in whom such right is vested, if the necessities of the case so require," he refuted the idea that officers are trustees for the creditors so as to be liable directly to a creditor for their nonfeasance or negligence.⁸⁸

In Missouri, it has been said that "doubtless in a proper case the creditors might bring a suit in equity to subject to the payment of their demand claims of the corporation against directors for nonfeasance. But such a suit would be like any other suit to reach other older assets of the bank. Such a suit would be really prosecuted in the right of the bank. In this sense the receiver represents the creditors, as well as the bank and stockholders."⁸⁹

In Mississippi, a suit in equity by some of the depositors and stockholders, on behalf of all, to recover for the negligence of the bank officers alleged to have resulted in the bank becoming insolvent, was held to lie; but it would seem from the language of the decision that the court recognized the right of a single depositor to sue at law in case of negligence.⁹⁰

§ 2578. — Rule as applied to depositors in bank. Depositors in a bank are creditors of the bank, but the courts are more inclined to assist them to recover for negligence of the bank officers, it would seem, than in case of creditors of other corporations, although generally the same rules applicable to creditors of corporations in general are applied to depositors in a bank. However, depositors in savings banks, as distinguished from ordinary banks, are held to be in

⁸⁸ Killen v. Barnes, 106 Wis. 546, 82 N. W. 536.

On the theory that the creditor was suing for the benefit of all other creditors, as a substitute for the corporation, directors were held liable in Gores v. Field, 109 Wis. 408, 85 N. W. 411, 84 N. W. 867, and in Gores v. Day, 99 Wis. 276, 74 N. W. 787. In the former case the court said: "It is not an action to recover property of the plaintiff, but an action to enforce rights of the banking corporation against its officers, and allowed

to be brought by the plaintiff simply because the proper officers of the corporation either actually or virtually refuse to bring it. The recovery, if any, becomes part of the assets of the corporation, and goes to the assignee." Gores v. Field, 109 Wis. 408, 415, 85 N. W. 411, 84 N. W. 867.

⁸⁹ Stone v. Rottman, 183 Mo. 552, 82 S. W. 76.

⁹⁰ Ellis v. H. P. Gates Mercantile Co., 103 Miss. 560, 43 L. R. A. (N. S.) 982, Ann. Cas. 1915 B 526, 60 So. 649.

the position of stockholders rather than creditors, so as not within a rule forbidding actions by creditors for nonfeasance.⁹¹ In case of banks in general, it is often held that directors are trustees for depositors,⁹² and are liable to depositors for mismanagement. Thus, it is held in Illinois that directors thereof "are trustees for depositors as well as for stockholders," and that "they are bound to the observance of ordinary care and diligence, and are hence liable for injuries resulting from their nonobservance."⁹⁴ So it is held in Virginia that they "are not trustees for the stockholders alone, but they owe an even earlier duty to the depositors. The law is, as it ought to be, very zealous in exacting the strict and thorough performance of these duties, and it is in the scrutiny of possible breaches of them that the rigid rules which govern trustees have been applied."⁹⁵ In New York, directors or trustees of banks are held to occupy a relation to depositors "similar to that of trustee and cestui que trust" so as make the former

⁹¹ *Chester v. Halliard*, 36 N. J. Eq. 313; *Stockton v. Mechanics' and Laborers' Sav. Bank*, 32 N. J. Eq. 163, as explained in *Landis v. Sea Isle City Hotel Co.*, 53 N. J. Eq. 654, 33 Atl. 964. See also *Fisher v. Andrews*, 37 Hun (N. Y.) 176, 180.

In any event, so far as savings banks are concerned, it seems that directors or trustees thereof are liable for mere nonfeasance. *Greenfield Sav. Bank v. Abercrombie*, 211 Mass. 252, 39 L. R. A. (N. S.) 173, Ann. Cas. 1913 B 420, 97 N. E. 897.

⁹² *Hun v. Cary*, 82 N. Y. 65, 37 Am. Rep. 546; *Marshall v. Farmers' & Mechanics' Sav. Bank of Alexander*, 85 Va. 676, 2 L. R. A. 534, 17 Am. St. Rep. 84, 8 S. E. 586.

"The directors of a bank are not trustees for the stockholders alone, but they owe an even earlier duty to the depositors." *Marshall v. Farmers' & Mechanics' Sav. Bank of Alexander*, 85 Va. 676, 2 L. R. A. 534, 17 Am. St. Rep. 84, 8 S. E. 586, followed in *Camden v. Virginia Safe Deposit & Trust Corporation*, 115 Va. 20, 78 S. E. 596.

⁹³ *United States. Foster v. Bank of*

Abingdon, 88 Fed. 604, 607.

Illinois. Delano v. Case, 121 Ill. 247, 2 Am. St. Rep. 81, 12 N. E. 676.

Kentucky. Caldwell v. Ryan, 173 Ky. 233, 190 S. W. 1078.

Mississippi. Ellis v. H. P. Gates Mercantile Co., 103 Miss. 560, 43 L. R. A. (N. S.) 982, Ann. Cas. 1915 B 526, 60 So. 649.

Virginia. Marshall v. Farmers' & Mechanics' Sav. Bank of Alexander, 85 Va. 676, 2 L. R. A. 534, 17 Am. St. Rep. 84, 8 S. E. 586.

⁹⁴ *Delano v. Case*, 121 Ill. 247, 2 Am. St. Rep. 81, 12 N. E. 676, aff'g 17 Ill. App. 531. In this case, according to appellant's brief, it was contended that there was no liability for mere nonfeasance, but inasmuch as the negligence involved was holding out the bank as solvent when in fact it was insolvent it would seem that there was misfeasance.

⁹⁵ *Marshall v. Farmers' & Mechanics' Sav. Bank of Alexander*, 85 Va. 676, 2 L. R. A. 534, 17 Am. St. Rep. 84, 8 S. E. 586, followed in *Camden v. Virginia Safe Deposit & Trust Corporation*, 115 Va. 20, 78 S. E. 596.

liable to the latter, it would seem, for their negligence.⁹⁶ In Kentucky, it is held that a depositor of bonds as a special deposit in a bank may sue the directors for negligence in regard thereto.⁹⁷ But in Nebraska, on the theory of nonliability for nonfeasance, it was held that officers of a bank were not liable to a depositor for refusal to pay back money on deposit.⁹⁸

§ 2579. Misappropriation, conversion and diversion of corporate assets—General rule. Whether a creditor may sue directors or other officers for misappropriation or diversion of corporate property is not altogether clear. Some of the decisions apparently warrant such a recovery,⁹⁹ and it would seem to be true beyond argument

⁹⁶ See *Hun v. Cary*, 82 N. Y. 65, 37 Am. Rep. 546, in which case, however, the action was by a receiver and it was held that he could maintain any action the bank could have maintained.

⁹⁷ *United Society v. Underwood*, 9 Bush (Ky.) 609, 15 Am. Rep. 731. But in this case the injury was directly to the depositor rather than to the bank.

⁹⁸ For failure to perform a duty which his corporation owes to a third person, it is held that an officer or agent of a corporation cannot be held personally liable; the rule is otherwise where the wrong on the part of the officer or agent is affirmative in its character. The corporation may be liable but the officer is liable also. *Penney v. Bryant*, 70 Neb. 127, 96 N. W. 1033.

⁹⁹ *Connecticut*. *Lewisohn v. Stoddard*, 78 Conn. 575, 63 Atl. 621.

Maine. In *re Broekway Mfg. Co.*, 89 Me. 121, 56 Am. St. Rep. 401, 35 Atl. 1012.

Maryland. See *Carrington v. Thomas C. Baashor Co.*, 118 Md. 419, 84 Atl. 746.

Missouri. *Alexander v. Relfe*, 74 Mo. 495; *Adam Roth Grocery Co. v. Hotel Monticello Co.*, 148 Mo. App. 513, 128 S. W. 542.

New Jersey. See *Mills v. Hendershot*, 70 N. J. Eq. 253, 62 Atl. 542.

Texas. *National Bank of Jefferson v. Texas Inv. Co.*, 74 Tex. 421, 12 S. W. 101.

Thus, where directors apply corporate funds to the discharge of their own debts or wrongfully pay out moneys as salaries to other officers, creditors may recover from them the amount of the funds thus misapplied. *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530.

This applies to misappropriations of money deposited for safe-keeping with a corporation not engaged in a banking business. *Vujacich v. Southern Commercial Co.*, 21 Cal. App. 439, 132 Pac. 80.

Misconduct of officers may be such a palpable breach of duty as to render them personally liable to creditors for amounts which the officers permitted to be diverted. *Bank of St. Marys v. St. John*, 25 Ala. 566.

Thus, a cashier may be held liable for misappropriation of the assets of the bank. *United Securities Co. v. Ostenberg*, 60 Colo. 249, 152 Pac. 1163.

An individual creditor may sue in equity to hold corporate officers liable for diversion of corporate assets. *Shea v. Mabry*, 1 Lea (Tenn.) 319, 344, holding officers who had misappropriated corporate funds individually liable to the suing creditor for the amount of his debt where less than the sum converted, without re-

that such an action will lie where the corporation has become insolvent, and the receiver or other proper officer neglects or refuses to sue, at least where the suit is a representative one brought on behalf of all the creditors.¹ Thus, the New Jersey court has stated the rule as follows: "The corporation and its officers owe to their creditors this duty: not to divert the corporate property from the general purpose of paying the creditors. * * * A violation of this duty will entitle the creditors who suffer thereby to relief."² And depositors in a bank are creditors within this rule.³ Stated in another way, it is generally held that directors are liable to creditors for loss resulting from their malfeasance.⁴ Moreover, a suit for conversion of assets may be brought even after the company has been dissolved.⁵

In any event, a creditor may recover, as such, under the broad terms of some of the statutes enacted in New York, Wisconsin and a few other states.⁶

gard to the rights of any other creditors.

A director who converts its property or diverts it to purposes other than corporate purposes is liable to creditors for the value of the property so converted or diverted. *Barnard Mfg. Co. v. Ralston Milling Co.*, 71 Wash. 659, 129 Pac. 389.

Furthermore, it has been held that one director is liable to creditors for misappropriations by co-directors where the result of his negligent inattention to the corporate business. *Nix v. Miller*, 26 Colo. 203, 57 Pac. 1084, and see § 2493 et seq., *supra*.

But it has been held that directors and other officers do not stand in a fiduciary relation to the creditors of the corporation, and they are not individually liable to corporate bondholders for money received from persons to whom they had leased the corporate property. *Young v. Haviland*, 215 Mass. 120, 102 N. E. 338.

¹ *Shea v. Knoxville & K. R. Co.*, 6 Baxt. (Tenn.) 277.

It has been held in Colorado that where a director purchases corporate

property at a sale under a mortgage to which he is not a party, for a sum much less than its real value, he is personally liable to corporate creditors, in an action in the nature of a creditor's bill, to the extent of the excess, on the theory of a conversion of assets. *Fishel v. Goddard*, 30 Colo. 147, 69 Pac. 607, criticising *West v. Hanson Produce Co.*, 6 Colo. App. 467, 41 Pac. 829.

² *Wilkinson v. Bauerle*, 41 N. J. Eq. 635, 645, 7 Atl. 514.

³ *Vujacich v. Southern Commercial Co.*, 21 Cal. App. 439, 132 Pac. 80.

⁴ *Boyd v. Mutual Fire Ass'n of Eau Claire*, 116 Wis. 155, 61 L. R. A. 918, 96 Am. St. Rep. 948, 94 N. W. 171, 90 N. W. 1086.

⁵ *Lewisohn v. Stoddard*, 78 Conn. 575, 63 Atl. 621.

⁶ *Benge v. Eppard*, 110 Iowa 86, 81 N. W. 183; *Lilienthal v. Betz*, 108 N. Y. App. Div. 222, 95 N. Y. Supp. 849, rev'd on other grounds 185 N. Y. 153, 7 Ann. Cas. 41, 77 N. E. 1002; *Gores v. Day*, 99 Wis. 276, 74 N. W. 787. See also §§ 2621, 2622, *infra*.

§ 2580. — Division of assets among stockholders. Independently of statute, if corporate officers divide the assets among stockholders when the corporation is insolvent or where the corporation is thereby rendered insolvent, such officers are personally liable for corporate debts,⁷ or at least to the extent of the amount of assets received by them.⁸ If the surplus after an execution sale of the corporate property is paid over to one who is both a director and treasurer who distributed it among stockholders, all the directors are personally liable to unpaid creditors to the extent of such payments.⁹

§ 2581. — Distinguished from conversion of property belonging to complainant. Directors may be liable to third persons for conversion of the property of such third persons;¹⁰ but this liability is not the same as the liability to creditors of the corporation for conversion of corporate property.¹¹

§ 2582. — Acquisition by officers of corporate stock. Creditors may sue directors for the value of stock issued by themselves to themselves without a valuable consideration, on the theory of a conversion of the corporate assets.¹² Thus, illegally voting to themselves corporate stock in payment of promotion services is a conversion of assets for which the directors are personally liable.¹³

§ 2583. — Payment of dividends. Directors are liable to creditors of the corporation where the directors wilfully or negligently mis-

⁷ **United States.** *White, Potter & Paige Mfg. Co. v. Henry B. Pettes Importing Co.*, 30 Fed. 864.

Iowa. *Swartley v. Oak Leaf Creamery Co.*, 135 Iowa 573, 113 N. W. 496.

New Jersey. *Mills v. Hendershot*, 70 N. J. Eq. 258, 62 Atl. 542.

New York. *Gilbert v. Finch*, 173 N. Y. 455, 61 L. R. A. 807, 93 Am. St. Rep. 623, 66 N. E. 133. To same effect, although decided under a statute, see *Darcy v. Brooklyn & N. Y. Ferry Co.*, 196 N. Y. 99, 26 L. R. A. (N. S.) 267, 134 Am. St. Rep. 827, 89 N. E. 461.

North Carolina. *McIver v. Young Hardware Co.*, 144 N. C. 478, 119 Am. St. Rep. 970, 57 S. E. 169.

England. *Re National Funds Assur. Co.*, L. R. 10 Ch. Div. 118; *Moxham v. Grant*, [1900] 1 Q. B. 88.

Rule is applicable to conversion of assets by wrongfully distributing them among shareholders without reference to the amount of stock held by the several shareholders. *Lewisohn v. Stoddard*, 78 Conn. 575, 63 Atl. 621.

⁸ *Wisconsin & A. Lumber Co. v. Cable*, 159 Iowa 81, 140 N. W. 211.

⁹ *American Cotton Oil Co. v. Saluda Oil Mill Co.*, — S. C. —, 93 S. E. 14.

¹⁰ See §§ 2539-2541, *supra*.

¹¹ *Schenck Chemical Co. v. Industrial Advertising & Distributing Co.*, 66 N. Y. Misc. 597, 121 N. Y. Supp. 838; *Virginia-Carolina Chemical Co. v. Floyd*, 158 N. C. 455, 74 S. E. 465.

¹² *Lamphere v. Lang*, 157 N. Y. App. Div. 306, 141 N. Y. Supp. 967.

¹³ *Lamphere v. Lang*, 157 N. Y. App. Div. 306, 141 N. Y. Supp. 967.

apply the assets of the corporation by payment of dividends, when there are no surplus profits out of which they may lawfully be paid.¹⁴ Payment of a dividend out of capital is a breach of trust which renders the directors jointly and severally liable.¹⁵ This matter is considered fully in a subsequent chapter in connection with the law relating to dividends.¹⁶

§ 2584. Ultra vires acts, including acts prohibited by statute. It has been noted that officers are liable to the corporation, or its stockholders in a proper case, for injuries resulting from officers acting ultra vires or in violation of a statute or the charter.¹⁷ It has been held, however, that a corporate creditor cannot hold an officer or agent of a corporation liable for a mere ultra vires act, as distinguished from a fraudulent transfer or misapplication of corporate assets.¹⁸ If the particular transaction by which the person suing became a creditor was itself ultra vires, i. e., beyond the power of the corporation, then the question whether the creditor can hold the corporate officers involved in the transaction personally liable is to be determined by the rules laid down in a preceding subdivision of this chapter.¹⁹ On the other hand, if the transaction with the creditor suing was within its corporate powers, the directors or other corporate officers are not liable to such creditor

¹⁴ *Lexington & O. R. Co. v. Bridges*, 7 B. Mon. (Ky.) 556, 46 Am. Dec. 523; *Gaffney v. Colvill*, 6 Hill (N. Y.) 567; *Scott v. Eagle Fire Co.*, 7 Paige (N. Y.) 198; *Gunkle's Appeal*, 48 Pa. St. 13; *In re National Funds Assur. Co.*, 10 Ch. Div. 118. See also *Gratz v. Redd*, 4 B. Mon. (Ky.) 178. Compare *Excelsior Petroleum Co. v. Lacey*, 63 N. Y. 422; *In re National Bank of Wales*, [1899] 2 Ch. 629.

¹⁵ *Northern Trust Co. v. Butchart*, 35 Dom. L. R. (Can.) 169, 174.

Reliance on statements of officials held to preclude liability of directors for declaring dividend which decreased the capital. *Re Owen Sound Lumber Co.*, 33 Dom. L. R. (Can.) 487.

¹⁶ *Infra*, chapter on Stockholders.

¹⁷ See §§ 2434-2441, *supra*.

¹⁸ *Force v. Age-Herald Co.*, 136 Ala. 271, 279, 33 So. 866.

Ultra vires or expressly prohibited acts of a solvent corporation, where not a fraud, give a creditor no cause of action against directors or other officers personally to recover his debt. *Frost Mfg. Co. v. Foster*, 76 Iowa 535, 41 N. W. 212.

This rule has been applied where directors contracted debts in excess of the debt limit fixed by the articles of incorporation. *Frost Mfg. Co. v. Foster*, 76 Iowa 535, 41 N. W. 212.

Directors are not liable to creditors for debts contracted in excess of the limit prescribed by the charter or statutes, unless the liability is imposed by the charter or by statute. *Frost Mfg. Co. v. Foster*, 76 Iowa 535, 41 N. W. 212; *Randolph v. Ballard County Bank*, 142 Ky. 145, 134 S. W. 165.

¹⁹ See § 2530, *supra*.

because at other times and with other persons they may have done business not authorized by its charter.²⁰

The violation by directors of a statute making an act a felony has been held to create personal liability in favor of depositors in a bank, the violation being the receipt of deposits when the bank was insolvent.²¹

§ 2585. Fraud. Fraud is ground for a recovery by creditors against corporate officers, independently of any statute. Such fraud may consist in the fact that the officers of a corporation organized it and contracted debts without subscribing for or paying in any of the capital stock, since in such a case the corporation is a mere shadow without substance.²² So where one-fourth of the capital stock is required to be paid in, in specie, before the directors of a bank can issue bank notes, the issuance of such notes by them at a time when practically nothing had been paid in on the stock, makes the directors liable to creditors for fraud, or breach of trust.²³ Incurring a debt in excess of the debt limit is not a fraud upon a creditor who extends credit to the company, since by inquiry or examination the creditor might have ascertained the condition of the company.²⁴

§ 2586. Liability for debts in general. The directors, or other officers of a corporation are not liable for debts contracted in the name and on behalf of the corporation and which are binding upon it, unless they are expressly made liable by statute, or unless they also contract on their own behalf.²⁵ This is true notwithstanding

²⁰ Dietrich v. Rothenberger, 25 Ky. L. Rep. 338, 75 S. W. 271.

One dealing with a corporation cannot hold directors personally liable because in other transactions they acted beyond the powers of the corporation where the transaction with him was within the corporate powers. Dietrich v. Rothenberger, 25 Ky. L. Rep. 338, 75 S. W. 271.

²¹ Baxter v. Coughlin, 70 Minn. 1, 72 N. W. 797.

²² Burns v. Beck, 83 Ga. 471, 495, 10 S. E. 121, where officers held liable for corporate debts to the extent of

the minimum capital stock named in the charter.

²³ Schley v. Dixon, 24 Ga. 273.

²⁴ Frost Mfg. Co. v. Foster, 76 Iowa 535, 41 N. W. 212.

²⁵ United States. Knower v. Haines, 31 Fed. 513.

Iowa. Frost Mfg. Co. v. Foster, 76 Iowa 535, 41 N. W. 212.

Missouri. Kritzer v. Woodson, 19 Mo. 327.

Oregon. Falls City Lumber Co. v. Watkins, 53 Ore. 212, 99 Pac. 884.

Texas. Snyder v. Wiley, 59 Tex. 448.

the corporation is insolvent.²⁶ They may bind themselves, of course, by express agreement,²⁷ if there is a consideration and the agreement is in writing, when necessary under the statute of frauds.²⁸ And, as already shown, officers may become liable personally if they contract in their own name, without disclosing that they are contracting on behalf of the corporation only, or if they contract without authority, or for a corporation which has no legal existence, or in excess of the powers of the corporation, etc.²⁹ Officers are not liable on a lease because of defects in executing it in behalf of the corporation where the lessor accepted the corporation as the contracting party and the officers acted as agents of a disclosed principal.³⁰

§ 2587. Liability for failure to comply with statutory requirements or conditions precedent to right to do business. A mere failure of a corporation to comply with statutory requirements does not of itself make the officers individually liable, where the statute does not so provide.³¹ For instance, corporate officers are not liable for corporate debts to creditors because the capital stock was not fully subscribed,³² unless there is an express statute imposing liability in such a case,³³ or unless the law in the particular jurisdiction is that subscription to the capital stock is essential to the legal existence of a corporation.³⁴ There is no common-law liability of

²⁶ *Martin v. Chambers*, 214 Fed. 769.

²⁷ See *Georgia Railroad & Banking Co. v. Pendleton*, 87 Ga. 751, 13 S. E. 822; *Maine Red Granite Co. v. York*, 89 Me. 54, 35 Atl. 1014; *Jones v. Trimble*, 3 Rawle (Pa.) 381.

See generally § 2521, *supra*.

²⁸ See *Youghiogheny Shaft Co. v. Evans*, 72 Pa. St. 331.

A parol agreement by an officer of a corporation to advance money to pay its debts is not binding on him individually. *First Nat. Bank of Burlington v. Owen*, 52 Iowa 107, 2 N. W. 980.

²⁹ See § 2522 *et seq.*, *supra*.

³⁰ *Schwartz v. Obstler*, 144 N. Y. Supp. 20.

³¹ *Pierce & Galloway v. Yeaton*, McDonald & Loring, — N. H. —, 97 Atl. 876.

³² *McKay v. Garman*, 89 Wash. 23,

153 Pac. 1082; *American Radiator Co. v. Kinnear*, 56 Wash. 210, 35 L. R. A. (N. S.) 453, 105 Pac. 630. See also *Barnard Mfg. Co. v. Balston Milling Co.*, 71 Wash. 659, 129 Pac. 389.

There is no liability, independent of statute, on the part of the president of a corporation, merely because he permitted the corporation to commence business before all its stock was subscribed. *McKay v. Garman*, 89 Wash. 23, 153 Pac. 1082.

³³ See § 2625, *infra*.

³⁴ "In *Walton v. Oliver*, 49 Kan. 107, 30 Pac. 172, 33 Am. St. Rep. 355, and *Wechselberg v. Flour City Bank*, 64 Fed. 90, 12 C. C. A. 56, 26 L. R. A. 470, individual liability was upheld on the ground that there was no corporation to be bound." *American Radiator Co. v. Kinnear*, 56 Wash. 210, 35 L. R. A. (N. S.) 453, 105 Pac. 630.

an officer for mere irregularities in organizing the corporation.³⁵

§ 2588. **Personal agreements between officers and creditors.** Independently of statute, an officer of a dissolved corporation is liable to creditors for their debts where he agreed himself to pay such debts in order to keep them from in any way interfering in the dissolution proceedings and receiver's sale of the property, with the result that he bought it at such sale for a fraction of its real value; and in such a case the property purchased may be impressed with a trust and it is not necessary to allege the receiver's sale was fraudulent or to seek to have such sale set aside.³⁶ Where directors agreed to put in a bank a sum sufficient to pay a creditor of the corporation, and they did so but used it to pay other debts, the fund was not impressed with a trust and the directors cannot be held individually liable to the creditor although they had agreed that the fund in the bank should be used for no other purpose than to pay said creditor, where that would have been an unauthorized preference of a creditor.³⁷

§ 2589. **Right of subsequent creditors to complain.** Generally, a creditor cannot complain of mismanagement occurring before he became a creditor.³⁸ But where the liability is not created by statute, as in case of wrongful diversion and misapplication of corporate assets, the rule that the disposition by a corporation of any of its property cannot be questioned by its subsequent creditors is subject to an exception where the fraudulent acts were clearly intended to operate as a fraud upon subsequent creditors, and of necessity could have no other effect.³⁹ Thus, it has been held, in a case where liability was not based on a statute but on the ground of wrongful diversion and misapplication of corporate assets, that the fact that a director resigned before plaintiff became a creditor does not release him from previous acts of misfeasance where the

³⁵ *Bartholemew v. Bentley*, 1 Ohio St. 37.

³⁶ *Lillienthal v. Betz*, 185 N. Y. 153, 7 Ann. Cas. 41, 77 N. E. 1002, rev'g on other grounds 108 N. Y. App. Div. 222, 95 N. Y. Supp. 849.

³⁷ *Clark v. Wallace Oil Co.*, 155 Ky. 836, 160 S. W. 506.

³⁸ *Commercial Bank of Augusta v. Warthen*, 119 Ga. 990, 47 S. E. 536. But see *Jesson v. Noyes*, 245 Fed. 46, 51.

A subsequent creditor cannot recover from officers the proceeds of their violation of trust in transferring control of the company and surrendering their offices to others for a monetary consideration. *Heineman v. Marshall*, 117 Mo. App. 546, 92 S. W. 1131.

³⁹ *Nix v. Miller*, 26 Colo. 203, 57 Pac. 1084.

diversion of assets was intended as a fraud upon subsequent creditors and such director contributed thereto so as to fix his liability before he resigned.⁴⁰

§ 2590. Defenses. On a bill by creditors to hold the directors of a corporation liable for loss of assets due to their mismanagement, the directors cannot attack the existence of the corporation because of irregularities in its organization.⁴¹ So it is no defense to actions by creditors for misfeasance that the services of the officer were performed gratuitously.⁴² And a director who has stated in the certificate of organization that the shares of a certain person had been fully paid up cannot, as against creditors of the company, assert that those shares had not been so paid up.⁴³

XXXI. STATUTORY LIABILITY

A. Preliminary Matters

§ 2591. General considerations. In many jurisdictions, for the better protection of the creditors of corporations or of depositors in banks, the legislatures have enacted statutes making the directors, trustees or other officers personally liable for corporate debts if they shall neglect to perform certain duties imposed upon them, or if they shall do certain acts which are prohibited.⁴⁴ These statutes vary, of course, in different jurisdictions, although they are in many respects more or less identical. Some states have no statutes regulating liability, others have statutes imposing liability for one or more acts or omissions, while still others have statutes imposing liability generally as well as specifically.

In some cases the directors and other officers of a corporation have been made liable by statute for corporate debts, on default by the corporation, not in case of any neglect of duty or misconduct on their part, but for the purpose of affording additional security to creditors, and in the same way as stockholders are made liable.⁴⁵ Such statutes, however, are very rare. The liability is

⁴⁰ *Nix v. Miller*, 26 Colo. 203, 57 Pac. 1084.

⁴¹ See *Merchants' & Planters' Line v. Waganer*, 71 Ala. 581.

⁴² *Michelson v. Pierce*, 107 Wis. 85, 82 N. W. 707.

⁴³ *Baldwin v. Wolff*, 82 Conn. 559, 74 Atl. 948.

⁴⁴ See *Lillenthal v. Betz*, 185 N. Y. 153, 7 Ann. Cas. 41, 77 N. E. 1002, rev'g 108 N. Y. App. Div. 222, 95 N. Y. Supp. 849.

⁴⁵ See *Ex parte Van Riper*, 20 Wend. (N. Y.) 617.

generally imposed in case of certain neglect or misconduct on their part.

A provision of a general statute imposing a personal liability on directors or other corporate officers is not incorporated into a special charter by a clause therein declaring that the corporation shall possess all the general powers and privileges and be subject to all the liabilities conferred and imposed upon corporations organized under such general act.⁴⁶

Directors of a corporation organized under a general law are chargeable, of course, with notice of provisions of the law regulating their duties and imposing individual liability upon them for failure to perform the same.⁴⁷

§ 2592. Purpose of statutes. Some of these statutes confer a cause of action on the corporation itself or on individual stockholders. For the most part, however, these statutes have been enacted merely for the better protection of creditors of the corporation. Generally, they, in effect, say to directors or other officers, do this or do not do that, and if you violate the duty you must yourself pay the debts of the corporation because you have failed to comply with a statute or have otherwise acted wrongfully, or must pay the damages sustained by creditors.

§ 2593. Statutes as merely reiterating common law. Some of the statutes create no new cause of action. This is generally true as to statutes authorizing a recovery for illegal payment of dividends,⁴⁸ as well as statutes authorizing a recovery in case of false reports, certificates, etc.,⁴⁹ and in case of some other statutes as hereinafter noted.

§ 2594. General classification of statutes. While the statutes in the various states differ, and in some states the statutes cover more ground and create liability in more instances than in other states, such statutes, taken as a whole, may be roughly classified as follows:

1. Statutes creating liability where statutory conditions precedent to the right to do business have not been complied with or where all or a certain part of the stock has not been subscribed for or paid in.⁵⁰

⁴⁶ "Something more specific and direct is necessary to burden an officer of the corporation with a penalty for omission of duty." *Park Bank v. Remsen*, 158 U. S. 337, 346, 39 L. Ed. 1008.

⁴⁷ *Van Etten v. Eaton*, 19 Mich. 187.

⁴⁸ *Jesson v. Noyes*, 245 Fed. 46, 49.

⁴⁹ See § 2643, *infra*.

⁵⁰ See §§ 2623-2627, *infra*.

2. Statutes providing that the violation of any of the provisions of the incorporation act, or of certain preceding sections of the act, shall make directors or other officers personally liable.⁵¹

3. Statutes making officers liable to creditors, or creditors and others, for negligence or other breach of duty.⁵²

4. Statutes creating personal liability where the debts exceed a certain amount.⁵³

5. Statutes making directors and other officers personally liable where they pay a dividend wrongfully.⁵⁴

6. Statutes making officers personally liable for failure to file annual reports.⁵⁵

7. Statutes making corporate officers personally liable for false reports, certificates, statements, notices or the like.⁵⁶

§ 2595. Statutes as divisible into those making officers liable for corporate debts and those making them liable for damages. The statutes may be roughly divided into two classes, as follows:

1. Those statutes making officers personally liable for any loss actually sustained by the creditor or other person in whose favor the statute is enacted.

2. Those statutes which make the officers liable for all debts of the corporation, or all debts contracted within a certain time, without regard to the loss actually sustained by the person seeking to enforce the liability.

Illustrations of the former class of statutes are those imposing liability for false reports, certificates, etc., and in some states liability for unauthorized dividends. Illustrations of the latter class are statutes requiring annual reports, etc.

Important consequences follow, according to whether the statute belongs to the one class or the other. Now, looking at the latter class of statutes making the officers personally liable "for all debts" of the corporation after the act or omission, it is to be noted that the liability imposed has no relation whatever to the amount of actual damage to either the creditors, or the corporation. The officers are, by such statutes, made absolutely liable for certain classes of debts although the acts or omissions of the officers have in fact not resulted in the loss of a dollar either to the corporation or its

⁵¹ See § 2620, *infra*.

⁵² See §§ 2621, 2622, *infra*.

⁵³ See §§ 2630-2637, *infra*.

⁵⁴ See § 2638, *infra*.

⁵⁵ See § 2642, *infra*.

⁵⁶ See § 2643, *infra*.

creditors.⁵⁷ The object of such statutes, it has been said by Justice Mitchell in a decision in Minnesota, is twofold: "First, to enforce diligence and fidelity on the part of corporate officers; and, second, to furnish a prompt and efficient remedy to those creditors who were, or might have been, injuriously affected by the acts of misfeasance or nonfeasance."⁵⁸

The tendency of legislation in this country is towards the repeal or amendment of statutes creating liability for debts of the corporation, without regard to the actual loss sustained by the creditor or other person seeking to recover, and the substitution of either a fixed penalty of a certain sum, or, as is more often done, the substitution of liability for all loss or damages actually resulting from the unlawful act or omission of the corporate officer. Much is to be said in favor of the latter substitution, in that it fully protects the person seeking to hold the officer liable and at the same time casts a lighter and more just burden upon the corporate officer. Furthermore, it is submitted, and there is authority so holding, that if the statute merely creates liability for damages actually sustained, it is to be deemed remedial rather than penal,⁵⁹ and construed more liberally in favor of the claimant, instead of a strict construction often applied where the court has sought to relieve from liability an officer or officers who have acted honestly and in good faith but who nevertheless seem to have been within the statute if liberally construed.

A further distinction to be noted is that, in the case of liability for actual damages, it is generally held that the creditor or other person suing may proceed in an action at law without joining other creditors or persons, and recover a judgment directly for his loss; while in the case where the liability is for the debts of the corporation, without regard to the actual damages sustained, the remedy of a creditor is generally confined to a suit in equity, he must sue in behalf of all the creditors, and the recovery is for the benefit of the creditors as a whole.⁶⁰

§ 2596. Constitutionality of statutes. Statutes imposing personal liability on directors or other corporate officers have almost invariably been held to be constitutional, so far as the nature of the

⁵⁷ *Patterson v. Stewart*, 41 Minn. 84, 90, 4 L. R. A. 745, 16 Am. St. Rep. 671, 90, 4 L. R. A. 745, 16 Am. St. Rep. 671, 42 N. W. 926.
⁵⁸ See § 2603, *infra*.

⁵⁹ *Patterson v. Stewart*, 41 Minn. 84, 90, 4 L. R. A. 745, 16 Am. St. Rep. 671, 42 N. W. 926.
⁶⁰ See § 2672, *infra*.

legislation is concerned.⁶¹ They have been held not in conflict with a constitutional provision prohibiting the imposition of "excessive fines,"⁶² and they have been held not to violate the due process clause of the fourteenth amendment of the federal constitution.⁶³

§ 2597. Statutes as penal or contractual or remedial—General considerations. Statutes creating personal liability of officers of corporations are generally held to be penal statutes, or at least it is held that since such statutes impose upon the officers burdensome liabilities, not by reason of any agreement or contract on their part, but as a penalty for their neglect or misconduct, in this sense they are penal in their nature, as respects the officers, and not contractual,⁶⁴ although in some states this theory that such statutes

⁶¹ See *Reuter Hub & Spoke Co. v. Hicks*, 181 Mich. 250, 148 N. W. 339.

⁶² *Daily v. Marshall*, 47 Mont. 377, 133 Pac. 681.

⁶³ *Reuter Hub & Spoke Co. v. Hicks*, 181 Mich. 250, 148 N. W. 339.

⁶⁴ *United States. Chase v. Curtis*, 113 U. S. 452, 28 L. Ed. 1038; *Providence Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 25 L. Ed. 786; *Patterson v. Thompson*, 86 Fed. 85; *Boston & M. R. R. v. Graves*, 80 Fed. 588; *Union Iron Co. v. Pierce*, 4 Biss. 327, Fed. Cas. No. 14,367.

California. *Moss v. Smith*, 171 Cal. 777, 155 Pac. 90; *Loveland v. Garner*, 71 Cal. 541, 12 Pac. 616; *Irvine v. McKeon*, 23 Cal. 472.

Colorado. *Clough v. Rocky Mountain Oil Co.*, 25 Colo. 520, 55 Pac. 809; *Gregory v. German Bank of Denver*, 3 Colo. 332, 25 Am. Rep. 760; *Bovee v. Boyle*, 25 Colo. App. 165, 136 Pac. 467; *Colorado Fuel & Iron Co. v. Lenhart*, 6 Colo. App. 511, 41 Pac. 834.

Connecticut. *Mitchell v. Hotchkiss*, 48 Conn. 9, 40 Am. Rep. 146.

District of Columbia. *Jackson v. Clifford*, 5 App. Cas. 312.

Maryland. *Attrill v. Huntington*, 70 Md. 191, 2 L. R. A. 779, 14 Am. St. Rep. 344, 16 Atl. 651 (rev'd 146 U. S. 657, 36 L. Ed. 1123, as to application

of rule); *First Nat. Bank of Plymouth v. Price*, 33 Md. 487, 3 Am. Rep. 204.

Massachusetts. *Halsey v. McLean*, 12 Allen 439, 90 Am. Dec. 157.

Michigan. *Breitung v. Lindauer*, 37 Mich. 217.

Minnesota. *Merchants' Nat. Bank of Chicago v. Northwestern Manufacturing & Car Co.*, 48 Minn. 349, 51 N. W. 117.

Montana. *State Sav. Bank of Butte City v. Johnson*, 18 Mont. 440, 33 L. R. A. 552, 56 Am. St. Rep. 591, 45 Pac. 662.

Nebraska. *Globe Pub. Co. v. State Bank of Nebraska*, 41 Neb. 175, 27 L. R. A. 854, 59 N. W. 683, overruling on this point *Howell v. Roberts*, 29 Neb. 483, 45 N. W. 923, and *Coy v. Jones*, 30 Neb. 798, 10 L. R. A. 658, 47 N. W. 208.

New Jersey. *Derriekson v. Smith*, 27 N. J. L. 166.

New York. *Carr v. Rischer*, 119 N. Y. 117, 23 N. E. 296; *Stokes v. Stickney*, 96 N. Y. 323; *Knox v. Baldwin*, 80 N. Y. 610; *Bruce v. Platt*, 80 N. Y. 381; *Bonnell v. Griswold*, 80 N. Y. 128; *Cameron v. Seaman*, 69 N. Y. 396, 25 Am. Rep. 212; *Wiles v. Suydam*, 64 N. Y. 173; *Borke v. Thomas*, 56 N. Y. 559; *Merchants' Bank of New Haven v. Bliss*, 35 N. Y. 412;

are penal seems to be rejected in its entirety.⁶⁵ The rule as laid down in perhaps a majority of the cases is that such statutes are penal in character, although not such in the strict sense of the term;⁶⁶ and that for the purpose of determining the liability of officers, the statutes are in the nature of a penalty, as to them.⁶⁷

Of course, it is possible for a statute to impose upon the directors and other officers of a corporation a contractual liability, or a quasi contractual liability, for corporate debts, just as it may impose such a liability upon stockholders.⁶⁸ In such a case, by becoming officers and contracting debts, they agree to assume the liability imposed by the statute, and the liability is therefore contractual in its nature. Such a liability is imposed by a charter of a bank declaring that, on default by the bank, the president and directors shall be individually, jointly and severally, liable for the payment of any bills or notes which they may issue or circulate. In such a case the liability is not imposed upon them as a penalty for any neglect or misconduct.⁶⁹ And it has been held that a statute making the directors of a corporation liable for debts contracted in excess of its capital stock, but not prohibiting them from contracting such debts, does not impose a penal liability, but imposes a quasi contractual liability analogous to the liability of a surety.⁷⁰

Garrison v. Howe, 17 N. Y. 458; *Hoboken Beef Co. v. Hand*, 104 App. Div. 390, 93 N. Y. Supp. 834; *Bird v. Hayden*, 2 Abb. Pr. (N. S.) 61, 1 Robt. 383; *Price v. Wilson*, 67 Barb. 9.

⁶⁵ *Nebraska Nat. Bank v. Walsh*, 68 Ark. 433, 82 Am. St. Rep. 301, 59 S. W. 952. And see *Farr v. Briggs' Estate*, 72 Vt. 225, 82 Am. St. Rep. 930, 47 Atl. 793.

The liability in case of assent to debts in excess of the debt limit is contractual and not penal. *Charles E. Brown & Co. v. Ware*, 87 Vt. 121, 88 Atl. 507, following *Hornor v. Henning*, 93 U. S. 228, 28 L. Ed. 879.

Such statutes are penal only in the sense that they create a liability which was not known to the common law. *Daily v. Marshall*, 47 Mont. 377, 133 Pac. 681.

⁶⁶ *Credit Men's Adjustment Co. v. Vickery*, — Colo. —. 161 Pac. 297.

⁶⁷ *Credit Men's Adjustment Co. v.*

Vickery, — Colo. —, 161 Pac. 297.

⁶⁸ *Infra*, chapter on Stockholders.

⁶⁹ See *Ex parte Van Riper*, 20 Wend. (N. Y.) 617, as explained and distinguished in *Derrickson v. Smith*, 27 N. J. L. 166.

⁷⁰ *Woolverton v. Taylor*, 132 Ill. 197, 22 Am. St. Rep. 521, 23 N. E. 1007, rev'g 30 Ill. App. 70; *Farr v. Briggs' Estate*, 72 Vt. 225, 82 Am. St. Rep. 930, 47 Atl. 793. See also *Hornor v. Henning*, 93 U. S. 228, 23 L. Ed. 879; *National Bank of Auburn v. Dillingham*, 147 N. Y. 603, 49 Am. St. Rep. 692, 42 N. E. 338.

In Illinois, the main ground for holding that statutes making officers individually liable for contracting debts, beyond a prescribed limit, were not penal statutes, was that the statute did not prohibit the incurring of liabilities beyond the limit but merely made the officers personally liable in such cases; and the court, in refer-

In construing the decisions on this subject, the following facts must be kept in mind, viz.:

1. There is more or less conflict between the decisions in the different jurisdictions although much of the apparent conflict is reconcilable as hereafter noted.

2. Even in the same state, one statute creating liability of corporate officers may be deemed penal while another statute, because of its different wording, may be held not penal. So the wording of a statute in one state may be such that it is properly held penal or not penal, while the reverse is held as to a statute creating liability for the same offense in another state, and yet there be no real conflict because of the different wording of the statutes.

3. According to many of the decisions, a statute such as those now being considered may properly be held penal in connection with some phase of the law and at the same time be held not penal as to another phase of the law.

A decision that a statutory liability can only be enforced in chancery is sometimes construed as in effect a decision that the action is not for the recovery of a penalty.⁷¹

§ 2598. — Argument in favor of holding statute one for a penalty.

The argument in favor of holding such statutes to be penal ones, at least in so far as the officer is concerned, is well presented in a federal decision as follows: "The courts have recognized the remedial feature of the statutes, in that they inure to the benefit of the creditors, for whose protection they are intended; but they have also held that, so far as the directors are concerned, the liability is in the nature of a penalty, and that the statutory provisions must be strictly construed. In this respect, reason is clearly coincident with the weight of authority. The liability imposed upon directors under the statute is absolute. It is not apportioned to the amount of the interest which the directors may have in the corporation, as stockholders or otherwise, thus differing from the statutory liability of stockholders. It is not predicated upon the amount of the bene-

ring to decisions holding such statutes to be penal, distinguished them by saying that "the language of those statutes will be found materially different from ours, and, so far as we have been able to ascertain, expressly prohibit the incurring of liabilities beyond certain limits fixed." Wool-

verton v. Taylor, 132 Ill. 197, 207, 22 Am. St. Rep. 521, 23 N. E. 1007, rev'g 30 Ill. App. 70.

⁷¹ Woolverton v. Taylor, 132 Ill. 197, 207, 22 Am. St. Rep. 521, 23 N. E. 1007, rev'g 30 Ill. App. 70, so explaining Law v. Buchanan, 94 Ill. 76.

fit which may accrue to the directors from the illegal dividend. It does not depend upon the amount of the dividend which is declared, nor the extent of the injury to the creditor, which is thereby occasioned. It is intended by such statutes, upon grounds of public policy, to require the directors of corporations to exercise diligence, to deal honestly with creditors, and to faithfully perform their duties. The law clearly presumes that the director is bound to know the condition of his corporation, and to know whether or not dividends are payable; and it makes no excuse or release of liability on account of his failure to acquire such knowledge. It is immaterial that the statute contains no direct prohibition of the payment of dividends under the circumstances mentioned therein. It is sufficient that a penalty is denounced against the act. That penalty can be regarded in no other light than as a punishment for the injurious act."⁷² It is to be noticed, however, that the statute referred to in this decision is much more in the nature of a penalty than are many other statutes imposing liability, and hence some of the language used therein would not apply to all statutes. In this case liability was imposed by the statute "for the debts of the corporation." But under some statutes the liability is "for any loss" resulting.

In a New York case decided by the Court of Appeals in 1866, the court, in considering a statute making directors liable for failure to publish an annual report, and for paying dividends when the company was insolvent, said: "Under these sections, the trustees are declared to be jointly and severally liable for all the debts of the company, in case of a violation of their provisions. The liability, it must be observed, is not limited to the injury or damage sustained by the creditors in consequence of the violation; but upon failure to file the report, or upon making a prohibited dividend, however small or trifling the amount, the trustees are subjected to the payment of the whole amount of the debts of the company then existing, and for all that shall be contracted, in the one case before the report shall be made, and in the other while they shall respectively continue in office. These provisions appear to be severally punitive, inflicted on grounds of public policy, for the protection of creditors, and the prevention of frauds upon the public in respect to the financial condition of such corporations. It is clear that the liability of the trustees is not imposed as an indemnity, because it has no relation to the actual loss or injury sustained

⁷² *Patterson v. Thompson*, 86 Fed.

85, 86, construing Oregon statute.

diversion of assets was intended as a fraud upon subsequent creditors and such director contributed thereto so as to fix his liability before he resigned.⁴⁰

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⁴⁷ *Van Etten v. Eaton*, 19 Mich. 187.

⁴⁸ *Jesson v. Noyes*, 245 Fed. 46, 49.

⁴⁹ See § 2643, *infra*.

⁵⁰ See §§ 2623-2627, *infra*.

Moreover, the question as to whether a particular statute is penal or remedial may arise in connection with an issue (1) as to whether the statute is to be strictly construed,⁸¹ or (2) whether the creditors of the corporation have a vested right therein which cannot be taken away by a repeal of the statute before judgment,⁸² or (3) whether the statute is within the statute of limitations relating to actions to recover penalties,⁸³ or (4) whether the cause of action survives the death of a party,⁸⁴ or (5) whether the statute can be enforced in a sister state or foreign country;⁸⁵ and the statute is often held penal in one or another of such cases and not penal in some other cases.

§ 2601. — *Statutes as remedial as to creditors.* Even in jurisdictions where particular statutes are held to be penal statutes, such statutes which impose liability for corporate debts upon the directors or other officers of a corporation for failure to file or publish a report of the company's condition, or neglecting to do other acts required of them by law, or for wrongfully contracting debts in violation of prescribed limitations, or doing other acts prohibited by law, are not penal statutes, in the strict and proper sense, like statutes imposing punishment for offenses against the state, but are remedial as respects the creditors.⁸⁶

⁸¹ See § 2605, *infra*.

⁸² See § 2607, *infra*.

⁸³ See §§ 2700, 2701, *infra*.

⁸⁴ See § 2706, *infra*.

⁸⁵ See § 2718, *infra*.

⁸⁶ *United States*. *Huntington v. Attrill*, 146 U. S. 657, 36 L. Ed. 1123; *Davis v. Mills*, 99 Fed. 39; *Fitzgerald v. Weidenbeck*, 76 Fed. 695.

California. *Moss v. Smith*, 171 Cal. 777, 155 Pac. 90, where question is discussed at length.

Colorado. *Credit Men's Adjustment Co. v. Vickery*, 161 Pac. 297.

Georgia. *Hargroves v. Chambers*, 30 Ga. 580, 600; *Banks v. Darden*, 18 Ga. 318; *Neal v. Moultrie*, 12 Ga. 104.

England. *Huntington v. Attrill*, [1893] App. Cas. 150.

"When the facts bring the case against the directors clearly within the statute, it affords relief to creditors and, as to them, is remedial in

character. The courts of this state have often considered the statute from the side affecting directors and as to them uniformly held it to be penal in its nature. Here the directors' liability is admitted, and we are now confronted with the question which requires a consideration of the statute from the viewpoint of creditors in enforcing the liability. The dominant idea of the statute no doubt is to secure an enforcement of the law by making directors personally liable for the debts of the corporation if they neglect to file the report. But at the same time it affords creditors relief by way of compensation, which may be summed up in a judgment against the directors. In *Huntington v. Attrill*, 146 U. S. 657, 36 L. Ed. 1123, it is said: 'Penal laws, strictly and properly, are those imposing punishment for an offense com-

§ 2602. — What is meant by “penal” statutes. If there was some precise definition of penal statutes, the question as to whether the statutes now under consideration are or are not penal would be much easier to decide. Much of the difference of opinion in regard to these statutes is predicated on the difference of opinion as to what is a penal statute. Perhaps the best and clearest statement of what are penal statutes is found in a leading case decided by the Supreme Court of the United States in 1892 in which Justice Gray, in an elaborate and well-considered opinion, stated the views of the court as follows: “In the municipal law of England and America, the words ‘penal’ and ‘penalty’ have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offense against its laws [citing cases]. But they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered. They are so elastic in meaning as even to be familiarly applied to cases of private contracts, wholly independent of statutes, as when we speak of the ‘penal sum’ or ‘penalty’ of a bond. * * * Penal laws, strictly and properly, are those imposing punishment for an offense committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal.”⁸⁷ Continuing, it was said that “the test whether a law is penal, in the strict and primary sense, is whether

mitted against the state, and which, by the English and American Constitutions, the executive of the state has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal. As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered penal, in the sense that it should be strictly construed. But as it gives a civil remedy, at the private suit of the creditor only, meas-

ured by the amount of his debt, it is as to him clearly remedial.’ In some respects the statute is penal, while in others it is remedial in character; penal in its nature as to the directors for the purpose of determining their liability, and to be strictly construed. When the liability is clearly shown, it is remedial in character as to creditors and to be liberally construed in its enforcement.” *Credit Men’s Adjustment Co. v. Vickery*, — Colo. —, 161 Pac. 297.

⁸⁷ *Huntington v. Attrill*, 146 U. S. 657, 666, 36 L. Ed. 1123.

the wrong sought to be redressed is a wrong to the public, or a wrong to the individual."⁸⁸ However, in this case the only question actually decided was that the statute involved was not a penal one within the international rule which forbids such laws to be enforced in any other country.⁸⁹

In an early case in Georgia it was held that a bank charter creating liability of directors for debts, where the debt limit is exceeded, was not a penal statute but a remedial one, for the reason that the statute gave a right of action therefor to individuals rather than the state.⁹⁰

This question is considered at length in a recent decision of the Supreme Court of Illinois, which, because of the thorough and able consideration and discussion of the question, is set forth at length in the note below.⁹¹

⁸⁸ Same case on page 668 of 146 U. S.

⁸⁹ See § 2718, *infra*.

⁹⁰ *Neal v. Moultrie*, 12 Ga. 104.

⁹¹ "The main question involved in the Appellate Court and in this appeal is whether or not the suit is an action to recover a statutory penalty, and barred by section 14 of the limitation act because not brought within two years from the time the cause of action accrued. Appellee contends that this is a suit to recover a statutory penalty, while appellant insists that the suit is on an implied contract or statutory liability, and that the five-year statute of limitations, or section 15 of the limitation act, is applicable in this case. Section 18 of the general incorporation act provides: 'If any person or persons being, or pretending to be, an officer or agent, or board of directors, of any stock corporation, or pretended stock corporation, shall assume to exercise corporate powers, or use the name of any such corporation, or pretended corporation, without complying with the provisions of this act, before all stock named in the articles of incorporation shall be subscribed in good faith, then they shall be jointly and severally liable for all debts and liabilities made

by them, and contracted in the name of such corporation, or pretended corporation.' Hurd's Stat. 1916, p. 640.

* * * This court expressly decided in *Loverin v. McLaughlin*, 161 Ill. 417, 44 N. E. 99, that liability under said section 18 is incurred if such officers or agents therein named contract for work or materials in the name of the corporation or pretended corporation before the filing of the certificate of incorporation or before all stock named in the articles of incorporation shall be subscribed in good faith. It was further held in that case that the object of the statute is to inflict a punishment for its violation, and that therefore it is penal in its character. In the case of *Diversey v. Smith*, 103 Ill. 378, 42 Am. Rep. 14, this court adopted the definition in *Potter's Dwarries on Statutes* that a penal statute is one which imposes a forfeiture or a penalty for transgressing its provisions or for doing a thing prohibited, and then said: 'It is the effect, not the form, of the statute that is to be considered, and when its object is clearly to inflict a punishment on a party for violating it—i. e., doing what is prohibited, or failing to do what is commanded to be done—it is penal in its character,

"Remedial statutes," says Mr. Sutherland in his well-known work on Statutory Construction, "are such as the name implies, embracing a great variety in detail; those enacted to afford a remedy, or to improve and facilitate remedies existing for the enforcement of rights and the redress of injuries; and also those intended for the correction of defects, mistakes and omissions in the civil institutions and administrative policy of the state." Continuing, he states that penal statutes "are often treated as contradistinguished from remedial statutes. They are not, however, in full and direct contrast. Penal statutes are those by which punishments are imposed for transgressions of the law. They are construed strictly and more or less so according to the severity of the penalty. * * * The gen-

and the circumstance that in punishing, remedy is likewise afforded to those having an interest in the observance of the statute, is unimportant.' This court accordingly held in that case, and also in the case of *Gridley v. Barnes*, 103 Ill. 211, that section 16 of the insurance statute (one very similar in character to the one now under consideration) is a penal statute and that a right of action thereunder is barred by section 14 of the limitation act. Said section 16 provides that the trustees and corporators 'shall be severally liable for all debts or responsibilities of such company, to the amount by him or them subscribed, until the whole amount of the capital of such company shall have been paid in, and a certificate thereof recorded as hereinbefore provided.' *Hurd's Stat.* 1916, p. 1484. The doctrine was also announced and approved in the case of *Diversey v. Smith*, supra, that an affirmative statute introductive of a new law which directs a thing to be done in a certain manner means that such thing shall not be done in any other manner, even though there be no negative words prohibiting it. That rule is equally applicable in this case, and said section 4, which provides that the certificate of complete organization shall be filed for record in the

county where the principal office of the corporation is located before the corporators shall commence business, is equivalent to an express prohibition against the authority to do so unless that certificate shall be first filed for record. A 'remedial statute' is one which not only remedies defects in the common law but defects in our civil jurisprudence generally, embracing not only the common law but the statutory law. 2 *Lewis' Sutherland on Stat. Const.* § 583. We find nothing in said section 18 to bring it within the class of remedial statutes. It cannot be said that the Legislature intended thereby to grant to creditors a remedy for the recovery of their claims which the common law does not give them. They had a right of action against the corporators as partners. *Bigelow v. Gregory*, 73 Ill. 197. That remedy has been in no way changed or taken away by the enactment of said section 18. *Loverin v. McLaughlin*, supra; *Richardson Fueling Co. v. Seymour*, 235 Ill. 319, 85 N. E. 496. The reading of said section indicates a legislative intent to create a liability against the officers and agents of a corporation, jointly and severally, for the general protection of the public. The words, 'shall be jointly and severally liable for all debts and liabilities made by them,'

eral purpose or aim of a statute may be remedial; as where they provide punitive compensation to the injured party. But the provisions that enforce the wrong for which a penalty is provided, and those which define the punishment, are penal in their character and are construed accordingly. A statute may be remedial in one part and penal in another. And the same statute may be remedial for certain purposes, and liberally construed therefor, and at the same time be of such a nature, and operate with such harshness upon a class of offenders subject to it, that they are entitled to invoke the rule of strict construction."⁹²

In Wisconsin, in discussing this proposition as to whether the

were not intended as the basis for establishing a contractual relation between the officers and the creditors, but were used for the purpose of holding each set of officers and directors responsible only for the wrongs and omissions occurring while they are in control and imposing a like responsibility and liability on their successors in office. The liability thus created is imposed upon the officers, directors, and agents because they permit business to be commenced and liabilities to be incurred in violation of their duty. The suit may be commenced at once to enforce this liability upon their failure or neglect to act according to said section 4, without regard to the question of whether the corporation is solvent or insolvent and notwithstanding the fact that the creditors have a right of action against the stockholders as partners. The conclusion is irresistible that said section 18 is a penal statute and that the right of action thereunder may be barred by the two-year statute of limitations. This holding should not have a tendency to work a hardship upon creditors. If they fail to bring their action within time, they still have their remedy in an appropriate action against the stockholders as partners, in which case the five-year statute of limitations applies. It is argued that section 18 should be

construed the same as section 16 of the same act, and it is pointed out that this court in the case of *Woolverton v. Taylor*, 132 Ill. 197, 23 N. E. 1007, 22 Am. St. Rep. 521, held that said section 16 is not a penal statute. Said section 16 reads: 'If the indebtedness of any stock corporation shall exceed the amount of its capital stock, the directors and officers of such corporation, assenting thereto, shall be personally and individually liable for such excess, to the creditors of such corporation.' In deciding that case, one of the main points upon which the decision turned was that there was no provision, express or implied, against officers and directors incurring for the corporation liabilities in excess of the capital stock, and no liability resulted unless the creditor suffered a loss by reason of the inability of the corporation to pay its obligation. It was also announced in that decision that said section in express words gave the remedy direct to the creditors, and that the effect of the statute was to create a liability against the officers in the character of a suretyship. That decision is in no way contrary to the views herein expressed." *M. H. Vestal Co. v. Robertson*, 277 Ill. 425, 115 N. E. 629.

⁹² 2 Lewis' Sutherland Statutory Construction (2nd Ed.), §§ 336, 337.

fact that the punishment inures to the benefit of a particular class of individuals instead of to the state, makes the statute remedial rather than penal, Justice Marshall said: "What is the primary purpose of the statute? That is the question. If that is public, the liability of a person for violating it to be mulcted in a sum having no reference whatever to the loss caused to creditors thereby, cannot, it would seem, be reasonably said to be other than a penalty, merely because the beneficiaries of the liability are private persons. We recognize the fact that there is high authority against this rule, but it is in accordance with what we deem to be the weight of authority and the better reasoning."⁸³

§ 2603. —Effect of whether liability is for debts of corporation or merely for injury sustained by person suing. The most satisfactory division is to hold that if a statute authorizes a recovery without regard to the actual damage sustained or to whether any damage has been sustained, it is penal; while if it merely authorizes a recovery of the actual damage sustained it is remedial and not penal; and in some cases the distinction between statutes of this class which are deemed penal and those which are deemed remedial seems to be that in the one case a cause of action not existing at common law is created and the creditor is not required to show any injury or damage, while in the latter case the injury must be expressly proved and the recovery is limited to the amount of the damages sustained.⁸⁴ Thus, it was said in an Indiana case that the action provided for by a statute relating to false reports was "one which might have been maintained at common law" under certain conditions, and the action, even under the statute, was for deceit and called for indemnity only and not punishment, and therefore was a remedial statute. "An action upon it," said the court, "is not an action to recover a 'penalty' given by statute, but a suit to recover damages for a fraud. The mere violation of the statute gives no right of action. The violation must produce injury, and the person aggrieved is entitled to compensation only to the extent of the damages sustained."⁸⁵

⁸³ Killen v. Barnes, 106 Wis. 546, 571, 82 N. W. 536.

⁸⁴ Brown v. Clow, 158 Ind. 403, 62 N. E. 1006; Caesar v. Bernard, 156 N. Y. App. Div. 724, 141 N. Y. Supp. 659.

If a statute merely authorizes a recovery by persons injured of all

"damages resulting from" such act or omission, the statute should be held remedial and not penal, even in so far as the statute of limitations is concerned.

⁸⁵ American Credit-Indemnity Co. v. Ellis, 156 Ind. 212, 59 N. E. 679, fol-

At the same time, it is held in Indiana that a statute imposing liability upon directors for all debts contracted after any violation of the statute, causing insolvency, including the failure to have the capital stock all paid in within eighteen months, is a penal statute, at least so far as the statute of limitations is concerned, because the creditor is not required to show that he has sustained any damage by the acts or omissions of the directors but instead the directors are personally liable for all the debts contracted after their violation of the statute, where the corporation is thereby rendered insolvent.⁹⁶

So, in New York, where such statutes are generally held to be penal, it has recently been held that a statute is remedial where it is designed to afford a remedy to creditors and stockholders for "losses" actually sustained by the official acts of directors and officers "by which the funds of the corporation have been depleted."⁹⁷ Likewise, a statute which makes corporate officers signing false reports personally liable "to any person who has become a creditor or stockholder of the corporation upon the faith of any such * * * report, * * * to the amount of the debt contracted upon the faith thereof if not paid when due, or the damage sustained by any purchaser of or subscriber to its stock upon the faith thereof," is held, even in New York, to be not penal. The court said that the amended statute differed from the former statutes on the same subject, in that the earlier ones made the officers who filed a false report liable for all the debts of the company whether or not incurred on the faith of the report and irrespective of the amount of the debts while the amended statute does not

lowed in *Brown v. Clow*, 158 Ind. 403, 62 N. E. 1006, and *St. John v. Stafford*, 26 Ind. App. 695, 59 N. E. 1075 as to statute requiring annual reports.

⁹⁶ *Brown v. Clow*, 158 Ind. 403, 411, 62 N. E. 1006, where the court said: "The liability so fixed upon them is a penalty or punishment for the violation of the duties with which they are expressly charged."

A statute imposing liability on directors "for all debts contracted" after the violation of a statute requiring the capital stock to be paid in within eighteen months after incorporation, is a penal statute since it creates a cause of action not before

existing and "the creditor is not required to show that he has been imposed upon by fraud, or that he has sustained any damage by the acts or omissions of the directors;" while, on the other hand, statutes authorizing a recovery for fraud and deceit, which the creditor must allege and prove, and limiting the recovery to the amount of damages sustained are not penal but are remedial. *Brown v. Clow*, 158 Ind. 403, 62 N. E. 1006.

⁹⁷ *Cesar v. Barnard*, 156 N. Y. App. Div. 724, 141 N. Y. Supp. 659, rev'g on other grounds 79 N. Y. Misc. 224, 139 N. Y. Supp. 974.

impose a liability for all the debts of the corporation but simply a liability to any person who has become a creditor or stockholder upon the faith of such a report. "This liability," said the court, "is greater than that which existed at common law, where, in an action for deceit scienter was essential to the maintenance of the action. But this fact does not necessarily render the statute penal," and it is then stated that a statute imposing liability for all actual losses or damages occasioned thereby, but nothing more, does not impose a penalty.⁹⁸ Likewise, in New York, the liability for illegal dividends was fixed by statute as the loss sustained by reason of such dividend, and it was held that the statute was to be treated not as a penalty but as a provision for indemnity against loss.⁹⁹ In New York there is now a penalty of fifty dollars a day for failure to file an annual report, after demand, but formerly the defaulting directors were made liable for all existing debts, which was unanimously held to be a penalty.

So in California it is held that a constitutional provision that directors shall be liable to creditors and stockholders for all moneys misappropriated by officers does not create a penal liability, in the technical sense, since the recovery allowed is merely to compensate for a loss.¹ On the other hand, in construing the statute making directors liable for debts created in excess of the debt limit to the full amount of the excess, "is of a highly penal character the moment it is construed as making the directors liable for the full amount of the excess debts which they may have authorized, regardless of loss or damage which may have been occasioned by their acts."²

In Mississippi, in 1916, the Supreme Court said that "the trend of modern authority. * * * and that of well-reasoned cases, is toward the conclusion that a statute of the character here in review [imposing liability on directors for paying illegal dividends] is not penal in the proper meaning of such term. * * * In the sense that the liability here declared 'is new and unknown to the common law,' * * * and that the party complaining must

⁹⁸ *Hutchinson v. Young*, 80 N. Y. App. Div. 246, 80 N. Y. Supp. 259; (16 N. Y. App. Div. 131, 45 N. Y. Supp. 137) and the Court of Appeals affirmed without opinion.

⁹⁹ *Dykman v. Keeney*, 10 N. Y. App. Div. 610, 42 N. Y. Supp. 488, *aff'd* without opinion in 160 N. Y. 677, 54 N. E. 1090. 1 *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153, 69 Pac. 77, 64 Pac. 692.

This holding was referred to on a subsequent appeal in the same case 2 *Moss v. Smith*, 171 Cal. 777, 155 Pac. 90.

therefore bring himself clearly within the terms of the statute, this might possibly be termed a penal statute. * * * So far as the interests of the bank in this case are concerned, the statute is remedial; its object is to authorize a recovery of the money actually disbursed in violation of the statute. It is compensation that the creditors seek; and, when once compensated, no matter from what source, the liability imposed is discharged. The public, as such, has no direct interest in the result."³

In Wisconsin, a late case also supports this distinction where a statute "does not give creditors of a corporation damages in excess of that occasioned by the wrong, but only equal to it," and holds that in such a case the statute imposes "a contractual relation upon the officers, and not a penalty in the strict sense of the term."⁴

A statute which does not enlarge the liability imposed under the rules of the common law is to be construed as not penal.⁵

In any event, liability under a statute authorizing depositors to sue directors of a bank for their loss due to receiving deposits when insolvent, is one "created by statute" rather than "for penalty or forfeiture"; and it was said in Kansas that "the general rule is that a statutory obligation to pay damages which the common law does not give is 'a liability created by statute,' where the damages awarded are limited to compensation—are limited to an amount which merely makes the injured person whole. The general rule, also, is that a statutory obligation to pay an amount beyond compensation—to submit to more than the simple redress of the wrong done; to pay not merely in respect of the deserts of the injured person but as punishment for the wrong done—is a penalty."⁶

§ 2604. — Importance of determining whether statute is penal or remedial. Generally the only time the decision as to the nature of the statute becomes important is either in connection with its construction,⁷ or in determining what statute of limitations is applicable,⁸ or as affecting the survival or abatement of the cause of action,⁹

³ Metzger v. Joseph, 111 Miss. 385, 71 So. 645.

⁴ Weston v. Dahl, 162 Wis. 32, 155 N. W. 949.

⁵ See Winchester v. Howard, 136 Cal. 432, 441, 89 Am. St. Rep. 153, 69 Pac. 77, 64 Pac. 77, 692, as explained

in Moss v. Smith, 171 Cal. 777, 785, 155 Pac. 90.

⁶ Frame v. Ashley, 59 Kan. 477, 53 Pac. 474.

⁷ See § 2605, *infra*.

⁸ See §§ 2700-2701, *infra*.

⁹ See § 2706, *infra*.

or as relating to the effect of a repeal of the statute,¹⁰ or as bearing on the right to sue in another state or country.¹¹

§ 2605. Construction of statutes. When the statute imposes a liability in the nature of a penalty, it is penal in such a sense as to be subject to the general rule that penal statutes are to be strictly construed; and an officer cannot be held liable unless the case comes clearly and strictly within the terms of the statute.¹² Furthermore, notwithstanding it has been held that a statute deemed to be remedial and not penal is to be liberally construed,¹³ the general and approved tendency of the courts is to construe the statute strictly and in favor of the corporate officers without regard to whether the statute is to be deemed strictly a penal one or otherwise. Thus, in Illinois, it was held that while the liability imposed by a certain statute was not penal but contractual, yet the liability was like that of a surety and therefore stricti juris, and the court said: "This being the case, the statute should receive a construction in consonance with the nature of the obligation imposed. The words employed should be interpreted according to their plain and obvious meaning, and should not be extended by construction so as to embrace cases not clearly within the terms of the statute."¹⁴ But when it is said that such statutes are to be strictly construed, this means no more, it has well been said, than that "the real sense of the legislature is to be found in the terms and arrangement of the statute without straining or refinement, and the expressions used are to be taken in their natural and ordinary sense."¹⁵

¹⁰ See § 2607, *infra*.

¹¹ See § 2718, *supra*.

¹² **United States.** *Park Bank v. Remsen*, 158 U. S. 337, 39 L. Ed. 1008; *Chase v. Curtis*, 113 U. S. 452, 28 L. Ed. 1038; *Providence Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 25 L. Ed. 786. And see the dictum of Mr. Justice Gray in *Huntington v. At- rill*, 146 U. S. 657, 36 L. Ed. 1123.

California. *Moss v. Smith*, 171 Cal. 777, 155 Pac. 90; *Loveland v. Garner*, 71 Cal. 541, 12 Pac. 616; *Irvine v. McKeon*, 23 Cal. 472.

Colorado. *Bovee v. Boyle*, 25 Colo. App. 165, 136 Pac. 467.

District of Columbia. *Jackson v. Clifford*, 5 App. Cas. 312.

Illinois. *Hoyt v. Haase*, 80 Ill. App. 187.

New York. *President, etc., of Man- hattan Co. v. Kaldenberg*, 165 N. Y. 1, 7, 58 N. E. 790; *Bruce v. Platt*, 80 N. Y. 379; *Bonnell v. Griswold*, 80 N. Y. 128; *Garrison v. Howe*, 17 N. Y. 458.

¹³ *Cesar v. Bernard*, 156 N. Y. App. Div. 724, 727, 141 N. Y. Supp. 659.

¹⁴ *Lewis v. Montgomery*, 145 Ill. 30, 47, 33 N. E. 880. See also *Woolver- ton v. Taylor*, 132 Ill. 197, 22 Am. St. Rep. 521, 23 N. E. 1007, rev'g 30 Ill. App. 70.

¹⁵ *Deloria v. Atkins*, 158 Mich. 232, 241, 122 N. W. 559, 16 Det. L. N. 583.

Statutes creating liability should be construed as a whole, although covering different sets of circumstances.¹⁶

§ 2606. Statutes as retrospective. Statutes imposing liability have been held not retrospective,¹⁷ but they have been held applicable to an indebtedness for rent arising after the enactment of the statute under a lease which was executed prior thereto.¹⁸

§ 2607. Amendment or repeal of statutes creating liability. It is generally held that such statutes are penal in such a sense that they may be repealed at any time, even after an action has been commenced by a creditor, without violating constitutional prohibitions against laws impairing the obligation of contracts or interfering with vested rights; and that a creditor has no vested right under such a statute against an officer until he has recovered a judgment against him.¹⁹ In such a case, the legislature may repeal a statute imposing upon directors or other officers a penal liability for corporate debts, not only as against existing creditors, but also as against creditors who have commenced an action, and after the repeal no judgment can be rendered.²⁰ Furthermore, while it is sometimes held that such statutes cannot be repealed so as to affect existing rights, where they are deemed remedial rather than penal,²¹ yet it seems that even where statutes are considered remedial, the governing rule is the general one that the repeal of a statute which gives a cause of action destroys the right, and any pending action based on such statute is abated by such repeal.²² And of course, inchoate and invested rights can be destroyed by a repeal where a statute expressly declares that "any statute may be repealed at any time."²³

¹⁶ *Gay v. Kohlsaat*, 223 Ill. 260, 79 N. E. 77.

¹⁷ *Stieffel v. Tolhurst*, 67 N. Y. App. Div. 521, 73 N. Y. Supp. 1034.

¹⁸ *Stieffel v. Tolhurst*, 67 N. Y. App. Div. 521, 73 N. Y. Supp. 1034.

¹⁹ "There is no such thing as a vested interest in an unenforced penalty." *Gregory v. German Bank of Denver*, 3 Colo. 332, 25 Am. Rep. 760, citing *Sedgwick, St. & Const. Law*, 111; *Norris v. Crocker*, 13 How. (U. S.) 429, 14 L. Ed. 210; *Gaul v. Brown*, 53 Me. 496; *Nichols v. Squire*, 5 Pick. (Mass.) 168; *Bay City & E. S. Ry. Co. v. Austin*, 21 Mich. 391; *Curtis v. Leavitt*, 15 N. Y. 152.

²⁰ *Union Iron Co. v. Pierce*, 4 Biss. 327, Fed. Cas. No. 14,376; *Gregory v. German Bank of Denver*, 3 Colo. 332, 25 Am. Rep. 760; *Breitung v. Lindauer*, 37 Mich. 217; *Victory Webb Printing & Folding Mach. Mfg. Co. v. Beecher*, 97 N. Y. 651; *Knox v. Baldwin*, 80 N. Y. 610.

²¹ See *Charles E. Brown & Co. v. Ware*, 87 Vt. 121, 88 Atl. 507.

²² See 2 *Thompson, Corporations*, § 1331, and also *Moss v. Smith*, 171 Cal. 777, 787, 155 Pac. 90.

²³ *Moss v. Smith*, 171 Cal. 777, 787, 155 Pac. 90.

The repealing act, of course, may expressly save the rights of creditors to hold directors liable for debts contracted prior to the repeal.²⁴ And in some states a general statute providing that the repeal of a statute shall not affect any penalty or liability incurred thereunder, unless the repealing act shall so provide, has been applied to the repeal of a statute making directors personally liable.²⁵

Such a statute, like other statutes, may be repealed by implication.²⁶

An amendment of the New York statute imposing liability for failure to file annual reports, by providing that written notice must be served within three years, has been held not applicable to actions to enforce such liability, where commenced before the statute was enacted.²⁷

§ 2608. Corporations which are within the statutes. Frequently, if not generally, the statutes imposing personal liability upon officers for corporate debts apply in terms to a particular class of corporations, and there is no liability unless the corporation comes strictly within the terms of the statute.²⁸ For instance, a statute making the directors of manufacturing companies liable does not apply to mining companies.²⁹ But a chamber of commerce whose articles of incorporation declare that it "is formed not for profit" is within a statute making the trustees of such a corporation personally liable for its debts, although its articles provide for corpo-

²⁴ See *Thayer v. New England Lithographic Steam Printing Co.*, 108 Mass. 523; *Knox v. Baldwin*, 80 N. Y. 610.

²⁵ *Cavanaugh v. Patterson*, 41 Colo. 158, 91 Pac. 1117. See also *Charles E. Brown & Co. v. Ware*, 87 Vt. 121, 88 Atl. 507, where statute provided that repeal of an act shall not affect a right accrued before the repeal takes effect.

²⁶ See *Kipp v. Lichtenstein*, 79 Ill. 358; *Bank of Metropolis v. Faber*, 1 N. Y. App. Div. 341, 37 N. Y. Supp. 423, 38 N. Y. App. Div. 159, 56 N. Y. Supp. 542, 150 N. Y. 200, 44 N. E. 779. Compare *Bank of Saginaw v. Pierson*, 112 Mich. 410, 70 N. W. 901.

²⁷ *Shepard v. Fulton*, 55 N. Y. App. Div. 329, 66 N. Y. Supp. 861; *Gund-*

lach-Bundschu Wine Co. v. Fritz, 49 N. Y. App. Div. 647, 63 N. Y. Supp. 198; *Loeb v. Bien*, 49 N. Y. App. Div. 638, 63 N. Y. Supp. 202; *St. George Vineyard Co. v. Fritz*, 48 N. Y. App. Div. 233, 62 N. Y. Supp. 775, 80 N. Y. Civ. Proc. 253.

²⁸ See *McKee v. City Garbage Co.*, 140 Mich. 497, 103 N. W. 906, 12 Det. L. N. 227; *E. E. Rice & Co. v. Kennedy*, 76 Vt. 380, 57 Atl. 971.

In New Hampshire, foreign corporations not manufacturing corporations are not within a statute requiring returns by foreign manufacturing corporations. *Pierce & Galloway v. Yeaton, McDonald & Loring*, — N. H. —, 97 Atl. 876.

²⁹ *Byers v. Franklin Coal Co.*, 106 Mass. 131.

rate stock, and declare that the corporation is intended to promote the prosperity of the city in which it is located.³⁰

The classification of corporations, and the question as to what corporations fall within particular classes, has been elsewhere fully considered.³¹

§ 2609. Liability as joint or several. The statutes often expressly provide that the liability of directors or other officers thereby created shall be joint and several.³² The nature of the liability where not expressly declared by statute is elsewhere considered.³³

§ 2610. Who may enforce the liability—General rule. In determining who may enforce the liability for corporate debts imposed by statute upon the directors or other officers, regard must be had, of course, to the terms of the particular statute. Most of the statutes expressly refer to "creditors of the corporation" as the persons who may sue, and in whose favor liability is created, in which case, of course, no action by the corporation or by stockholders is authorized thereunder. And a statute making corporate officers liable "for all the debts of the corporation," without referring further to who may enforce the liability, creates, of course, a liability in favor of creditors only. A few statutes expressly authorize an action by the corporation or by creditors, by creating liability to the corporation and to the creditors thereof.³⁴ Still other statutes create a liability in favor of any "creditor or stockholder of the corporation" injured by the act.³⁵

Statutes sometimes give the remedy for payment of unlawful dividends to stockholders personally and not to the corporation, so that the corporation cannot sue the directors for losses sustained from the payment of such dividends.³⁶ Other statutes create a liability not only in favor of creditors of the corporation, but also expressly create liability in favor of the corporation or stockholders or representatives of the corporation on its insolvency, or of the

³⁰ *Snyder v. Chamber of Commerce*, 53 Ohio St. 1, 41 N. E. 33.

³¹ *Supra*, §§ 57-102, vol. 1.

³² See *Williams v. Brewster*, 117 Wis. 370, 93 N. W. 479.

³³ See § 2416, *supra*.

³⁴ See, for instance, section 28 of the Stock Corporation Law of New York, relating to liability of directors

for unauthorized dividends.

³⁵ See, for instance, section 35 of the Stock Corporation Law of New York creating liability for false reports, notices or certificates.

³⁶ *Fleisher v. West Jersey Securities Co.*, 84 N. J. Eq. 55, 92 Atl. 575, under amendment of 1904.

state.³⁷ One conspiring or co-operating with the officer who has acted wrongfully cannot recover.³⁸

§ 2611. — **Creditors in general.** The statutory liability, where enforceable by creditors of the corporation, may be enforced by any creditor whose debt is within the terms of the statute, and by no others.³⁹ Thus, one not a creditor at the time of a diversion of corporate funds cannot recover under a statute giving a cause of action therefor.⁴⁰

A creditor who sues the directors under such a statute must prove that there is a valid subsisting debt due from the corporation to him.⁴¹ If only a creditor can sue, one must show that he is a bona fide creditor of the corporation, and it is not sufficient for him to show that he is a creditor under certain conditions and contingencies, without further proving the existence of the conditions on which his right depends.⁴²

A surviving partner may enforce a debt which belonged to the firm.⁴³

Stockholders who are not creditors cannot ordinarily enforce the statutory liability for failure to file an annual report.⁴⁴

A depositor in a bank who becomes such after a misappropriation may sue the directors under a statute making them liable for

³⁷ See § 2621, *infra*.

³⁸ *Zimmerman v. Western & S. Fire Ins. Co.*, 121 Ark. 408, Ann. Cas. 1917 D 513, 181 S. W. 283.

³⁹ As to what debts are within the statutes, see §§ 2648-2660, *infra*.

Under the Massachusetts statute making officers liable for corporate debts if they shall make a false certificate required by law, or fail to file a report, etc., and providing that, to render an officer liable, judgment must be recovered against the corporation and an execution returned unsatisfied, after which any creditor may file a bill in equity for himself and all other creditors against all the officers liable for the debts of the corporation—in such a proceeding, the judgment creditor, as well as other creditors, may prove any claims due on simple contract. *Thacher v. King*,

156 Mass. 490, 31 N. E. 648.

⁴⁰ *Benge v. Eppard*, 110 Iowa 86, 81 N. W. 183; *Hill v. Frazier*, 22 Pa. St. 320, applying rule to illegal dividend.

⁴¹ *National Park Bank of New York v. Remsen*, 43 Fed. 226; *Jones v. Barlow*, 62 N. Y. 202; *Adams v. Mills*, 60 N. Y. 533; *Miller v. White*, 50 N. Y. 137; *Sherman v. Slayback*, 58 Hun (N. Y.) 255, 12 N. Y. Supp. 291; *Hill v. Frazier*, 22 Pa. St. 320.

Where only creditors may sue to enforce the statutory liability the person suing must be a bona fide creditor. *State Bank of Rock Island v. Pope*, 179 Ill. App. 282.

⁴² *State Bank of Rock Island v. Pope*, 179 Ill. App. 282, 288.

⁴³ *Ferguson v. Gill*, 64 Hun (N. Y.) 284, 19 N. Y. Supp. 149.

⁴⁴ *Steele v. Hughes*, 104 Ark. 517, 149 S. W. 336.

misappropriations by other persons, since new depositors become such on the faith of the presumed assets.⁴⁵

The right of a receiver to sue to enforce a statute imposing personal liability on corporate officers is stated in a subsequent chapter.⁴⁶

§ 2612. — Creditor who is also stockholder or officer of corporation.

The fact that a creditor is also a stockholder, or even an officer, does not prevent him from enforcing the liability of the directors or other officers, if he is in no way responsible for or connected with the misconduct or neglect of which he complains,⁴⁷ unless it appears from the terms of the statute, or its purpose, that it was not intended for the benefit of creditors who might also be stockholders or officers.⁴⁸ But a director or other officer who is also a creditor cannot hold the other directors or officers liable for his debt because of acts or omissions of which he is equally guilty, and for which he would be liable, equally with them, to other creditors; for he cannot thus take advantage of his own neglect or misconduct.⁴⁹

⁴⁵ *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153, 69 Pac. 77, 64 Pac. 692.

⁴⁶ *Infra*, chapter on Receivers.

⁴⁷ *Anderson v. Blattau*, 43 Mo. 42; *Sanborn v. Lefferts*, 58 N. Y. 179. See also *Slater v. Taylor*, 241 Ill. 102, 89 N. E. 271, *aff'd* 146 Ill. App. 97; *Weber v. Fickey*, 52 Md. 500; *Janney v. Minneapolis Industrial Exposition*, 79 Minn. 488, 50 L. R. A. 273, 82 N. W. 984.

Rule applied to action by director against co-director for failure to file annual report. *Ginsburg v. Von Seggern*, 59 N. Y. App. Div. 595, 69 N. Y. Supp. 758, *aff'd* without opinion 172 N. Y. 662, 65 N. E. 1116.

⁴⁸ *Thacher v. King*, 156 Mass. 490, 31 N. E. 648; *McDowall v. Sheehan*, 129 N. Y. 200, 29 N. E. 299; *Easterly v. Barber*, 65 N. Y. 252.

Under the Massachusetts statute providing that the officers of a corporation shall be jointly and severally liable, when the debts of the corporation exceed the capital stock, to the

extent of such excess existing when suit is commenced against the corporation, it has been held that a director who is a creditor, or a member of a firm which is a creditor, is not entitled to share with the other creditors in the fund raised from the directors in enforcing their liability, as the statute is not intended for the benefit of directors who are creditors. *Thacher v. King*, 156 Mass. 490, 31 N. E. 648.

⁴⁹ *Knox v. Baldwin*, 80 N. Y. 610; *Easterly v. Barber*, 65 N. Y. 252; *Bronson v. Dimock*, 4 Hun (N. Y.) 614; *Wait v. Ferguson*, 14 Abb. Pr. (N. Y.) 379; *Briggs v. Easterly*, 62 Barb. (N. Y.) 51; *Roach v. Duckworth*, 65 How. Pr. (N. Y.) 303, 61 How. Pr. 128; *Estes v. Burns*, 5 Jones & S. (N. Y.) 1.

Contra, under the Massachusetts statute making officers liable for making any false certificate required by law. *George Woods Co. v. Storer*, 144 Mass. 399, 11 N. E. 662.

And **this** estoppel extends also to his assignee,⁵⁰ unless the assignment of the debt was absolute and for value, and was made before the default.⁵¹ The fact that the director seeking to hold the others liable was illegally elected is immaterial, if he acted as a director.⁵²

§ 2613. — **Assignee.** The right to enforce a judgment or other debt against the officers of a corporation passes to the assignee of, or to a receiver appointed for the creditor in supplementary proceedings against him.⁵⁴

§ 2614. — **Assignee for benefit of creditors.** The personal liability imposed upon directors and other officers for corporate debts is generally imposed for the benefit of creditors, and the liability does not constitute any part of the assets of the corporation.⁵⁵ In such a case, it follows that the right to enforce the liability does not pass to an assignee of the corporation for the benefit of creditors.⁵⁶

§ 2615. — **Person suffering no injury or loss.** A creditor is not precluded from enforcing his claim against an officer for the filing of a false report because he knew the report was false, where the statute does not require that he shall have relied on the report.⁵⁷ In this respect, many of the statutes create a liability different from any liability which exists at common law. And a creditor is not precluded from holding the officers liable for failure to file a re-

⁵⁰ Knox v. Baldwin, 80 N. Y. 610; Bronson v. Dimock, 4 Hun (N. Y.) 614; Briggs v. Easterly, 62 Barb. (N. Y.) 51; Roach v. Duckworth, 65 How. Pr. (N. Y.) 303, 61 How. Pr. 128.

⁵¹ Cornell v. Roach, 101 N. Y. 373, 5 N. E. 52. See also Chemical Nat. Bank v. Colwell, 14 Daly (N. Y.) 361, 132 N. Y. 250, 30 N. E. 644.

The fact that a director of a corporation, who held its bonds, was in default in filing a report, does not affect the right of one to whom he has sold and assigned the bonds to sue the directors to enforce their personal liability. Morgan v. Hedstrom, 164 N. Y. 224, 58 N. E. 26.

⁵² Easterly v. Barber, 65 N. Y. 252.

⁵³ Davis v. Mills, 99 Fed. 39; Fitzgerald v. Weidenbeck, 76 Fed. 695; Winchester v. Howard, 136 Cal. 432,

89 Am. St. Rep. 153, 69 Pac. 77, 64 Pac. 692; Credit Men's Adjustment Co. v. Vickery, — Colo. —, 161 Pac. 297; Morgan v. Hedstrom, 164 N. Y. 224, 58 N. E. 26; Cornell v. Roach, 101 N. Y. 373, 5 N. E. 52; Bolen v. Crosby, 49 N. Y. 183; Allen v. Clark, 66 Hun (N. Y.) 628, 21 N. Y. Supp. 338; Pier v. George, 14 Hun (N. Y.) 568, 86 N. Y. 613.

⁵⁴ Boynton v. Sprague, 100 N. Y. App. Div. 443, 91 N. Y. Supp. 839, aff'd without opinion 183 N. Y. 505, 76 N. E. 1089.

⁵⁵ First Nat. Bank v. Hingham Mfg. Co., 127 Mass. 563.

⁵⁶ First Nat. Bank v. Hingham Mfg. Co., 127 Mass. 563.

⁵⁷ Ferguson v. Gill, 64 Hun (N. Y.) 284, 19 N. Y. Supp. 149.

port by the fact that he had actual notice of all facts which would have been stated in the report if filed.⁵⁸

So knowledge by a creditor that the corporation was not legally organized does not prevent him from holding the officers personally liable, under the Georgia statute making persons who organize a company and transact business in its name, before the minimum capital stock has been subscribed, personally liable to creditors to make good the minimum capital stock with interest.⁵⁹

On the other hand, the statute may be so worded as to make injury or loss necessary to authorize one to sue.⁶⁰ For instance, under a statute creating liability for false notices, certificates or reports in favor of "any person who has become a creditor or stockholder of the corporation upon the faith" thereof, it is self-evident that creditors whose debts were incurred prior to the making of the certificate or report alleged to be false cannot recover thereunder.⁶¹

§ 2616. — Where debts in excess of debt limit. Take a statute which makes corporate directors liable "to the creditors thereof" to the "full amount of the debt contracted," where debts are created in excess of the debt limit. Can a creditor whose debt was created before the debt limit was reached recover thereunder?⁶² Or can such a creditor participate in the benefits of a recovery in behalf of all the creditors? This liability, it is generally held, is created not only in favor of the creditors whose debts are in excess of the debt limit but also in favor of all the other creditors,⁶³ although there is some authority to the contrary.⁶⁴

⁵⁸ *Sullivan v. Sullivan Mfg. Co.*, 20 S. C. 79.

⁵⁹ *Rozar v. Rosenheim Shoe Co.*, 14 Ga. App. 13, 80 S. E. 24.

⁶⁰ *Dykman v. Keeney*, 10 N. Y. App. Div. 610, 42 N. Y. Supp. 488, aff'd without opinion 160 N. Y. 677, 54 N. E. 1090, unlawful payment of dividends.

⁶¹ *Bagley & Sewall Co. v. Lennig*, 61 N. Y. App. Div. 26, 70 N. Y. Supp. 242.

⁶² See *Moss v. Smith*, 171 Cal. 777, 155 Pac. 90, where question was raised but not decided.

⁶³ *National Bank of Auburn v. Dillingham*, 147 N. Y. 603, 49 Am. St. Rep. 692, 42 N. E. 338, overruling Pat-

erson v. Robinson, 36 Hun 622; *Sturges v. Burton*, 8 Ohio St. 215, 72 Am. Dec. 582.

⁶⁴ *Allison v. Coal Creek & N. R. Coal Co.*, 87 Tenn. 60, 9 S. W. 226.

A statute providing that, if the debts of a corporation shall at any time exceed the capital stock paid in, the directors assenting thereto shall be individually liable for such excess, applies only to unpaid creditors, to the making of whose debts the directors assented, and not to other creditors whose debts were incurred to pay off former illegal debts to which the directors had assented. *Allison v. Coal Creek & N. River Coal Co.*, 87 Tenn. 60, 9 S. W. 226.

§ 2617. — **New York statute.** Perhaps the broadest statute, in this respect, is one in New York authorizing an action against corporate officers to compel them to account for mismanagement, "including any neglect of or failure to perform their duties," or "to pay to the corporation * * * or to its creditors, any money, and the value of any property, which they have acquired to themselves, or transferred to others, or lost, or wasted, by or through any neglect of or failure to perform or by other violation of their duties";⁶⁵ and also providing that such an action may be brought "by the attorney-general in behalf of the people of the state, or * * * by a creditor of the corporation, or by a trustee, director, manager, or other officer of the corporation, having a general superintendence of its concerns."⁶⁶ This statute is construed in this respect in a subsequent section.⁶⁷

§ 2618. **Persons liable—In general.** The question as to who may be held liable under a statute creating liability depends primarily, of course, upon the wording of the statute. Some statutes merely use the word "officers," others merely "directors," others "directors or other officers," while still others expressly designate the particular officers, such as the directors, president and secretary. These statutes imposing upon the officers of corporations personal liability for corporate debts for neglect or misconduct generally use such terms as to leave no doubt as to the officers to whom the statute is intended to apply. The term "officers," in such a statute, is broad enough to include the directors or trustees.⁶⁸ Under some statutes, directors are made liable only for acts or omissions "during the time they are stockholders in the company"; and hence a director who has ceased to be a stockholder cannot be held liable.⁶⁹ Under other statutes forbidding transfers to officers where

⁶⁵ General Corp. Law (N. Y.), § 90, subd. 1, 2.

⁶⁶ General Corp. Law (N. Y.), § 91.

⁶⁷ See § 2621, *infra*.

⁶⁸ *Gaff v. Theis*, 33 Ind. 307; *Torbett v. Eaton*, 49 Hun 209, 1 N. Y. Supp. 614, 113 N. Y. 623, 20 N. E. 876; *Brand v. Godwin*, 15 Daly (N. Y.) 456, 9 N. Y. Supp. 743, 8 N. Y. Supp. 339.

⁶⁹ *Stafford v. St. John*, 164 Ind. 277, 73 N. E. 596, construing statute requiring filing of annual reports.

Under a statute (Laws N. Y. 1892, c. 688, §§ 20, 30, 48) providing that "if a director shall cease to be a stockholder his office shall become vacant"; that a transfer of stock by a shareholder in contemplation of the insolvency of the corporation shall be void, and that a director violating a provision of the section shall be liable to creditors of the corporation for "any loss they may sustain by such violation"; and declaring directors, in case an annual report is not made,

the corporation is insolvent, any officer "concerned in violating any provision" of the statute is liable, regardless of whether he received any of the property of the corporation.⁷⁰ Under a statute which makes directors and other corporate officers, under certain conditions, "jointly and severally" liable for all debts "made by them," the liability is not limited to the officer or officers who actually gave the order or made the contract resulting in the debt, but includes other officers who participated in or assented to the creation of the debt.⁷¹ When a new director is elected, a new default makes him liable with the old members of the new defaulting board.⁷²

Whether a certain person, assuming that the office he is claimed to occupy or to have occupied is one within the terms of the statute, is such an officer, or was such an officer when the alleged wrongful act or omission defined by the statute was committed, including the question of liability after termination of the office by lapse of time, resignation, removal or the like, so as to make him liable under the statute, is governed by the same rules applicable to liability for mismanagement independent of statute, which have been fully stated in a preceding subdivision of this chapter in this volume.⁷³

"liable for all the debts of the corporation then existing, and for all contracted before such report shall be made,"—it has been held that a director who makes an absolute transfer of his shares, although with the belief that the corporation is insolvent, and will ultimately fail, but without reference to any particular liability to be thereafter incurred, ceases to be a director, and is not liable to a person who becomes a creditor of the corporation after a new certificate has been issued to the transferee. *Sinclair v. Fuller*, 158 N. Y. 607, 53 N. E. 510, aff'g 9 N. Y. App. Div. 297, 41 N. Y. Supp. 193.

However, under a Georgia statute making personally liable those who organize a company and transact business in its name before the minimum capital stock has been subscribed for, those who afterwards sell their stock in the company are nevertheless liable for the satisfaction of debts subsequently contracted by the corpora-

tion, but the transferee is not liable since one must both participate in the organization of the corporation and also transact business in its name before the minimum capital stock has been subscribed for, in order to be liable. *John V. Farwell Co. v. Jackson Stores*, 137 Ga. 174, 73 S. E. 13, construing Civ. Code, § 2220.

⁷⁰ *Pennsylvania R. Co. v. Pedrick*, 222 Fed. 75, construing New York statute.

⁷¹ *Seymour v. O. S. Richardson Fueling Co.*, 103 Ill. App. 625, rev'd on other grounds 205 Ill. 77, 68 N. E. 716.

⁷² *Morgan v. Hedstrom*, 164 N. Y. 224, 58 N. E. 26, aff'g 25 N. Y. App. Div. 547, 49 N. Y. Supp. 1049.

⁷³ See §§ 2409-2412, *supra*.

In Montana, directors are made liable for failure to file the annual report "for all debts of the corporation then existing, or which may be thereafter contracted until such report shall be made," but if the report is made after the time fixed the di-

If a statute makes liable officers "assenting" to any violation of statutory provisions, there is no assent unless the officers have actual knowledge of the act or facts or unless they were negligent in not knowing of the act or facts.⁷⁴

§ 2619. — Dissenting or absent directors. In Georgia, a charter provided that, in case of debts beyond the debt limit, "the directors under whose administration it shall happen, shall be liable for the same, in their private and individual capacities." The Supreme Court held that thereunder absent and dissenting directors are liable, and said: "The director may have been a thousand miles off in the service of the institution, as Banks was; still, if an excess of indebtedness be contracted, that excuse will not avail him. He may have been present, laboring to prevent the very abuse by his colleagues for which he is sued, and when the measure was carried over his head, and in despite of his opposition, he may not only have recorded his vote in the negative, but entered his solemn dissent upon the minutes of the board. The law will take no excuse. He was one of the board of directors, under whose administration the charter was violated—that fixes his liability. The bond demands the pound of flesh, and it must be paid."⁷⁵ This construction as to the liability of absent or dissenting directors, however, is ridiculous on its face, and no court, it is believed, has ever followed it.⁷⁶ On the other hand, many statutes excuse from liability for certain acts of the board those directors who have caused their dissent therefrom to be entered upon the minutes of the board at the time, and those who were not present when the acts happened.⁷⁷ Under such a statute it has been held that plaintiff must affirmatively prove that the director sought to be held liable was present at the time when the act relied upon was done.⁷⁸ However, a protest filed thereunder does not exonerate a director filing it against future debts in excess of the debt limit where such later debts were contracted with his concurrence or sanction.⁷⁹

rectors are not "liable for the debts thereafter contracted." Mont. Civ. Code, § 451, construed in *Risdon Iron & Locomotive Works v. Von Storch*, 166 Fed. 936.

⁷⁴ *Lippitt v. Ashley*, 89 Conn. 451, 94 Atl. 995, 998. See also § 2632, *infra*.

Rule in Minnesota, see § 2620, *infra*.

⁷⁵ *Banks v. Darden*, 18 Ga. 318, 338.

⁷⁶ For contrary statement of rule,

holding that protest need not be written nor entered upon the books, see *Schofield v. Henderson*, 67 Ind. 258.

⁷⁷ See, for instance, section 28 of the Stock Corporation Law of New York in reference to the liability of directors for unauthorized dividends.

⁷⁸ *Irvine v. McKeon*, 23 Cal. 472.

⁷⁹ *Cornwall & Maize v. Eastham*, 2 Bush (Ky.) 561.

B. Particular Statutes

§ 2620. **Violation of corporation statutes generally as express ground for personal liability.** The broadest statutes, it would seem, make directors and other officers personally liable for the debts of the corporation in case of violation by them of any of the provisions of the statute governing their powers and duties. In some states there are provisions making the directors or other officers liable for corporate debts if they shall intentionally neglect or refuse to comply with the provisions of the act under which the corporation is formed, and to perform the duties therein required of them, or if they shall order or assent to the violation of the act by the corporation, and it shall become insolvent, etc.⁸⁰ Thus, in Indiana, it is provided by statute that if manufacturing and mining companies shall violate any of the provisions of the corporation act, and shall thereby become insolvent, the directors ordering or assenting to such violation shall be liable for all debts contracted after such violation.⁸¹ Under a like statute in Kentucky, it was held that there was a violation of the provisions of the article on corporations, so as to make directors liable, where debts were incurred in excess of the amount permitted by a section of the statutes in such article.⁸²

The statute in Minnesota, made applicable only to manufacturing corporations, provides that "every officer who shall intentionally neglect or refuse to perform any duty imposed upon him by law shall be liable for all corporate debts contracted during the period of such neglect, and if the corporation shall violate any provision

⁸⁰ Clow v. Brown, 150 Ind. 185, 49 N. E. 1057, 48 N. E. 1034; Gunther v. Basket Coal Co., 21 Ky. L. Rep. 655, 52 S. W. 931; First Nat. Bank of Merrill v. Harper, 61 Minn. 375, 63 N. W. 1079; Patterson v. Stewart, 41 Minn. 84, 4 L. R. A. 745, 16 Am. St. Rep. 671, 42 N. W. 926.

In Arkansas, one provision imposes personal liability for debts during the period of neglect or refusal, upon the president, directors or secretary, where they "intentionally neglect or refuse to comply with the provisions of this act, and to perform the duties therein required of them respectively," and another provision makes directors liable for debts "if any cor-

poration, organized and established under the authority of this act, shall violate any of its provisions, and shall thereby become insolvent," if the directors order, or assent to, such violation. Kirby's Ark. Dig. (1916) c. 31, §§ 970, 971.

⁸¹ 2 Burns' Ann. Ind. St. (1914) § 5104.

To illustrate: if directors do not require stock to be paid for within the time fixed by statute, directors are liable if the company becomes insolvent. Brown v. Clow, 158 Ind. 403, 62 N. E. 1006.

⁸² Randolph v. Ballard County Bank, 142 Ky. 145, 134 S. W. 165.

of law, whereby it becomes insolvent, the directors ordering or assenting to such violation shall be liable in an action under the statute for all debts contracted after such violation."⁸³ Under this statute, it was held that the statute required something more than mere negligence—something amounting to wilful or at least intentional violation of legal duty—but that the assent need not be express, and "if a director knew that a violation of law was being, or about to be, committed, and made no objection when duty required him to object, and when he had the opportunity of doing so, this would amount to 'assent.'"⁸⁴ In a later case in that state, the statute was applied to engaging in unauthorized and ultra vires business, in direct violation of the general statute forbidding acts not specified in the incorporation papers, which finally resulted in wrecking the corporation.⁸⁵

§ 2621. Official misconduct, including negligence. In New York, and the statute has been copied to some extent in a few other states, the General Corporation Law expressly authorizes an action against corporate officers either (1) to compel them "to account for their official conduct, including any neglect of or failure to perform their duties, in the management and disposition of the funds and property, committed to their charge," or (2) to compel them "to pay to the corporation, which they represent, or to its creditors, any money, and the value of any property, which they have acquired to themselves, or transferred to others, or lost, or wasted, by or

⁸³ Minn. Gen. St. 1913, § 6450.

⁸⁴ *Patterson v. Stewart*, 41 Minn. 84, 4 L. R. A. 745, 16 Am. St. Rep. 671, 42 N. W. 926.

To constitute assent of a director of a corporation to an unauthorized act, so as to render him liable therefor, there must be something more than mere negligence on his part. There must be "something amounting to wilful, or at least intentional, violation of legal duty, either ordering the act done, participating in doing it, or assenting to its being done, with knowledge that it was being, or about to be, done." The assent, however, need not be expressly given. If a director knows that the charter is being violated, or about to be violated, and makes no objection, when it is his

duty to object, and he has the opportunity, this is equivalent to assent. *Patterson v. Stewart*, 41 Minn. 84, 4 L. R. A. 745, 16 Am. St. Rep. 671, 42 N. W. 926. See also § 2632, *infra*.

⁸⁵ *Citizen's State Bank of Kenyon v. Story Specialty Mfg. Co.*, 84 Minn. 408, 87 N. W. 1016, construing Gen. St. 1894, § 2825.

An ultra vires act of the directors of a corporation in executing accommodation paper in its name, or in loaning its funds, is an act by the corporation, within the meaning of a statute giving a creditor a right of action against the directors of a corporation for a violation of its charter causing its insolvency. *Patterson v. Stewart*, 41 Minn. 84, 4 L. R. A. 745, 16 Am. St. Rep. 671, 42 N. W. 926.

through any neglect of or failure to perform or by other violation of their duties.”⁸⁶ Such an action, it is expressly provided, may be brought (a) by the attorney general in behalf of the people of the state, or (b) by a creditor of the corporation, or (c) by “a trustee, director, manager, or other officer of the corporation, having a general superintendence of its concerns.”⁸⁷ In 1913, another section was added by amendment, giving a remedy in equity for the same acts, “at the suit of a corporation, or of a receiver, or trustee in bankruptcy.”⁸⁸

It has been said that this statute was enacted in response to the opinion, or doubt, of Chancellor Kent, that no power of supervision or control over other than charitable corporations was vested in the court of chancery.⁸⁹ It will be noticed that this statute is a very broad one, and while undoubtedly it merely restates the common

⁸⁶ General Corporation Law (N. Y.), § 90, formerly Code Civ. Proc. § 1781.

The words “any neglect of or failure to perform their duties” were added by amendment in 1907, and for the first time made the statute cover liability for damages caused by the mere neglect of directors to properly perform their duties. *People v. Equitable Life Assur. Soc. of United States*, 124 N. Y. App. Div. 714, 735, 109 N. Y. Supp. 453.

⁸⁷ General Corp. Law (N. Y.), § 91.

This statute is substantially reenacted in Wisconsin. Rev. St. Wis. 1915, §§ 3237, 3239.

Under this New York statute, the relief sought may include an accounting, the cancellation of a mortgage, and the removal of offending directors. *Jacobus v. Diamond Soda Water Mfg. Co.*, 94 N. Y. App. Div. 366, 88 N. Y. Supp. 302.

The phrase “creditor of the corporation” means a judgment creditor. *Steele v. Isman*, 164 N. Y. App. Div. 146, 148, 149 N. Y. Supp. 488.

That statute confers no new cause of action, except as to removal of officers, see *People v. Equitable Life Assur. Soc. of United States*, 124 N. Y. App. Div. 714, 109 N. Y. Supp. 453.

Mere charge of negligence, without stating the facts, is not sufficient in a complaint. *People v. Equitable Life Assur. Soc. of United States*, 124 N. Y. App. Div. 714, 109 N. Y. Supp. 453.

⁸⁸ See *German American Coffee Co. v. Diehl*, 86 N. Y. Misc. 547, 149 N. Y. Supp. 413, holding that co-directors need not be joined as defendants.

“The effect of this statute is to do away with the distinctions recognized in the cases above cited between strict actions for an accounting of property actually received and for wrongful acts, and to authorize a single comprehensive action in equity, in which the directors or officers of a corporation may be called to account for all of their acts while in office, whether the said acts consisted of the actual misappropriation of funds, or were negligence or neglect of duty, resulting in damage.” *German American Coffee Co. v. Diehl*, 86 N. Y. Misc. 547, 149 N. Y. Supp. 413.

⁸⁹ *Attorney General v. Utica Ins. Co.*, 2 Johns Ch. (N. Y.) 371, as explained in *State v. Milwaukee Elec. Railroad & Light Co.*, 136 Wis. 179, 183, 18 L. B. A. (N. S.) 672, 116 N. W. 900.

law so far as the liability of officers to the corporation or its stockholders, where one or more sue as the representatives and on behalf of the corporation, is concerned, yet in conferring a cause of action for negligence on the attorney general or a creditor of the corporation, it goes beyond the rules in this respect independently of statute, at least as laid down in many jurisdictions.⁹⁰ It applies to foreign as well as to domestic corporations.⁹¹ It is held that a suit under this section must be in equity, and that if a creditor sues he must sue as a representative of all the other creditors and of the corporation;⁹² but it is clear that if there is only one judgment creditor who may sue, it cannot be contended that the action should be a representative one, but he may obtain a judgment in his favor as an individual.⁹³ It will be noticed that this statute expressly authorizes a director, among others, to sue,⁹⁴ and if he sues, a general creditor of the corporation is not a necessary party,⁹⁵ nor are the other persons named in the statute as entitled to sue,⁹⁶ and he need not join the corporation as a plaintiff.⁹⁷ However, this statute authorizing suits to be brought by a director, manager or other corporate officer "having a general superintendence of its concerns"

⁹⁰ But see *People v. Equitable Life Assur. Soc. of United States*, 124 N. Y. App. Div. 714, 109 N. Y. Supp. 453, which holds no new cause of action is created.

⁹¹ *Miller v. Quincy*, 179 N. Y. 294, 72 N. E. 116, rev'g 88 N. Y. App. Div. 529, 85 N. Y. Supp. 310.

In New York, the statute providing that an action for an accounting may be brought against corporate officers by a creditor, or "by a trustee, director, manager, or other officer" applies to foreign as well as to domestic corporations, so that an action will lie thereunder by a director of a foreign corporation against its other directors. *Miller v. Quincy*, 179 N. Y. 294, 72 N. E. 116, rev'g on this point 88 N. Y. App. Div. 529, 85 N. Y. Supp. 310.

⁹² "An individual action at law cannot be maintained." *Davis v. Wilson*, 150 N. Y. App. Div. 704, 135 N. Y. Supp. 825.

⁹³ *Buckley v. Stansfield*, 155 N. Y.

App. Div. 735, 140 N. Y. Supp. 953.

⁹⁴ *Schoenherr v. Van Meter*, 215 N. Y. 548, 109 N. E. 625; *Miller v. Barlow*, 78 N. Y. App. Div. 331, 79 N. Y. Supp. 964.

Director, as representative of corporation, may sue co-directors. *Jacobus v. Diamond Soda Water Mfg. Co.*, 94 N. Y. App. Div. 366, 88 N. Y. Supp. 302.

It is no defense that plaintiff is a co-director with defendant, under this statute. *Ginsburg v. Von Seggern*, 59 N. Y. App. Div. 595, 69 N. Y. Supp. 758, aff'd without opinion 172 N. Y. 662, 65 N. E. 1116.

For case where complaint in action by director under such statute was held sufficient, see *Green v. Compton*, 41 N. Y. Misc. 21, 83 N. Y. Supp. 588.

⁹⁵ *Miller v. Barlow*, 78 N. Y. App. Div. 331, 79 N. Y. Supp. 964.

⁹⁶ *Miller v. Barlow*, 78 N. Y. App. Div. 331, 79 N. Y. Supp. 964.

⁹⁷ *Miller v. Barlow*, 78 N. Y. App. Div. 331, 79 N. Y. Supp. 964.

does not include its treasurer.⁹⁸ Under this statute, the corporation is not a necessary defendant,⁹⁹ except where there are special circumstances, as where a receivership is sought.¹ Under this statute, a stockholder who is neither an officer nor a creditor cannot sue, it is held in New York,² but the contrary is held under the Wisconsin statute.³ It is held in Wisconsin that a creditor cannot sue unless he has a direct personal interest in the relief sought.⁴

This statute covers both (1) failure to perform the duties of the office and (2) negligence. Of course, the failure to perform the duties may be negligence but the failure may be actionable in some cases although not amounting to negligence, as in cases where the failure constitutes active misfeasance. Thus, it has been held thereunder that where the directors transfer all the corporate assets to another corporation which agreed to pay the debts of the seller, but no notice thereof was given to the creditors, there was a "violation of their duties"; and the motives which induced the omission are immaterial, since the good faith of the directors constitutes no defense.⁵ So the statute has been applied where directors transferred practically all of the corporate property to one of their number for a nominal consideration.⁶ Directors cannot effect a voluntary dissolution of a corporation, by selling and transferring all its property and distributing the proceeds among the stockholders, where the payment of creditors is not provided for, even though the purchaser assumes the payment of the corporate debts; and directors who so dispose of the property are liable under this statute.⁷ In

⁹⁸ *Loughlin v. Wocker*, 152 N. Y. App. Div. 466, 137 N. Y. Supp. 257.

⁹⁹ *Green v. Compton*, 41 N. Y. Misc. 21, 83 N. Y. Supp. 588.

¹ *Miller v. Barlow*, 78 N. Y. App. Div. 331, 79 N. Y. Supp. 964.

² *Clubb v. Cook*, 161 N. Y. App. Div. 775, 147 N. Y. Supp. 94.

³ *State v. Milwaukee Elec. Railroad & Light Co.*, 136 Wis. 179, 183, 18 L. B. A. (N. S.) 672, 116 N. W. 900.

A personal, and not a corporate, claim, cannot be sued on by a stockholder under these sections. *Figge v. Bergenthal*, 130 Wis. 594, 110 N. W. 798, 109 N. W. 581.

⁴ "It would be subversive of all principle to permit a creditor to demand" officers "to account or to re-

claim assets when the corporation is entirely solvent and the creditors' rights not jeopardized, or when the corporation is competent and ready to enforce such right." *State v. Milwaukee Elec. Railroad & Light Co.*, 136 Wis. 179, 184, 18 L. B. A. (N. S.) 672, 116 N. W. 900.

⁵ *Darcy v. Brooklyn & N. Y. Ferry Co.*, 196 N. Y. 99, 26 L. B. A. (N. S.) 267, 134 Am. St. Rep. 827, 89 N. E. 461, aff'g 127 N. Y. App. Div. 167, 111 N. Y. Supp. 514.

⁶ *Cullen v. Friedland*, 152 N. Y. App. Div. 124, 136 N. Y. Supp. 659.

⁷ *Flaum v. Kaiser Bros. Co.*, 66 N. Y. Misc. 586, 122 N. Y. Supp. 100, aff'd 144 N. Y. App. Div. 897, 129 N. Y. Supp. 1122.

one case, it was contended that under this statute directors of a defunct corporation rendered themselves liable to creditors of the corporation by distributing all the assets among themselves without a formal dissolution proceeding and notice to the creditors; but it was held that the mere failure to formally go through dissolution proceedings does not entitle a creditor, in the absence of fraud or bad faith, to recover from directors the amount of his claim, where he would not have been entitled to the payment of any part of it had the corporation been thus dissolved, and hence the creditor can recover only what he would have received in case the corporation had been formally dissolved.⁸ The provision making corporate officers liable for losing or wasting the property of the corporation includes losses incurred in going outside the scope of the business and engaging in stock gambling.⁹ On the other hand, it has been held that the cause of action authorized by this statute relates only to a violation of the "duties" of "officers" as such, and does not apply to an action by creditors against an officer of a dissolved corporation to impress a trust upon property bought by him at the receiver's sale for a small fraction of its value—he having previously promised the creditors to himself pay all the debts of the corporation, which resulted in the creditors paying no attention to the receiver's sale. In such a case the wrong relied on is not any "official" act and therefore the statute does not apply.¹⁰

In New York, the statute provides that "where the attorney general has good reason to believe that an action can be maintained in behalf of the people of the state, as prescribed, he must bring an action accordingly * * * if, in his opinion, the public interests require that an action should be brought."¹¹ It is held thereunder that an action may be brought by the attorney general under the above provisions, to compel trustees or directors to account, etc., without a relator, whenever he is convinced, not only that it can be maintained, but that the public interests require it, although the

⁸ Curran v. Oppenheimer, 164 N. Y. App. Div. 746, 150 N. Y. Supp. 369.

⁹ Hemsley & Co. v. C. C. Duncan Co., 98 N. Y. Misc. 338, 164 N. Y. Supp. 282.

¹⁰ Lilienthal v. Betz, 185 N. Y. 153, 7 Ann. Cas. 41, 77 N. E. 1002, rev'g on this point 108 N. Y. App. Div. 222, 95 N. Y. Supp. 849.

¹¹ People v. Equitable Life Assur. Soc. of United States, 124 N. Y. App.

Div. 714, 109 N. Y. Supp. 453.

Under this New York statute, an action against directors and other officers for losses due to their misfeasance may be maintained by the attorney general, although a remedy at law therefor exists in favor of the corporation or its receiver. People v. Equitable Life Assur. Soc. of United States, 124 N. Y. App. Div. 714, 109 N. Y. Supp. 453.

people may have no direct interest in the result, and although the grievance sought to be redressed is a private, and not a public, one; and that the attorney general has absolute discretion as to what the public interests require, and his determination is not subject to review by the courts.¹² But in Wisconsin it is held that the attorney general cannot sue to enforce the primary right of the corporation to reclaim misapplied assets unless in a special case.¹³ In regard to the right of the state, through its attorney general, to sue, the Supreme Court of Wisconsin said: "That the uncovering of assets and the reclamation thereof either from the recipient or the recreant officers is a right vested in the corporation is too plain for debate.

* * * An action for that purpose rests in the corporation and can be instituted only by it except that, when the corporation by its ordinary machinery and officers refuses to act, or is prevented by the adverse interests of those officers, a stockholder, as a cestui que trust of the corporation, may apply to a court of equity to practically coerce the corporation to bring such suit, and in such action may proceed to the enforcement of the right [citing cases]. Another exception is in case of insolvency or threatened insolvency, when the creditor of the corporation becomes the real cestui que trust and may apply to a court of equity to accomplish the same results as above stated for his protection [citing cases]. But, except in the case of charitable or eleemosynary, and perhaps municipal, corporations * * * where the general public are interested in the application of the funds, obviously the state has no legal interest in the management or disposal of the funds of the corporation. * * * The state, which is but another name for the general public, has no interest therein save possibly in the case where a corporation charged with a duty to the public, as is this, might by dissipation of its assets or property disable itself from performing that public duty."¹⁴

§ 2622. Negligence. Some of the statutes imposing personal liability upon corporate officers are broad enough to cover liability

¹² *People v. Ballard*, 134 N. Y. 269, 17 L. R. A. 737, 32 N. E. 54, rev'g 56 Hun 125, 8 N. Y. Supp. 918.

¹³ *State v. Milwaukee Elec. Railroad & Light Co.*, 136 Wis. 179, 184-189, 18 L. R. A. (N. S.) 672, 116 N. W. 900, explaining *People v. Ballard*, 134 N. Y. 269, 17 L. R. A. 737, 32 N. E. 54, as based also on another statute

authorizing the attorney general to sue "if in his opinion the public interests require that an action be brought."

¹⁴ *State v. Milwaukee Elec. Railroad & Light Co.*, 136 Wis. 179, 185-187, 18 L. R. A. (N. S.) 672, 116 N. W. 900.

for negligence,¹⁵ and in some states statutes expressly make directors and other officers personally liable to the creditors of the corporation, among others, for their negligence.¹⁶ However, of course, a statute creating liability in case of fraud or "wilful mismanagement" does not cover liability for negligence.¹⁷ But in Minnesota, a statute making corporate officers liable for corporate debts if guilty of any fraud, "unfaithfulness" or dishonesty in the discharge of any official duty, was held to include negligence, on the theory that "unfaithfulness" included any violation or neglect of official duty.¹⁸ However, it was held thereunder that this provision gave a creditor a right of action against the officer only when his unfaithfulness has resulted in damage peculiar to such creditor, but not when the only damage or loss is to the corporation and by reason thereof to all the creditors in common.¹⁹

§ 2623. Violations of statute as to the incorporation of the company and as to subscriptions to stock—In general. Some statutes make officers personally liable for defects or irregularities or violations of statute in relation to acts to be done preliminary to the commencement of business by the corporation.

§ 2624. — Irregularities and noncompliance with statute in creation or organization of corporation. Statutes in some jurisdictions make the directors, trustees or other officers liable for corporate debts if they fail to take the steps required by law in the formation or organization of the corporation.²⁰ In Illinois, the statute provides, in part, that if directors or other officers "assume to exercise corporate powers, or use the name of any" stock corporation, "without

¹⁵ See, for instance, *Fletcher v. Eagle*, 74 Ark. 585, 109 Am. St. Rep. 100, 86 S. W. 810, based on Kirby's Dig. (Ark.) § 863.

This applies, it seems, to a statute making directors liable for "official mismanagement" whereby a loss or deficiency of capital stock occurs. *Bank of Mutual Redemption v. Hill*, 56 Me. 385, 96 Am. Dec. 470.

¹⁶ See New York statute as set out in § 2621, *supra*.

¹⁷ *Deaderick v. Bank of Commerce*, 100 Tenn. 457, 45 S. W. 786.

¹⁸ *First Nat. Bank of Merrill v. Harper*, 61 Minn. 375, 63 N. W. 1079.

Under this statute, it was held that "a superior officer of a corporation is liable to its creditors for loss caused by the failure of such superior officer to properly superintend the acts of its inferior officer or officers under his control, and that such superior officer is liable, not only for the loss caused by such failure, but for the whole debt of the creditor, thereby specially injured." *First Nat. Bank of Merrill v. Harper*, 61 Minn. 375, 63 N. W. 1079.

¹⁹ *First Nat. Bank of Merrill v. Harper*, 61 Minn. 375, 63 N. W. 1079.

²⁰ See, *infra*, this section.

complying with the provisions of this act," they shall be liable "for all debts and liabilities made by them, and contracted in the name of the corporation."²¹ This statute was very carelessly constructed, and was practically unintelligible because of the joinder of other matters therein, until it was construed by the Supreme Court in 1896;²² and in that case it was said that "the intention was to secure the public, dealing with corporations, against the evils of illegal or incomplete organization, * * * by placing upon the managing officers or directors the responsibility of seeing to it, that the provisions of the Incorporation Act shall be fully complied with."²³ Such provision is violated "by a neglect to comply with any one of the provisions of the act not mentioned in the special clause," and it is not necessary that there should be a non-compliance with all the provisions in order to incur the liability."²⁴ For instance, there is a liability thereunder where there is a failure to record the certificate of complete organization before incurring debts.²⁵ Proof of a corporation de facto does not relieve the directors and officers of the corporation from liability, but there must be a corporation de jure in order to escape that liability.²⁶ However, there is no personal liability because of defective organization merely because of failure to give notice of the first meeting of subscribers to organize the corporation, as required by statute, where all the sub-

²¹ *M. H. Vestal Co. v. Robertson*, 277 Ill. 425, 115 N. E. 629; *O. S. Richardson Fueling Co. v. Seymour*, 235 Ill. 319, 85 N. E. 496; *Edwards v. Armour Packing Co.*, 190 Ill. 467, 60 N. E. 807, aff'd 90 Ill. App. 333; *Hipp v. Muehleisen*, 88 Ill. App. 55; *Hoyt v. Hasse*, 80 Ill. App. 187; *George M. Clark & Co. v. Kent*, 80 Ill. App. 128, aff'd 181 Ill. 237, 54 N. E. 967; *Greene v. Masten*, 66 Ill. App. 345; *Loverin v. McLaughlin*, 46 Ill. App. 373, aff'd 161 Ill. 417, 44 N. E. 99; *Worthington v. Griesser*, 77 N. Y. App. Div. 203, 79 N. Y. Supp. 52, decided under Illinois statute.

In Illinois, if any officer of a stock corporation assumes to exercise corporate powers, or to use the name of the corporation, without complying with the provisions of the act, or before all the stock named in the arti-

cles of incorporation is subscribed in good faith, then the statute provides that they shall be liable "for all debts and liabilities made by them, and contracted in the name of such corporation." 2 J. & A. Ann. St. (1913) § 2435.

²² See *Loverin v. McLaughlin*, 161 Ill. 417, 44 N. E. 99.

²³ *Loverin v. McLaughlin*, 161 Ill. 417, 431, 44 N. E. 99.

²⁴ *Loverin v. McLaughlin*, 161 Ill. 417, 433, 44 N. E. 99.

²⁵ *M. H. Vestal Co. v. Robertson*, 277 Ill. 425, 115 N. E. 629; *Loverin v. McLaughlin*, 161 Ill. 417, 44 N. E. 99; *Seymour v. O. S. Richardson Fueling Co.*, 103 Ill. App. 625, rev'd on other grounds 205 Ill. 77, 68 N. E. 716.

²⁶ *Loverin v. McLaughlin*, 161 Ill. 417, 44 N. E. 99.

scribers waived such notice in writing.²⁷ Under this statute, a person who deals with an association as a corporation is not estopped to enforce the personal liability of the directors.²⁸ The existence of personal liability, under the statute, does not preclude the right to hold the corporation liable.²⁹

So in Connecticut a statute at one time provided that "if the president, directors or secretary of any such corporation shall intentionally neglect or refuse to comply with the provisions of this act, and to perform the duties therein required of them respectively," they shall be liable "for all debts of such corporation contracted during the period of any such neglect or refusal."³⁰

In Vermont, a statute provides that if a corporation contracts debts before a copy of its articles of association and certificate of amount of capital actually paid in are both filed, then "the president and directors shall be personally liable for such debts."³¹

Closely akin to this branch of the law is the common-law liability of directors to a creditor where the corporation has no existence even as a de facto one, in which case the basis of the liability is that governing where an agent contracts without a legally responsible principal to whom resort may be had.³²

§ 2625. — Incurring debts before all or certain per cent. of stock is subscribed or paid in. Statutes sometimes make the directors or other officers of a corporation personally liable if they contract debts on behalf of the corporation, or allow it to contract debts, before the whole capital stock of the corporation or a certain percentage thereof is subscribed, or before it is paid in, and a certificate to such effect filed.³³ The intention of such a provision has been said to be

²⁷ *J. W. Butler Paper Co. v. Cleveland*, 220 Ill. 128, 110 Am. St. Rep. 230, 77 N. E. 99, aff'g 121 Ill. App. 491.

²⁸ *Loverin v. McLaughlin*, 161 Ill. 417, 44 N. E. 99.

²⁹ *Gunderson v. Illinois Trust & Savings Bank*, 199 Ill. 422, 65 N. E. 326.

³⁰ *Armstrong v. Cowles*, 44 Conn. 44, where directors failed to file certificate of organization as required by statute.

³¹ Vt. Pub. St. (1906), § 4305; Pub. Acts 1915, No. 141, § 20. See also *Cady v. Sanford*, 53 Vt. 632.

However, if the articles of association are signed under a condition never fulfilled so that they did not take effect, there is no corporation, and no directors, and no liability under this statute. *Corey v. Morrill*, 61 Vt. 598, 17 Atl. 840.

³² *Booth v. Wonderly*, 36 N. J. L. 250, where directors of insurance company held liable on policy where charter permitted establishment of corporation only in another place than where it was established.

³³ *Kent v. George M. Clark & Co.*, 181 Ill. 237, 54 N. E. 967, aff'g 80 Ill. App. 128; *Chicago Coated Board*

"to secure the public * * * against the evils of * * * fictitious or bogus subscriptions," by placing the responsibility upon corporate officers to see to it "that the subscriptions to the capital stock shall be made in good faith."³⁴

In Indiana, a statute provided that the capital stock should be paid in within eighteen months from the time of incorporation, and that if because of violation thereof the corporation "shall thereby become insolvent," the directors assenting to such violation shall be liable for all debts thereafter contracted. In construing this statute the Supreme Court has held that insolvency must be ascribed to the violation where the corporation whose stock has not been paid in is permitted by its directors to become indebted beyond its ability to pay; and that in an action against the directors based thereon the creditor "is not required to show that he has been imposed upon by fraud, or that he has sustained any damage by the acts or omission of the directors."³⁵

In Massachusetts, a statute makes the directors of street railroad companies liable, to the extent of the capital stock, for all debts until all its capital stock is paid in and a certificate thereof filed.³⁶

In Wisconsin, personal liability is imposed on corporate officers who consent to the incurring of any corporate liability, "while having knowledge that less than one half of the authorized capital stock has been subscribed or that less than twenty per centum thereof has been actually paid in."³⁷

Co. v. Bear, 166 Ill. App. 258; *Edwards v. Armour Packing Co.*, 90 Ill. App. 333, *aff'd* 190 Ill. 467, 60 N. E. 807; *Hoyt v. Hasse*, 80 Ill. App. 187; *Clow v. Brown*, 150 Ind. 185, 49 N. E. 1057, 48 N. E. 1034; *International Paper Co. v. Gazette Co.*, 182 Mass. 578, 66 N. E. 636; *French Gas Sav. Co., Ltd. v. Desbarats Advertising Agency, Ltd.*, 1 Dom. L. R. (Can.) 136.

Directors are not individually liable, under a statute, on the ground that all of the capital stock of the corporation was not subscribed in good faith before commencing business, merely because one subscription was reported as "held subject to the call of the board of directors." *Newmann v. Sexton*, 156 Ill. App. 517.

In Louisiana, directors or other

managing officers are expressly made personally liable for debts to the creation of which they assent, where a certain per cent. of the capital stock has not been paid in before the debt was incurred. 1 Marr's La. Rev. St., § 1398, which so provides as to non-trading corporations.

³⁴ *Loverin v. McLaughlin*, 161 Ill. 417, 431, 44 N. E. 99.

³⁵ *Brown v. Clow*, 158 Ind. 403, 62 N. E. 1006.

³⁶ See *Savage v. Shaw*, 195 Mass. 571, 122 Am. St. Rep. 272, 12 Ann. Cas. 806, 81 N. E. 303; *Westinghouse Elec. & Mfg. Co. v. Reed*, 194 Mass. 590, 120 Am. St. Rep. 576, 80 N. E. 621, holding that filing of false certificate does not relieve directors of liability.

³⁷ *Weston v. Dahl*, 162 Wis. 32, 155

Questions as to what constitutes payment of capital stock are considered in a subsequent chapter.³⁸

§ 2626. — Payment for capital stock by conveyance of property at unfair valuation. If a statute makes the officers of a foreign corporation liable for debts of the company where the stock has been paid in by a conveyance at an unfair valuation, it is held that it is not necessary to prove their actual knowledge that the property is valued too highly.³⁹

§ 2627. — Making and filing certificates of payments of capital stock. In New Jersey, the president and secretary, or treasurer, are required, upon payment of each instalment of capital stock, and of every increase thereof, to make and file a certificate showing the amount of capital so paid and whether paid in cash or property; and on failure so to do, after request, they are made liable for all debts contracted before the filing of the certificate.⁴⁰ It was held thereunder that a certificate that the stock had been paid in in cash when in fact it was paid in in property of uncertain value, rendered such officers liable for the corporate debts.⁴¹

§ 2628. Fraud. In some states, the statute reads that "intentional fraud in failing to comply substantially with the articles of incorporation, or in deceiving the public or individuals in relation to their means or their liabilities," warrants a recovery of damages by "any person who has sustained injury from such fraud * * * against those guilty of participating in such fraud."⁴² In Tennessee, a statute provides, in reference to corporations for profit, that "intentional fraud in failing to comply substantially with the articles of incorporation, or in deceiving the public or individuals in relation to their liabilities, subjects all officers, stockholders, or directors, knowingly participating therein, * * * to damages at the suit of any person injured thereby"; and it then enumerates the frauds referred to as including the diversion of corporate funds

N. W. 949, holding statute to impose a contractual relation upon the officers and not a penalty in the strict sense of the term, and hence that claims arising under it are assignable.

³⁸ *Infra*, chapter on Stockholders.

³⁹ *Anthony & Scovill Co. v. Metropolitan Art Co.*, 190 Mass. 35, 76 N. E. 289.

⁴⁰ Pub. L. 1896 (N. J.), pp. 284, 285; *Benjamin v. Laffray*, 79 N. J. L. 310, 75 Atl. 775.

⁴¹ *Waters v. Quimby*, 27 N. J. L. 198, 296.

⁴² Iowa Code 1897, § 1620.

to objects not mentioned in the articles of incorporation, the illegal payment of dividends, the keeping of false books or accounts whereby any one is injured, and the making and publishing of false reports.⁴³ These matters are separately treated of in other places. They merely treat as fraud not only false reports and the like, concerning which separate statutes have been enacted in many states,⁴⁴ but also other matters generally treated of in separate sections and not under the head of fraud.

§ 2629. Misappropriation or diversion of assets. Where a statute imposes liability for diversion of assets, it is no defense that the grantee of the property claimed to have been diverted made provision for the assumption of the debts of the selling corporation,⁴⁵ at least where the creditor had no knowledge thereof at the time of bringing suit against the corporate officer.⁴⁶

In California a constitutional provision makes directors liable "to the creditors and stockholders for all moneys embezzled or misappropriated" by the corporate officers. This provision makes directors absolutely liable for acts of other officers, and it is held to be constitutional and also self-executing.⁴⁷ It has been held that this constitutional provision does not impose a penal liability in the technical sense, since the recovery is simply in compensation of a loss suffered, not as a punishment;⁴⁸ and also that it is not in violation of the federal constitution as taking property from the directors without due process of law, or denying to them the equal protection of the law.⁴⁹ The liability imposed is limited strictly to moneys "embezzled or misappropriated."⁵⁰ And the word "misappropriation," as used therein, "means something like embezzlement, or, in other words, it means the misapplication of funds intrusted to an officer for a particular purpose, by devoting them to some unauthorized purpose, and does not apply to the payment of an ex-

⁴³ Shannon's Tenn. Ann. Code (1917), §§ 2067, 2068.

⁴⁴ See § 2643, *infra*.

⁴⁵ *Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co.*, 13 Fed. 516.

⁴⁶ *Carstens & Earles v. Hofus*, 44 Wash. 456, 87 Pac. 631.

⁴⁷ *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153, 69 Pac. 77, 64 Pac. 692. See also *Major v. Walker*, 23 Cal. App. 465, 138 Pac. 360; *Hercules Oil Refining Co. v. Hocknell*, 5

Cal. App. 702, 91 Pac. 341.

For exhaustive review of California cases on this subject, see article in 3 California Law Rev. 33-40.

⁴⁸ *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153, 69 Pac. 77, 64 Pac. 692.

⁴⁹ *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153, 69 Pac. 77, 64 Pac. 692.

⁵⁰ *Hercules Oil Refining Co. v. Hocknell*, 5 Cal. App. 702, 91 Pac. 341.

travagant price for services or materials properly appertaining to the business of the corporation."⁵¹

§ 2630. Incurring debts in excess of debt limit—In general. In a number of states there are statutes making the directors or other officers of a corporation personally liable if they contract debts on behalf of the corporation, or assent to the contracting of debts, in excess of the capital stock, or the capital stock paid in, or some other prescribed limitation.⁵² If a statute limits the amount of the in-

⁵¹ *Fox v. Hale & Norcross Silver Min. Co.*, 108 Cal. 369, 41 Pac. 308.

⁵² *United States*. *Hornor v. Henning*, 93 U. S. 228, 23 L. Ed. 879, construing federal statute governing District of Columbia; *Knower v. Haines*, 31 Fed. 513, construing Massachusetts statute.

California. *Moore v. Lent*, 81 Cal. 502, 22 Pac. 875; *Irvine v. McKeon*, 23 Cal. 472. In this state the statute (Civ. Code, § 309) is repealed, so far as evidences of indebtedness by public utility corporations is concerned, by Act March 23, 1912, which substitutes a penalty against the corporation instead of the officers and makes the officers guilty of a felony instead of a misdemeanor. *Moss v. Smith*, 171 Cal. 777, 155 Pac. 90.

Illinois. *Lewis v. Montgomery*, 145 Ill. 30, 33 N. E. 880; *Woolverton v. Taylor*, 132 Ill. 197, 22 Am. St. Rep. 521, 23 N. E. 1007, rev'g 30 Ill. App. 70; *Low v. Buchanan*, 94 Ill. 76; *Buchanan v. Bartow Iron Co.*, 3 Ill. App. 191.

Indiana. See *Schofield v. Henderson*, 67 Ind. 258; *Wilcox v. Davis*, 7 Ind. 248.

Kentucky. *Brannin v. Loving*, 82 Ky. 370; *Cornwall v. Eastham*, 2 Bush 561; *Gunther v. Basket Coal Co.*, 21 Ky. L. Rep. 655, 52 S. W. 931; *Stafford v. Cain*, 13 Ky. L. Rep. 639. In this state, however, the statute creating liability in general and relates merely to violation of "any of the provisions of these articles." See

Randolph v. Ballard County Bank, 142 Ky. 145, 134 S. W. 165.

Massachusetts. *Thacher v. King*, 156 Mass. 490, 31 N. E. 648; *First Nat. Bank of Barre v. Hingham Mfg. Co.*, 127 Mass. 563; *Merchants' Bank of Newburyport v. Stevenson*, 10 Gray 232.

Mississippi. *Sells v. Rosedale Grocery & Commission Co.*, 72 Miss. 590, 17 So. 236, holding debts valid although in excess of limit.

New Hampshire. *Swan v. Burnham*, 70 N. H. 580, 49 Atl. 93; *Niagara Bridge Works v. Jose*, 59 N. H. 81.

New York. *National Bank of Auburn v. Dillingham*, 147 N. Y. 603, 49 Am. St. Rep. 692, 42 N. E. 338; *Whitney v. Pugh*, 58 App. Div. 316, 68 N. Y. Supp. 992; *Patterson v. Robinson*, 36 Hun 622, 116 N. Y. 193, 22 N. E. 372; *McClave v. Thompson*, 36 Hun 365, 21 Wkly. Dig. 452; *Motley v. Pratt*, 13 Misc. 758, 35 N. Y. Supp. 184.

Ohio. *Sturges v. Burton*, 8 Ohio St. 215, 72 Am. Dec. 582.

Pennsylvania. *Miller v. York Coated Paper Co.*, 39 Pa. Super. Ct. 538; *Margarge & Green Co. v. Ziegler*, 9 Pa. Super. Ct. 438, 43 Wkly. Notes Cas. 466.

Rhode Island. *Smith & Thayer Co. v. Arnold*, 37 R. I. 512, 93 Atl. 656.

Tennessee. *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, 95 Tenn. 634, 31 L. R. A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097; *Moulton v. Connell-Hall-McLester Co.*, 93 Tenn. 377, 27 S. W. 672; *Albitztigui v. Guadalupe*

debtedness but does not impose personal liability for violation thereof upon directors or other officers, there is no personal liability, since it did not exist at common law,⁵³ and hence the right to recover depends wholly upon the terms of the statute⁵⁴ which should be strictly construed.⁵⁵

These statutes differ more or less but generally are quite similar in their phraseology. Under some statutes, directors are made unconditionally liable in case debts are contracted exceeding the limit,⁵⁶ while under other statutes the liability is imposed only upon the directors who assent to the creation of the unauthorized indebtedness.⁵⁷ Under some statutes, a director may escape liability by filing his objections to the debt with the secretary of the company or in some other way.⁵⁸

This liability of the directors, whether considered penal or in the nature of the liability of sureties or what not, is so burdensome that it is highly proper that the statute imposing it be subject to a strict construction in favor of the officer.⁵⁹ Such a statute does not embrace

y Caloo Min. Co., 92 Tenn. 598, 22 S. W. 739; Allison v. Coal Creek & N. E. Coal Co., 87 Tenn. 60, 9 S. W. 226; Webster v. Whitworth (Tenn. Ch. App.), 63 S. W. 290.

Vermont. National Bank of Rutland v. Paige's Ex'r, 53 Vt. 452; Windham Provident Institution v. Sprague, 43 Vt. 502. Statute was repealed in 1910. Charles E. Brown & Co. v. Ware, 87 Vt. 121, 88 Atl. 507. See also Rice v. Kennedy, 76 Vt. 380, 57 Atl. 971.

Of course, such a statute may be, and often is, repealed either expressly or impliedly, at least as to the amount of indebtedness by other statutes increasing the amount of indebtedness permitted. Niagara Bridge Works v. Jose, 59 N. H. 81; Miller v. York Coated Paper Co., 39 Pa. Super. Ct. 538.

The statute is contractual, said Justice Watson, and the liability "is secondary to that of the corporation, and is for the benefit of all the creditors entitled to share in the fund to be derived therefrom, in proportion to the amount of their debts, entering into the excess, so far as may be necessary

to pay the same." Charles E. Brown & Co. v. Ware, 87 Vt. 121, 88 Atl. 507.

Sufficiency of proof of existence of debts in excess of capital stock, see Smith & Thayer Co. v. Arnold, 37 R. I. 512, 93 Atl. 656.

⁵³ Frost Mfg. Co. v. Foster, 76 Iowa 535, 41 N. W. 212.

⁵⁴ Mann's Mercantile Co. v. Smith, 107 Miss. 16, 64 So. 929.

⁵⁵ See infra, note 59.

⁵⁶ See Windham Provident Inst. for Savings v. Sprague, 43 Vt. 502.

⁵⁷ See De Witt Grocery Co. v. Ware, 89 Vt. 251, 95 Atl. 537.

⁵⁸ See Moore v. Lent, 81 Cal. 502, 22 Pac. 875. See also § 2619, supra.

Under a statute providing that any director objecting to contracting debts may file his objection with the secretary of the company, and with the county clerk, and thereupon he shall be exempt from liability, a director filing such objection is not thereby exempted from liability for debts subsequently contracted with his assent. Cornwall v. Eastham, 2 Bush (Ky.) 561.

⁵⁹ Moore v. Lent, 81 Cal. 502, 22

associations exercising corporate powers without legal authority so to do, but refers only to de jure corporations.⁶⁰

The validity or invalidity of debts in excess of the debt limit has already been noticed in another connection.⁶¹

The nature of this liability and the method of enforcing it has been stated at length in an Illinois decision⁶² which holds that (1) a judgment must first be obtained against the corporation,⁶³ (2) the fund is for the indemnity of all the creditors, (3) a single creditor cannot sue alone solely for his own benefit, (4) the remedy is in equity, and (5) all the debts of the corporation need not be due before action can be brought. However, the decisions are in conflict as to whether one creditor can sue alone merely to recover his own debt,⁶⁴ and as to whether the remedy is at law or in equity.⁶⁵

§ 2631. — What constitutes excessive indebtedness. The statutes make directors liable either (1) for debts in excess of a specified debt limit or (2) for debts in excess of the whole or a certain per cent. of the capital stock paid in. The term "capital stock," where used in such statutes, means the amount of capital stock stated in the charter or incorporation papers,⁶⁶ and does not include the assets of the corporation.⁶⁷ The "subscribed capital stock," as the term is used in a California statute, has been held to apply to all such stock whether or not paid in, and regardless of the disposition which

Pac. 875; *Irvine v. McKeon*, 23 Cal. 472; *Banks v. Darden*, 18 Ga. 318; *Gay v. Kohlsaat*, 223 Ill. 260, 79 N. E. 77; *Lewis v. Montgomery*, 145 Ill. 30, 33 N. E. 880; *J. L. Mott Iron Works v. Arnold*, 35 E. I. 456, 87 Atl. 17, and see, generally, § 2605, *supra*.

"Certainly, it [the statute] cannot be so enlarged by construction, as to make it applicable to a case not within the letter of the statute." *Schofield v. Henderson*, 67 Ind. 258, 263.

⁶⁰ *Gay v. Kohlsaat*, 223 Ill. 260, 79 N. E. 77, *aff'g* 126 Ill. App. 4.

⁶¹ See §§ 917-920, vol. 2.

⁶² *Woolverton v. Taylor*, 132 Ill. 197, 22 Am. St. Rep. 521, 23 N. E. 1007, *rev'g* 30 Ill. App. 70.

⁶³ As to this matter, the decisions are conflicting. See § 2668, *infra*.

⁶⁴ See § 2672, *infra*.

⁶⁵ See § 2672, *infra*.

⁶⁶ Under a statute declaring that the directors shall be liable for indebtedness in excess of capital stock, they are not entitled to treat the whole assets of the corporation as capital stock, and to be held liable only for the difference between such assets and the amount of the corporate indebtedness. The term "capital stock" in such a statute means the amount of capital stock stated in the charter or articles of incorporation. *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, 95 Tenn. 634, 31 L. R. A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097.

⁶⁷ *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, 95 Tenn. 634, 31 L. R. A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097.

"This statute takes no account of the property of the corporation, and

may have been made of it; and the capital stock of the company is not to be figured as a debt merely because all the subscribed capital stock was issued for property purchased.⁶⁸

Debts contracted by the corporation to one of the directors are to be taken into consideration in determining whether debts have been contracted in excess of the limitation.⁶⁹ The term "indebtedness" in a statute providing that, if the indebtedness of a corporation shall at any time exceed the capital stock paid in, the directors assenting thereto shall be liable to creditors for the excess, includes the bonded debt of the company.⁷⁰ Notes secured by mortgage are counted as part of the indebtedness unless the statute otherwise provides.⁷¹ In some states, however, this excess must be indebtedness not secured by mortgage, since the statute so expressly provides.⁷² It is unnecessary, however, to go further into this question in this connection, since the governing rules as to what constitutes an indebtedness, within debt limit provisions, have already been noted in a preceding volume.⁷³

§ 2632. — What constitutes "assenting to creation" of debts. The statutes very generally make the directors liable for those debts only to the creation of which they assent; so that a director who does not assent to the creation of a debt does not incur liability.⁷⁴

it makes no difference what the assets are when the excessive debt is created." *Slater v. Taylor*, 241 Ill. 102, 89 N. E. 271, aff'g 146 Ill. App. 97.

⁶⁸ *Moore v. Lent*, 81 Cal. 502, 22 Pac. 875.

⁶⁹ *Thacher v. King*, 156 Mass. 490, 31 N. E. 648. Contra, *McClave v. Thompson*, 36 Hun (N. Y.) 365.

But where a director is a creditor, although his debt is counted as part of the total indebtedness, yet he cannot share in the fund recovered from the directors, since "as to the fund realized from the excess of indebtedness the director is not regarded as a creditor at all." *Thacher v. King*, 156 Mass. 490, 495, 31 N. E. 648.

⁷⁰ *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, 95 Tenn. 634, 31 L. R. A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097.

⁷¹ *Smith & Thayer Co. v. Arnold*, 37 R. I. 512, 93 Atl. 656.

⁷² *Irving Nat. Bank v. Moynihan*, 84 N. Y. App. Div. 301, 82 N. Y. Supp. 705.

⁷³ See § 919, vol. 2. See also *Webster v. Whitworth* (Tenn. Ch. App.), 63 S. W. 290.

Giving new notes for old ones is not an increase of indebtedness in such a sense as to render the directors of a company liable in an action based on such new notes, under a statute making directors liable if they assent to the contracting of debts in excess of capital stock, although the indebtedness of the company at the time exceeds the limit. *National Bank of Rutland v. Paige's Ex'r*, 53 Vt. 452.

⁷⁴ *Lewis v. Montgomery*, 145 Ill. 30, 33 N. E. 880, aff'g 48 Ill. App. 282; *Brannin v. Loving*, 82 Ky. 370; *Patterson v. Robinson*, 36 Hun (N. Y.)

What is the meaning of "assenting" to the creation of indebtedness? In a late Vermont case it was contended that there could be no liability on the part of directors under the statute without a showing that the directors assented to the creation of the particular debt which was the basis of the claim. On the other side, it was contended by the creditors that the statute does not make the liability depend upon an assent given in any particular way, and that one who has knowledge of the situation and the action being taken may give assent by keeping silent, and that the fact that the directors knew that goods were being purchased by the manager of the corporation on credit, coupled with their knowledge of the excess indebtedness, was sufficient evidence of their assent. The court held that (1) the directors could not be held liable for mere inattention to the business of the corporation and consequent ignorance of its affairs nor (2) for debts of which they had no knowledge or (3) for a debt because after learning of its creation and the giving of a note therefor they made no protest in reference to it and took no steps to repudiate it but instead made part payments thereon.⁷⁵ In Illinois it is held that the assent can only be given by some affirmative voluntary act, or at least by some active participation or co-operation in the particular transactions out of which the indebtedness arose.⁷⁶ In Tennessee it has even been held that the assent must be given by the director not as an individual but "in his capacity as director, acting concurrently with a majority of the official board;"⁷⁷ and this rule has been approved in Mississippi.⁷⁸ In Iowa the statute makes di-

622, 116 N. Y. 193, 22 N. E. 372; *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, 95 Tenn. 634, 31 L. R. A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097; *Allison v. Coal Creek & N. River Coal Co.*, 87 Tenn. 60, 9 S. W. 226.

⁷⁵ *De Witt Grocery Co. v. Ware*, 89 Vt. 251, 95 Atl. 537.

⁷⁶ Directors who allow one of their number, who owns a majority of the stock, to manage the business substantially as he pleases, and who fail to keep themselves informed as to the financial condition of the corporation, do not thereby assent to debts created by him without their knowledge, so as to become personally liable. *Lewis v. Montgomery*, 145 Ill. 30, 33 N. E. 880, aff'g 48 Ill. App. 282. Com-

pare, under a different statute, *Patterson v. Stewart*, 41 Minn. 84, 4 L. R. A. 745, 16 Am. St. Rep. 671, 42 N. W. 926.

⁷⁷ *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, 95 Tenn. 634, 31 L. R. A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097.

⁷⁸ "It may be, and is, suggested that this rule will make it extremely difficult to fix liability upon directors of trading corporations. * * * Appeal to the lawmakers, and not to the courts, is the only remedy, if the statutes have not gone far enough to remedy existing evils." *Mann's Mercantile Co. v. Smith*, 107 Miss. 16, 64 So. 929.

rectors "knowingly consenting" to the excessive indebtedness personally liable; and it is held no recovery can be had merely because the directors were guilty of inattention or negligence where they had no actual knowledge of the excess.⁷⁹ In Kentucky, however, where the statute imposes liability without conditions, directors have been held liable where they permitted the manager of the company to run it to suit himself, although they had no knowledge of the amount of the corporate debts, especially when they have ratified the debt by executing a note therefor in itself several times the amount of the debt limit.⁸⁰

It is generally held that a director who does not assent to the "creation" of a debt does not become liable by afterwards recognizing it or agreeing to its payment.⁸¹

A new assent is necessary, to create liability, where debts are incurred to pay off former indebtedness to which the directors had assented.⁸²

§ 2633. — Rights of nonconsenting directors. Directors who object to the creation of the additional indebtedness may escape liability, it is expressly provided by the statutes in several of the states, by filing a dissent thereto with the secretary or having it appear in the minutes. Moreover, even where there was no such provision for exoneration, it was held in Indiana that a director may escape liability by protest and objection against the incurring of the debt, and that "it was not necessary * * * that they should have made a formal written protest against, or have presented their written objections to, the action of the other directors, or that such protest and objections should have been recorded in the books of the company."⁸³

§ 2634. — As of what time excess is determined, and effect of subsequent reduction of indebtedness. In Rhode Island, the statute

⁷⁹ "Personal liability can be enforced only where consent is given to the making of the indebtedness with actual knowledge that the limit has already been reached, or is by such act being exceeded. Constructive knowledge, or knowledge which might have been obtained had the defendants not been negligent, is not enough." *Edward Hines Lumber Co. v. Marquardt* (Iowa), 117 N. W. 666.

⁸⁰ *Randolph v. Ballard County Bank*, 142 Ky. 145, 134 S. W. 165.

⁸¹ *Lewis v. Montgomery*, 145 Ill. 30, 33 N. E. 880, aff'g 48 Ill. App. 282; *Patterson v. Robinson*, 36 Hun (N. Y.) 622; *DeWitt Grocery Co. v. Ware*, 89 Vt. 251, 95 Atl. 537.

⁸² *Allison v. Coal Creek & N. River Co.*, 87 Tenn. 60, 9 S. W. 226.

⁸³ *Schofield v. Henderson*, 67 Ind. 258, 264. See also § 2619, *supra*.

imposes liability unconditionally on the directors "to the extent of such excess" and "for all the debts of the company then existing and for all that shall be contracted as long as" the directors shall continue in office, and "until the debts shall be reduced to the amount of the capital stock of such company paid in." It was held thereunder that where the corporation, after contracting debts exceeding its capital stock, goes into bankruptcy, the fact that its trustee, in liquidation of its affairs and before suit is brought, pays to the creditors certain sums sufficient to reduce its indebtedness to the amount of paid-in capital stock, does not exonerate the directors from liability.⁸⁴ The same rule was adopted in Massachusetts in an early case under a statute almost identical in its wording.⁸⁵ So the amount paid, after bankruptcy, on a corporate note secured by a mortgage, from the proceeds of a sale of the mortgaged property, is not to be counted as a reduction of indebtedness, since the payment is not made from surplus assets.⁸⁶ In Massachusetts, under the later statutes, the liability exists only to the extent of the excess "existing at the time of the commencement of the suit against the corporation upon the judgment in which the suit in equity to enforce such liability is brought," and in construing them the court has said that "instead of the complicated provisions of the Revised Statutes, the statute before us fixes a single date, namely, when the suit is brought on which judgment is recovered. If the debts on that day exceed the capital stock, there is liability; otherwise not."⁸⁷

§ 2635. — Debts not valid claims. In Mississippi, the statute imposes absolute liability upon all directors "who contracted such debts"; but this was held not applicable to a contract made without authority by an individual director, since "debts prohibited by the statute must be valid claims against the corporation, enforceable in the courts, and capable of being made a charge on the assets of the company."⁸⁸

⁸⁴ *J. L. Mott Iron Works v. Arnold*, 35 R. I. 456, 87 Atl. 17, distinguishing and explaining Illinois cases, and distinguishing *Flint v. Boston Woven Hose & Rubber Co.*, 183 Mass. 114, 66 N. E. 592, as decided under a statute relating to excess "existing at the time of the commencement of the suit."

To same effect *Margarge & Green*

Co. v. Zeigler, 9 Pa. Super. Ct. 438.

⁸⁵ *Merchants' Bank v. Stevenson*, 10 Gray (Mass.) 232.

⁸⁶ *Smith & Thayer Co. v. Arnold*, 37 R. I. 512, 93 Atl. 656.

⁸⁷ *Flint v. Boston Woven Hose & Rubber Co.*, 183 Mass. 114, 66 N. E. 592.

⁸⁸ *Mann's Mercantile Co. v. Smith*, 107 Miss. 16, 64 So. 929.

§ 2636. — Defenses. A suit under such a statute is not barred by proceedings against the same defendants as stockholders to enforce their personal liability under another statute for debts contracted before payment of the capital stock.⁸⁹ The good faith of the directors is no defense.⁹⁰ It is no defense that creditors had knowledge of the illegal increase of the corporate indebtedness at the time their contract was entered into,⁹¹ nor that the creditor who is suing participated in creating the indebtedness, where there is no claim but that the corporation is liable to him.⁹²

§ 2637. — Who may sue, extent of recovery, etc. These questions are treated of in other sections.⁹³

§ 2638. Unlawful payment of dividends. As already stated, directors are liable to the corporation for misapplication of assets, even in the absence of a statute, if they pay dividends, not acting through any mistake or mere error of judgment, when there are no profits out of which dividends may lawfully be paid, and this liability may be enforced by or for the benefit of creditors;⁹⁴ but in the absence of a statute, this does not render the directors liable personally for corporate debts. In some states, however, there are statutes expressly making the directors personally liable for corporate debts, or for resulting losses, if they shall wrongfully pay dividends when there are no surplus profits available for the purpose, and thereby impair the capital stock, or render the corporation insolvent.⁹⁵

⁸⁹ *First Nat. Bank v. Hingham Mfg. Co.*, 127 Mass. 563.

⁹⁰ A director's belief that the debt will be paid is no defense. *Stafford v. Cain*, 13 Ky. L. Rep. 639.

⁹¹ *Swan v. Burnham*, 70 N. H. 580, 49 Atl. 93.

⁹² *Slater v. Taylor*, 241 Ill. 102, 89 N. E. 271, aff'g 146 Ill. App. 97.

⁹³ See §§ 2610-2617, *supra*, and §§ 2672, 2722, *infra*.

⁹⁴ See § 2583, *supra*.

⁹⁵ *United States*. *Patterson v. Thompson*, 86 Fed. 85.

Connecticut. *Davenport v. Lines*, 72 Conn. 118, 44 Atl. 17.

Massachusetts. *Chamberlin v. Huguenot Mfg. Co.*, 118 Mass. 532; *Priest v. Essex Hat Mfg. Co.*, 115 Mass. 380.

New Jersey. *Whittaker v. Amwell Nat. Bank*, 52 N. J. Eq. 400, 29 Atl. 203; *Williams v. Boice*, 38 N. J. Eq. 364.

New York. *Dykman v. Keeney*, 160 N. Y. 677, 54 N. E. 1090; *Rorke v. Thomas*, 56 N. Y. 559.

Pennsylvania. *Gunkle's Appeal*, 48 Pa. St. 13.

Virginia. *Slaymaker's Adm'r v. Jaffray & Co.*, 82 Va. 346, 4 S. E. 606.

Such a statute imposes no liability unless the directors or trustees act in bad faith, or are guilty of negligence. Wrongful payment of a dividend through mere mistake or error of judgment, not due to their culpable negligence, does not render them liable, although it may impair the cap-

This question is considered in a subsequent chapter dealing with the law relating to dividends.

§ 2639. Division, withdrawal or reduction of capital stock. Statutes in some states, in addition to making directors personally liable for illegal dividends, also impose such liability where they divide, withdraw or in any way pay to the stockholders or any of them, any part of the capital stock of the company, or reduce its capital stock except as authorized by law.⁹⁶ Under such a statute, where a

ital stock. *Witters v. Sowles*, 31 Fed. 1; *Van Dyck v. McQuade*, 86 N. Y. 38; *Excelsior Petroleum Co. v. Lacey*, 63 N. Y. 422; *Rorke v. Thomas*, 56 N. Y. 559.

The statute is intended as a provision for indemnity against the loss which the corporation or its creditors may sustain by reason of the wrongful payment of dividends, and therefore it does not render the directors or trustees liable if, as matters have turned out, no loss or injury has resulted. Thus, although the directors of a bank, at the time of declaring a dividend, may have failed to class certain notes remaining overdue more than a year as losses, as required by the New York Banking Law (Laws 1892, c. 689, § 26), and although, if they had done so, there would have been no surplus profits for payment of the dividend, they may defeat an action by creditors on the ground that payment of the dividend was unlawful, by showing that the notes were afterwards paid, so that there has been no actual injury or loss from payment of the dividend. *Dykman v. Keeney*, 160 N. Y. 677, 54 N. E. 1090, 10 N. Y. App. Div. 610, 42 N. Y. Supp. 488, 16 N. Y. App. Div. 131, 45 N. Y. Supp. 137. See also *Dykman v. Keeney*, 34 N. Y. App. Div. 45, 54 N. Y. Supp. 1.

Procedure in Wisconsin to enforce statutory liability, see *Williams v. Brewster*, 117 Wis. 370, 93 N. W. 479.

⁹⁶ See *Audenried v. East Coast Mill-*

ing Co., 68 N. J. Eq. 450, 59 Atl. 577; *Shaw v. Ansaldi Co.*, — N. Y. App. Div. —, 165 N. Y. Supp. 872.

In New York, section 28 of the Stock Corporation Law is as follows: "The directors of a stock corporation shall not make dividends, except from the surplus profits arising from the business of such corporation, nor divide, withdraw or in any way pay to the stockholders or any of them, any part of the capital of such corporation, or reduce its capital stock, except as authorized by law. In case of any violation of the provisions of this section, the directors under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large upon the minutes of such directors at the time, or were not present when the same happened, shall jointly and severally be liable to such corporation and to the creditors thereof to the full amount of any loss sustained by such corporation or its creditors respectively by reason of such withdrawal, division or reduction." This statute was amended in 1901 so as to confine the liability to "the amount of any loss sustained" thereby. *Shaw v. Ansaldi Co.*, — N. Y. App. Div. —, 165 N. Y. Supp. 872.

In North Carolina a statute forbids any division, withdrawal or reduction of the capital stock except as provided for therein, and makes directors personally liable in case of its viola-

corporation is dissolved and the assets divided by the directors among the stockholders, without paying a creditor, he may hold the directors personally liable for his debt.⁹⁷ So the statute is applicable where a corporation purchases at par value its stock from stockholders and pays therefor out of the capital as distinguished from the surplus of the corporation.⁹⁸

§ 2640. Loans to stockholders or officers. In some states, corporate officers who disobey the statute forbidding loans to stockholders are expressly declared by statute to be personally liable for such loans or for corporate debts to the extent of such loans.⁹⁹ However, such a statute has been enacted in only a few of the states. In New York, such a statute is construed to be in the nature of a penalty, and it is held that it is necessary thereunder to show that there was both in law and in fact "a loan of money," i. e., an actual loan of money in such form as to create an indebtedness to be at some time repaid, so that a liability for repayment by the borrower is created.¹ And in Maryland it is held that taking security for debts previously contracted is not the making of a loan.²

In Massachusetts, a statute provides that directors shall be liable for debts contracted between the time "of making or assenting to a loan to a stockholder and the time of its repayment, to the extent of such loan." This statute has been applied where stockholders paid for their stock in full and then three-eighths of the amount paid was lent to them by checks payable to the order of the respective stockholders.³

In case of a director not present when a loan is made, it is necessary to show his consent to the loan.⁴ "Consent" to a loan is not

tion. *McIver v. Young Hardware Co.*, 144 N. C. 478, 119 Am. St. Rep. 970, 57 S. E. 169.

⁹⁷ *Keen v. Maple Shade Land & Improvement Co.*, 63 N. J. Eq. 321, 50 Atl. 467, rev'g 61 N. J. Eq. 497, 48 Atl. 596.

⁹⁸ *Jesson v. Noyes*, 245 Fed. 46, 50.

⁹⁹ See, for instance, section 29 of the Stock Corporation Law of New York, under which recovery was sustained in *Hemsley & Co. v. O. C. Duncan Co.*, 98 N. Y. Misc. 338, 164 N. Y. Supp. 282.

¹ *Billings v. Trask*, 30 Hun (N. Y.) 314.

² *Murphy v. Penniman*, 105 Md. 452, 121 Am. St. Rep. 583, 66 Atl. 282.

³ *Old Colony Boot & Shoe Co. v. Parker-Sampson-Adams Co.*, 183 Mass. 557, 67 N. E. 870.

⁴ *Thomas v. Penniman*, 105 Md. 475, 66 Atl. 291.

"His mere absence from the meeting, if it be assumed he had notice, cannot be fairly said to be 'consenting thereto, directly or indirectly,' to an act for which the statute imposes a penalty on parties so consenting." *Murphy v. Penniman*, 105 Md. 452, 121 Am. St. Rep. 583, 66 Atl. 282.

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necessarily shown by the absence of a director from the special meeting or the next regular meeting when the loan was approved.⁵

§ 2641. Transfer of property to corporate officers and other acts constituting a preference when corporation is insolvent or has refused to pay any of its obligations when due. In New York, a statute provides that no corporation which shall have refused to pay any of its obligations when due, nor any of its officers or directors, shall transfer any of its property to any of its officers or stockholders for the payment of any debt, and if it does so, the directors and officers participating therein shall be personally liable to the creditors and stockholders for any loss sustained by them.⁶ Under such

⁵ *Murphy v. Penniman*, 105 Md. 452, 121 Am. St. Rep. 583, 66 Atl. 282.

⁶ "No corporation which shall have refused to pay any of its notes or other obligations, when due, in lawful money of the United States, nor any of its officers or directors, shall transfer any of its property to any of its officers, directors or stockholders, directly or indirectly, for the payment of any debt, or upon any other consideration than the full value of the property paid in cash. * * * Every director or officer of a corporation who shall violate or be concerned in violating any provision of this section, shall be personally liable to the creditors and stockholders of the corporation of which he shall be director or an officer to the full extent of any loss they may respectively sustain by such violation." Stock Corporation Law of New York, § 66.

In *Pennsylvania R. Co. v. Peddrick*, 222 Fed. 75, 80, in construing the statute, it is held that the injured creditor is not obliged to seek his remedy through the medium of a creditor's or stockholder's or trustee's action in equity, but may bring his independent suit to recover damages which he has sustained.

Liability is limited to loss sustained. *Shaw v. Ansaldi Co.*, — N. Y. App. Div. —, 165 N. Y. Supp. 872.

Amount recoverable by single cred-

itor is merely his pro rata share of property transferred. *Trustees of Masonic Hall & Asylum Fund v. Fontana*, 99 N. Y. Misc. 497, 164 N. Y. Supp. 370.

There must be a "refusal" to pay. *Shaw v. Ansaldi Co.*, — N. Y. App. Div. —, 165 N. Y. Supp. 872.

"In *Cesar v. Bernard*, 156 App. Div. 724, 732, 141 N. Y. Supp. 659, 665, we held that the provisions of section 66 were enacted 'to prevent those occupying confidential and fiduciary relations toward corporations from profiting directly or indirectly by information thereby acquired, and to prevent unjust discrimination and preferences among creditors of insolvent corporations, or those bordering on insolvency,' and the Court of Appeals affirmed on our opinion. That section has therefore, I think, been authoritatively construed as relating to corporations which are financially embarrassed or in danger of so becoming. This company was not financially embarrassed when it made default in the payment of interest on the mortgage. Down to the time it closed the restaurant business for the summer, it had sufficient funds with which to pay the interest and all other current obligations, and only became financially embarrassed when it suspended business and the plaintiff elected to declare the entire indebtedness due and

statute, there is no "loss" by reason of transfers, so far as a contingent liability, such as liability for subsequent instalment of rents, is concerned, where not accruing until after the transfer.⁷

In the same section of the New York statutes, liability is imposed on officers for violation of the provision forbidding transfers of property or other acts with the intent of giving a preference where the corporation is insolvent or its insolvency is imminent.⁸ It has been held thereunder that a creditor suffers "loss," within this statute, where execution is returned unsatisfied on his judgment because of such transfers, notwithstanding the transfers are void and that the creditor may sue the person or persons receiving such preference for an accounting; that the remedy is by an action at law rather than in equity; that there need not be an accounting to ascertain the loss before suing at law; and that the "loss" sustained is the sum plaintiff creditor would have received had the corporation been wound up, and its property, so far as improperly transferred, converted into money and applied to the payment of its debts pro rata.⁹

The national Bankruptcy Act, while it forbids preferences by an insolvent corporation, does not impose any liability upon the directors or other officers concerned in the preferential disposition of corporate assets.¹⁰

payable. Nor is there any evidence of a refusal to pay the interest. It merely appears that the interest was demanded from time to time, and that Ansaldi promised to pay it, but failed so to do. It cannot be that this section is to be construed literally as rendering illegal every disbursement by a solvent corporation after it has failed to pay an obligation falling within the provisions of the statute." *Shaw v. Ansaldi Co.*, — N. Y. App. Div. —, 165 N. Y. Supp. 872.

⁷ *Trustees of Masonic Hall & Asylum Fund v. Fontana*, 99 N. Y. Misc. 497, 164 N. Y. Supp. 370.

⁸ The statute makes officers violating such statute personally liable to creditors "to the full extent of any loss they may respectively sustain by such violation."

This statute providing that no corporation which shall have refused to

pay any of its notes or obligations when due shall make certain transfers of property, and that no transfer of any property of any "such" corporations when insolvent with intent to prefer creditors shall be valid, and making directors personally liable for violations thereof, has been construed as not limiting its operation to the first class of corporations by the use of the word "such." *Cesar v. Bernard*, 156 N. Y. App. Div. 724, 141 N. Y. Supp. 659, rev'g on this point 79 N. Y. Misc. 224, 139 N. Y. Supp. 974.

⁹ *Pennsylvania R. Co. v. Peddrick*, 234 Fed. 781, construing New York statute and following *Cesar v. Bernard*, 156 N. Y. App. Div. 724, 141 N. Y. Supp. 659, aff'd without opinion in 209 N. Y. 570, 103 N. E. 1122.

¹⁰ *Kinter v. Connolly*, 233 Pa. 5, 81 Atl. 905.

§ 2642. Failure to file or publish reports or statements. The law in regard to this liability is fully stated in a following chapter in this volume.¹¹

§ 2643. False certificate, notice or report. Under a statute making the directors or other officers liable for corporate debts for failure to file or publish a report of the condition of the company, or other statement or certificate, the fact that a report or certificate is false does not render them liable, if it is filed and published as required by the statute.¹² In some states, however, statutes impose personal liability on corporate officers where they make or publish a false certificate, notice or report;¹³ but ordinarily such a statute merely reiterates the rule prevailing at common law independently of statute.¹⁴ In England, a statute imposes liability on directors for loss sustained by stockholders who became such by reason of any untrue statement in a prospectus of the company, with certain exceptions.¹⁵ Such a statute makes directors liable to persons who buy shares on the faith of a statement

¹¹ *Infra*, Chapter 46.

¹² *Pier v. Hanmore*, 86 N. Y. 95, and see *infra*, chapter on Reports.

¹³ *Colorado*. *Matthews v. Patterson*, 16 Colo. 215, 26 Pac. 812.

Maryland. *Attrill v. Huntington*, 70 Md. 191, 2 L. R. A. 779, 14 Am. St. Rep. 344, 16 Atl. 651, construing New York statute.

Massachusetts. *Felker v. Standard Yarn Co.*, 150 Mass. 264, 22 N. E. 896; *George Woods Co. v. Storer*, 144 Mass. 399, 11 N. E. 662.

Montana. *Giddings v. Holter*, 19 Mont. 263, 48 Pac. 8.

New Jersey. *Quimby v. Waters*, 28 N. J. L. 533.

New York. *Huntington v. Attrill*, 118 N. Y. 365, 23 N. E. 544.

Pennsylvania. *Githers v. Clarke*, 158 Pa. St. 616, 28 Atl. 232.

In New Jersey, certificate of incorporation is not, however, an act of the "officers of the company," so as to be within the statute. *Thompson-Houston Elec. Co. v. Murray*, 60 N. J. L. 20, 37 Atl. 443.

Under a statute providing for liability of directors for publishing a false report of the financial status of the corporation, allegations in a complaint that a specified published report was false within the knowledge of the directors, and that it was intended to deceive and did deceive plaintiff so that credit was extended by plaintiff to the corporation to the damage of plaintiff, were sufficient, at least, to require an answer, there having been neither a demurrer to the complaint nor a motion to make its averments more certain. *American Credit-Indemnity Co. v. Ellis*, 156 Ind. 212, 59 N. E. 679. See also *United States v. Lake*, 129 Fed. 499.

¹⁴ *American Credit-Indemnity Co. v. Ellis*, 156 Ind. 212, 222, 59 N. E. 679.

For rules independent of statute, see §§ 2544-2555, *supra*.

¹⁵ *Adams v. Thrift*, [1915] 2 Ch. 21, [1915] 1 Ch. 557.

in a prospectus that certain contracts are the only contracts to which the company is a party, where untrue; and it is no defense that a director thought a contract omitted was not material and was so advised.¹⁶

The liability is generally imposed, by the express terms of the statute, only when the statement is known to be false, so that no liability will attach to a director who signs a statement in good faith, and in the belief that it is true.¹⁷ Where the statute omits the words "knowing it to be false," it is held in New York that it is no defense to the statutory liability that defendant signed a report without any knowledge or information that it was in any respect untrue, although defendant exercised proper care before he signed the report to ascertain the facts set forth and to which it related; and that, regardless of knowledge of the falsity, the fact that the report in untrue in any material representation is sufficient to support the action.¹⁸ In Pennsylvania, where the statute says nothing about knowledge, the rule to be deduced is that a director is liable, although he may sign without actual knowledge that the statement is false, if he signs recklessly and without any knowledge as to its truth or falsity, when he ought to know that it is false, and would have such knowledge if he performed his duty.¹⁹ An intention to defraud is not necessary.²⁰

The statute generally requires, in terms, that the false representation be material; and even in the absence of an express provision to this effect, it would undoubtedly be implied.²¹

In California, the statute reads as follows: "Any officer of a corporation who wilfully gives a certificate, or wilfully makes an official report, public notice, or entry in any of the records or books of the corporation, concerning the corporation or its business, which

¹⁶ *Shepherd v. Broome*, [1904] A. C. 342.

¹⁷ *Felker v. Standard Yarn Co.*, 150 Mass. 264, 22 N. E. 896; *Stebbins v. Edmonds*, 12 Gray (Mass.) 203; *Bonnell v. Griswold*, 89 N. Y. 122; *Pier v. Hanmore*, 86 N. Y. 95; *Van Vleet v. Jones*, 75 Hun (N. Y.) 340, 26 N. Y. Supp. 1082.

The words "knowing it to be false" were contained in the earlier New York statutes, while in later statutes such words are omitted. See *Huntington v. Attrill*, 118 N. Y. 365, 376,

23 N. E. 544, noting changes in New York statute.

¹⁸ *Torbett v. Eaton*, 49 Hun (N. Y.) 209, 1 N. Y. Supp. 614, *aff'd* without opinion in 113 N. Y. 623, 20 N. E. 876, which was followed in *Huntington v. Attrill*, 118 N. Y. 365, 376, 23 N. E. 544.

¹⁹ *Githers v. Clarke*, 158 Pa. St. 616, 28 Atl. 232.

²⁰ *Chittenden v. Thannhauser*, 47 Fed. 410.

²¹ *Butler v. Smalley*, 101 N. Y. 71, 4 N. E. 104.

is false in any material representation, shall be liable for all the damages resulting therefrom to any person injured thereby.”²³ In Iowa, the statute imposes liability for “intentional fraud” in “deceiving the public or individuals in relation to their means or their liabilities.”²³ In New York, the statute is more explicit than in most of the other states having such a statute. It includes any certificate or report or public notice by officers of a corporation, where false “in any material representation”; it makes the officers personally liable, if they sign, to any person becoming a creditor or stockholder on the faith thereof, regardless of whether the contents of the signed paper is communicated to him “directly or indirectly”; and it authorizes a recovery “to the amount of the debt contracted upon the faith thereof if not paid when due, or the damage sustained by a purchaser or subscriber to its stock upon the faith thereof.”²⁴

In Massachusetts, certain corporate officers are personally liable, by statute, where they sign “any certificate which is required by law knowing it to be false; but only the officer or officers who have knowledge thereof shall be liable.”²⁵ Thus, in that state, corporations cannot commence business until all the capital stock is paid in and certain of the officers have filed a certificate showing how the stock has been paid, etc., and officers who knowingly sign a false certificate in regard thereto are liable for corporate debts; but it is held that an officer is not liable although his statement that the stock has been paid in cash is false, where he was so advised by attorney and it depended upon a construction of the statute as to

²³ Cal. Civ. Code, § 316.

This statute is the same as the one in Idaho Rev. Codes, § 2739.

²³ Iowa Code 1897, § 1620, which makes no express reference to false reports, certificates or the like.

²⁴ Stock Corporation Law (N. Y.), § 35.

Statute is not penal in international sense, so as to preclude suing on it in another state. *Huntington v. Attrill*, 146 U. S. 657, 36 L. Ed. 1123, rev'g 70 Md. 191, 2 L. R. A. 779, 14 Am. St. Rep. 344, 16 Atl. 651, and see § 2718, *infra*.

²⁵ Mass. Rev. Laws, c. 110, § 58, subd. 5.

This statute applies to a certificate of amount of capital stock and assets and liabilities of foreign corporations required in Rev. Laws, c. 126, §§ 13, 14. *Heard v. Pictorial Press*, 182 Mass. 530, 65 N. E. 901.

Ignorance is a defense to an action under this statute, based on an alleged false certificate, although it was such as to amount to recklessness in making the oath. *Harvey-Watts Co. v. Worcester Umbrella Co.*, 193 Mass. 138, 146, 78 N. E. 886, following *Nash v. Minnesota Title Insurance & Trust Co.*, 163 Mass. 574, 28 L. R. A. 753, 47 Am. St. Rep. 489, 40 N. E. 1039.

what constitutes a payment in cash.²⁸ However, it is no defense that the certificate was not made intentionally with a purpose to deceive or that the creditor who sues was not deceived thereby because he had never seen the certificate.²⁷

It is to be noted that most of the statutes imposing liability for false certificates, reports, etc., impose liability merely to the extent of the actual damages sustained from relying on the false statements, instead of making the officers liable for all the debts of the corporation in such a case;²⁸ and it is held, because thereof, that the statute is not a penal statute.²⁹

The liability of directors and other officers for deceit, in the absence of a statute, to persons who act to their injury upon a false report, is considered in another subdivision.³⁰

Liability for false annual reports, as imposed by statute, is further considered in a subsequent chapter.³¹

The liability of officers of a national bank for making a false report, in violation of the statute, depends upon the particular wording of that statute.³²

§ 2644. Liability of directors as trustees after dissolution of corporation. Under a statute which provides that, upon the dissolution of a corporation, the directors shall be liable to the creditors "to the extent of its property and effects that shall come into their hands,"

²⁸ *International Paper Co. v. Gazette Co.*, 182 Mass. 578, 66 N. E. 636.

In Massachusetts, under the statute imposing liability on officers for signing a false certificate that the capital stock was paid in in cash, it has been held that a mere transfer and retransfer of checks was not a payment in cash; that the giving of a note was not a payment in cash; that "there is no more a payment in cash where the corporation receives cash one day and lends the cash received to the stockholder the next day than where it receives a note originally in payment of a stock subscription"; but that where the directors acted under the advice of counsel in swearing to the certificate—his theory being that the payment was in cash—they were not liable, and that if one of the directors did not know of the evasion of

the law by the other directors, he is not liable on theory that he acted recklessly in making the oath. *Harvey-Watts Co. v. Worcester Umbrella Co.*, 193 Mass. 138, 78 N. E. 886. where statute provided that note should not be considered as payment.

²⁷ *Heard v. Pictorial Press*, 182 Mass. 530, 65 N. E. 901, followed in *Harvey-Watts Co. v. Worcester Umbrella Co.*, 193 Mass. 138, 78 N. E. 886.

²⁸ *Bagley & Sewall Co. v. Lenning*, 61 N. Y. App. Div. 26, 70 N. Y. Supp. 242.

²⁹ *Hutchinson v. Young*, 80 N. Y. App. Div. 246, 80 N. Y. Supp. 259, and see § 2603, *supra*.

³⁰ See §§ 2544-2555, *supra*.

³¹ *Infra*, chapter on Reports.

³² See § 2647, *infra*.

and where another statute provides that the corporation may be sued to enforce existing debts notwithstanding its dissolution, an action for a tort committed during the life of the corporation, commenced after its dissolution, should be brought against the corporation rather than its former directors.³³ On insolvency of the corporation, statutes in some jurisdictions make the directors personally liable for wages of servants for one year back.³⁴ These questions as to liability after dissolution are more properly a part of the chapter on Dissolution of Corporations, and hence further consideration of these matters will be reserved for such chapter.

§ 2645. Statutes relating to banks and bank officers—In general. In some states, there are statutes creating liability of officers which are applicable only to officers of banks.

§ 2646. — Liability for receiving deposits or creating debts when corporation is insolvent. Statutes in some states make officers of banks personally liable for deposits received or debts created when they knew that the bank was insolvent.³⁵ However, such a statute is not applicable to national banks.³⁶

§ 2647. — Statutory liability of officers of national banks. The federal statutes provide that "if the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this title," then "every director who participated in or assented to the same" shall be held personally liable for all damages sustained by the bank, its shareholders, or "any other person."³⁷ This statutory liability of directors of national banks is the

³³ *Cunningham v. Glauber*, 133 N. Y. App. Div. 10, 117 N. Y. Supp. 866.

³⁴ *Reuckwald v. Murphy*, 28 Dom. L. R. (Can.) 474.

³⁵ *Mallon v. Hyde*, 76 Fed. 388, construing Washington Constitution; *Forbes v. Mohr*, 69 Kan. 342, 76 Pac. 827; *Baxter v. Coughlin*, 70 Minn. 1, 72 N. W. 797; *Utley v. Hill*, 155 Mo. 232, 49 L. R. A. 323, 78 Am. St. Rep. 569, 55 S. W. 1091.

³⁶ *Stout v. Lusk*, 9 Kan. App. 694, 59 Pac. 603.

³⁷ U. S. Rev. St. § 5239, 5 Fed. St. Ann. p. 180.

For general discussion of provision, see *Yates v. Jones Nat. Bank*, 206 U. S. 158, 51 L. Ed. 1002; *Dudley v. Hawkins*, 239 Fed. 386.

The words "any other person," as used in this statute, includes persons who purchase bank stock in the open market, from a shareholder not an officer, in reliance on the statutory report of the bank's condition. *Chesbrough v. Woodworth*, 195 Fed. 875, 879, aff'd 244 U. S. 72, 61 L. Ed. 1000.

In construing this statute, where a false report was filed, a federal court has held as follows: If the damages

exclusive rule by which to measure the right to recover damages from directors based upon a loss alleged to have resulted solely from violation by such directors of a duty expressly imposed by a provision of the National Banking Act.³⁸ Under this statute the test of liability is whether the directors "knowingly" violate, or "knowingly" permit the violation of, the statute.³⁹ This phase of the question was carefully considered by the Supreme Court of the United States in a comparatively recent case.⁴⁰ In that case the Supreme Court of Nebraska had held the directors of a national bank liable for making false statements to the Comptroller of the Currency. It was held in the state court that the means of information were accessible to them, and whether the attesting directors possessed knowledge of the falsity of the report was wholly immaterial. The judgment of the state court was reversed solely on the ground that it did not appear that the violation in question was intentional.

This statute covers excessive loans by the bank.⁴¹ Where the offense claimed is the loaning to an officer of more than one-tenth the capital stock of the bank—which is forbidden by statute—it is no defense that the by-law forbidding overdrafts was copied from the by-laws of other banks and that notwithstanding such by-laws other banks also often allow overdrafts.⁴²

C. Debts or Obligations for Which Officers Are Liable

§ 2648. **In general.** The statutes imposing upon directors and other officers personal liability for corporate debts vary in the different states, and, in determining to what debts or obligations the liability extends, regard must be had, of course, to the terms of the particular statute. They may be made liable for all debts of the

are personal one may sue in his own right instead of for the bank; no direct issue of negligence is involved; the liability of the directors is several; the measure of damages is limited to losses from the false element in a report and does not include losses from causes not included within the element so falsified; and that damages must be such as defendant officers should naturally have anticipated would follow from the representation. *Chesbrough v. Woodworth*, 195 Fed. 875, *aff'd* 244 U. S. 72, 61 L. Ed. 1000.

³⁸ *Yates v. Jones Nat. Bank*, 206 U. S. 158, 51 L. Ed. 1002; *McCormick v. King*, 241 Fed. 737, 743. See also *Jones Nat. Bank v. Yates*, 93 Neb. 121, 139 N. W. 844, 1135.

³⁹ *Bailey v. Babcock*, 241 Fed. 501.

⁴⁰ *Yates v. Jones Nat. Bank*, 206 U. S. 158, 179, 51 L. Ed. 1002.

⁴¹ *City Nat. Bank of Mangrum v. Crow*, 27 Okla. 107, Ann. Cas. 1912 B 647, 111 Pac. 210.

⁴² *McCormick v. King*, 241 Fed. 737, 743.

corporation contracted while they were directors or officers, or they may be made liable for all debts existing at the time of their default, and all debts contracted during the period of their default and before it is cured, or they may be made liable only for such debts as are contracted after their default or their misconduct, as the case may be. And in order that they may be held liable for a particular debt, it is necessary, of course, that it shall have existed as a debt or been contracted at such a time as to come within the terms of the statute.⁴³ The officers are liable, under such statutes, only for debts actually due when suit is brought, and for which a present right of action exists against the corporation at the time the action is commenced.⁴⁴ A demand which is a mere gratuity is not a debt within the meaning of the statutes;⁴⁵ and it seems that a debt barred by limitations is not one for which officers are liable.⁴⁶ But an indebtedness arising after the passage of the statute, for rent of premises under a lease executed prior to its passage, is included.⁴⁷

⁴³ *Providence Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 25 L. Ed. 786; *Morgan v. Hedstrom*, 164 N. Y. 224, 58 N. E. 26; *Gold v. Clyne*, 134 N. Y. 262, 17 L. R. A. 767, 31 N. E. 980, 58 Hun (N. Y.) 419, 12 N. Y. Supp. 531; *Whitney Arms Co. v. Barlow*, 68 N. Y. 34; *Garrison v. Howe*, 17 N. Y. 458; *Carley v. Hodges*, 19 Hun (N. Y.) 187; *Blake v. Wheeler*, 18 Hun (N. Y.) 496; *Cameron v. Seaman*, 7 Hun (N. Y.) 601, 69 N. Y. 396, 25 Am. Rep. 212; *Cady v. Sanford*, 53 Vt. 632.

The debt must be contracted during the period of default. *Westchester Appliance Co. v. Englehardt*, 180 Mich. 602, 147 N. W. 489.

The liability for failing to file a report covers a debt contracted after a director was elected in April, as to such director, although the report is required to be filed in January. *Union Bank of Buffalo v. Keim*, 52 N. Y. App. Div. 135, 64 N. Y. Supp. 1070, aff'd without opinion in 169 N. Y. 587, 62 N. E. 1101, and following *Chandler v. Hoag*, 2 Hun (N. Y.) 613.

Rule which is applied to filing of annual report, see also *Reuter Hub &*

Spoke Co. v. Hicks, 181 Mich. 250, 148 N. W. 339; *Continental & Commercial Nat. Bank v. Emery*, 178 Mich. 612, 146 N. W. 303, and see *infra*, chapter on Reports.

As to whether a transaction was a deposit of money to be repaid on demand, so as to create a debt at the time the money was received, or a loan for a definite period, see *Chapman v. Comstock*, 58 Hun (N. Y.) 325, 11 N. Y. Supp. 920.

In New York, there is no exception in the statutes relating to stock corporations as to debts not to be paid within one year from the time they are contracted. The year rule applies only to membership corporations. *Ginsburg v. Von Seggern*, 59 N. Y. App. Div. 595, 69 N. Y. Supp. 758, aff'd without opinion in 172 N. Y. 662, 65 N. E. 1116.

⁴⁴ *Jones v. Barlow*, 62 N. Y. 202.

⁴⁵ *Norris v. DeWolf*, 12 Hun (N. Y.) 666, bonds given to plaintiff by the corporation.

⁴⁶ *Rector, etc., of Trinity Church v. Vanderbilt*, 98 N. Y. 170.

⁴⁷ *Stieffel v. Tolhurst*, 67 N. Y. App. Div. 521, 73 N. Y. Supp. 1034.

A statute making directors liable for corporate debts on failure to file an annual report extends to debts contracted and due in other states.⁴⁸ But such a statute does not render them liable for an indebtedness imposed upon the corporation by fraud or improper practices of the creditor.⁴⁹

The debt for which the directors or other officers are liable is the original debt due from the corporation, with interest, rather than the amount of the judgment rendered against the corporation with interest.⁵⁰

§ 2649. Time when debt is contracted or accrues—In general. If nothing appears from the statute as to what debts are included, it has been held to extend to debts existing before the doing of the act, or the omission, claimed to create liability;⁵¹ but statutes making officers liable for all debts contracted "while they are officers thereof" have been held not to apply to debts in existence at the time of the act or omission of the officer creating liability.⁵² If the statute fixes the liability as for debts contracted "during the period

⁴⁸ *Sears v. Waters*, 44 Hun (N. Y.) 101.

⁴⁹ *Adams v. Mills*, 60 N. Y. 533, 536.

⁵⁰ *Brown v. Clow*, 158 Ind. 403, 62 N. E. 1006.

⁵¹ The Massachusetts statute declaring that directors of a corporation, if they make a false certificate, "shall be jointly and severally liable for its debts and contracts," has been held to extend to debts existing when the certificate is made, as well as to those afterwards contracted. *Felker v. Standard Yarn Co.*, 148 Mass. 226, 19 N. E. 220.

⁵² It has been held that the New York statute providing that the officers of a corporation signing a false report of its condition shall be liable "for all the debts of the corporation contracted while they are officers thereof" does not apply to debts in existence at the time of signing and filing the report. *Bagley & Sewall Co. v. Lennig*, 61 N. Y. App. Div. 26, 70 N. Y. Supp. 242; *Watson v. Godwin*, 62 Hun (N. Y.) 622, 17 N. Y. Supp. 51; *Torbett v. Godwin*, 62 Hun (N.

Y.) 407, 17 N. Y. Supp. 46; *Woods v. Godwin*, 46 N. Y. St. Rep. 937, 19 N. Y. Supp. 658. Compare *Ferguson v. Gill*, 64 Hun (N. Y.) 284, 19 N. Y. Supp. 149.

The Montana statute making the officers of corporations engaged in buying and selling town lots, who sign a false annual report as to capital and debts, liable for all its debts contracted while they are in office, applies only to debts contracted after making the false report. *Giddings v. Holter*, 19 Mont. 263, 48 Pac. 8.

The Michigan statute requiring corporations to make annual reports, and making directors, for wilful neglect thereof, liable for "all the debts of such corporation, and subject to a penalty" for each day "during the pendency of such neglect," renders them liable for debts contracted after and pending the default. *M. I. Wilcox Cordage & Supply Co. v. Mosher*, 114 Mich. 64, 72 N. W. 117; *Bank of Saginaw v. Pierson*, 112 Mich. 410, 70 N. W. 901.

of any such neglect or refusal," then of course an officer is not liable for debts contracted after the neglect or refusal is cured by doing the act.⁵³ Sometimes the statute fixes a certain length of time back of which liability shall not extend.⁵⁴ So, under a statute making the directors liable for all debts contracted during the period of their neglect to file a report of the company's condition, they are not liable for debts contracted before their default, although they remain unpaid during the period of their default.⁵⁵ They are liable for breaches of an executory contract, although the contract was made before their default, where the breaches occur during the period of their default, but not for breaches occurring after their default has been cured by filing the report as required by the statute.⁵⁶ Where a statute makes the directors liable for debts contracted "after" certain misconduct on their part, they are not liable for a debt contracted before such misconduct, although existing afterwards.⁵⁷ In Minnesota, a statute provides that if insolvency results from violation of certain statutory provisions, the directors shall be liable "for all debts contracted after such violation as aforesaid." It was held, where the violation was the engaging in an ultra vires business, that the fact that a portion of the indebtedness was incurred and created by the corporation after defendants ceased to be directors, did not exempt them from liability, and the reasons were forcibly stated by Justice Brown as follows: "The language of the statute is that in such case the directors assenting to such violation shall be liable for all debts thereafter contracted. This must be construed, to effectuate the clear intent of the legislature, to mean that the directors assenting to the unauthorized business shall be liable for all debts thereafter contracted by the corporation, whether during the time the assenting directors are in office or subsequently thereto. * * * To release them from liability under such circumstances merely because debts were contracted by the corporation after they severed their official connection therewith would be to

⁵³ *Beekman Lumber Co. v. Ahern*, 75 Ark. 107, 86 S. W. 842.

⁵⁴ Under a statute requiring directors to file an annual report within sixty days after the 1st of January, and providing that, if they neglect to do so, they shall be personally liable for the debts of the corporation "contracted during the year next preceding the time when such report should have been made and filed,"

the year dates backward from the end of the sixty-day limit, and not from the first of January. *Bradford v. Gulley*, 10 Colo. App. 146, 50 Pac. 314.

⁵⁵ *Providence Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 25 L. Ed. 786; *Cady v. Sanford*, 53 Vt. 632.

⁵⁶ *Cady v. Sanford*, 53 Vt. 632.

⁵⁷ See *Ogden v. Rollo*, 13 Abb. Pr. (N. Y.) 300.

destroy the wholesome purpose of the statutes and the intended protection of those dealing with the corporation; and we hold, without further discussion, that the directors who assent to and are instrumental in the inauguration and continuance by the corporation of which they are such officers of an unauthorized and ultra vires business are liable for all debts thereafter contracted by the corporation."⁵⁸

Under a statute making the directors of a corporation, if they shall fail to file and publish a report of its condition within twenty days from the first of January of each year, liable for all debts of the corporation then existing, and all debts contracted before the report is filed or published, it is essential to the liability of directors that their occupancy of that relation, the default in filing and publishing a report, and the debt of the corporation shall exist at the same time; and therefore, where the charter of a corporation expires after the making of an executory contract for work to be performed, and before performance thereof, the directors are not liable for the work because of failure to file a report for the last year of the corporation's existence, since there is no debt until the work is performed, and at that time there is no corporation.⁵⁹

§ 2650. — **Debt not yet due.** While an "obligation" is not necessarily a "debt" within the meaning of such a statute,⁶⁰ yet if an obligation is not merely contingent, but the consideration has been received by the corporation, and it has become liable, there is a debt, or a debt contracted, within the meaning of such statutes, although it is not yet due.⁶¹

⁵⁸ *Citizens' State Bank of Kenyon v. Story Specialty Mfg. Co.*, 84 Minn. 408, 87 N. W. 1016.

Under a Minnesota statute declaring that, if any corporation organized thereunder should violate any of its provisions, and thereby become insolvent, the directors ordering or assenting to such violation should be liable for all debts contracted after such violation, it was held that, where a series of acts, or a continuous course of conduct on the part of the directors in violation of the statute, finally producing the insolvency of the corporation, were begun before the debt of a creditor was contracted, the

debt was one contracted "after such violation," although the series of acts or course of conduct was not completed, nor the insolvency of the corporation consummated, until afterwards. *Patterson v. Minnesota Mfg. Co.*, 41 Minn. 84, 4 L. R. A. 745, 16 Am. St. Rep. 671, 42 N. W. 926.

⁵⁹ *Gold v. Clyne*, 134 N. Y. 262, 17 L. R. A. 767, 31 N. E. 980, aff'g 58 Hun (N. Y.) 419, 12 N. Y. Supp. 531.

⁶⁰ *Bovee v. Boyle*, 25 Colo. App. 165, 136 Pac. 467.

⁶¹ *Lee v. Jacob*, 38 N. Y. App. Div. 531, 56 N. Y. Supp. 645; *Providence Steam & Gas Pipe Co. v. Connell*, 86 Hun (N. Y.) 319, 33 N. Y. Supp. 482;

§ 2651. — **Contingent liabilities.** Under a statute making directors liable for all debts existing or contracted during the period of their default, they are not liable upon obligations or liabilities which, up to the time their default is cured, are wholly executory or contingent, although they may afterwards become debts.⁶² Thus liability on a note as an indorser does not become a debt until after default by the maker and notice to the indorser;⁶³ but if the corporation is an indorser on a note, it has been held that it may be shown that the note was accommodation paper and that the corporation was in reality the principal debtor, so that the debt is to be considered contracted at the time the note was executed.⁶⁴ However, it is held in Arkansas that a debt due by the corporation to one who was its surety on a note is "contracted" at the time the party becomes surety rather than the time payment is made by the surety.⁶⁵ So in Massachusetts it is held that the obligation of a corporation as principal to indemnify an accommodation acceptor of a bill of exchange as surety, for any payment the latter is compelled to make

Vernon v. Palmer, 16 Jones & S. (N. Y.) 231, rev'g 62 How. Pr. (N. Y.) 425.

When a corporation indorses a note made by an officer for a debt which is in fact that of the corporation, the debt exists when the note is given, within a statute making directors liable, in case of failure to make an annual report, for all debts then existing, or that shall be contracted before the report is made. *Witherow v. Slayback*, 158 N. Y. 649, 70 Am. St. Rep. 507, 53 N. E. 681, rev'g 11 N. Y. Misc. 526, 32 N. Y. Supp. 746.

The obligation of a corporation, either as drawer of a bill of exchange, or under an express agreement as to a bill of exchange drawn by a third person for its benefit, to indemnify an accommodation acceptor for his payment of the bill, is a debt contracted by the corporation at the time of the acceptance. *Byers v. Franklin Coal Co.*, 106 Mass. 131.

⁶² *Bovee v. Boyle*, 25 Colo. App. 165, 136 Pac. 467; *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156; *Gold v. Clyne*, 134 N. Y. 262, 17 L. R.

A. 767, 31 N. E. 980, 58 Hun (N. Y.) 419, 12 N. Y. Supp. 531; *Whitney Arms Co. v. Barlow*, 68 N. Y. 34; *Garrison v. Howe*, 17 N. Y. 458; *Dunn v. Neustadt*, 72 N. Y. Misc. 1, 129 N. Y. Supp. 161; *Nimmons v. Hennion*, 2 Sweeney (N. Y.) 663. Compare, however, *Brand v. Godwin*, 15 Daly (N. Y.) 456, 9 N. Y. Supp. 743, 8 N. Y. Supp. 339.

The contingent liability of a land company on its covenant of warranty in a deed of land, claimed by it under a scrip entry, which is canceled after the conveyance, is not, prior to such cancellation, an existing debt, within a statute imposing liability for debts upon officers for failure to file a report. *Giddings v. Holter*, 19 Mont. 263, 48 Pac. 8.

⁶³ *Western Nat. Bank v. Faber*, 29 N. Y. Misc. 467, 62 N. Y. Supp. 82.

⁶⁴ *Witherow v. Slayback*, 158 N. Y. 649, 70 Am. St. Rep. 507, 53 N. E. 681, rev'g 11 N. Y. Misc. 526, 32 N. Y. Supp. 746.

⁶⁵ *Griffin v. Long*, 96 Ark. 268, 271, 35 L. R. A. (N. S.) 855, Ann. Cas. 1912 B 622, 131 S. W. 672.

for the former, arises from the time the surety becomes responsible for the debt of his principal, and upon payment by the surety his debt is a "debt contracted" at the time he became responsible and not at the time of such payment.⁶⁶

In New York, under the Membership Corporations Law making directors liable for debts contracted during their term of office and payable within one year or less from the time when contracted, where a judgment against the corporation therefor cannot be collected, a liability for breach of an executory contract is not a "debt," and a debt is "contracted" only when the contingency upon which it is to arise occurs, and hence monthly instalments of rent maturing after the expiration of their term of office, although under a lease for a year executed by them, cannot be collected from the directors.⁶⁷ So, conversely, directors are liable under such a statute on instalments of rent coming due more than one year after a lease is executed, since the contingent liability ripens into a debt only when the rent becomes due.⁶⁸

§ 2652. — Renewal notes as contracting of indebtedness. The execution of a renewal note is not the contracting of a debt.⁶⁹ Thus, it is held that where a statute makes the directors liable for corporate debts contracted after a certain time—after they became directors, or after they have made a false report, etc.,—they are not liable on a note given by the corporation after such time, merely in renewal of an existing note or debt given or contracted before such time.⁷⁰

⁶⁶ Byers v. Franklin Coal Co., 106 Mass. 131, 136.

⁶⁷ Dunn v. Neustadt, 72 N. Y. Misc. 1, 129 N. Y. Supp. 161.

⁶⁸ Thistle v. Jones, 123 N. Y. App. Div. 40, 107 N. Y. Supp. 840, following Sanford v. Rhoads, 113 N. Y. App. Div. 782, 99 N. Y. Supp. 407, and rev'g on this point 45 N. Y. Misc. 215, 92 N. Y. Supp. 113.

⁶⁹ Griffin v. Long, 96 Ark. 268, 35 L. R. A. (N. S.) 855, Ann. Cas. 1912 B 622, 131 S. W. 672.

Where liability covers the period of neglect or refusal to file a report, the officers are not liable to a surety who has paid the debt of his principal—the corporation—where the note

on which he was a surety was executed before there was a duty to file a report, notwithstanding notes given in renewal were executed during the default of the officers, since the renewal note does not create a new indebtedness and the debt was "contracted" when the first note was given. Griffin v. Long, 96 Ark. 268, 35 L. R. A. (N. S.) 855, Ann. Cas. 1912 B 622, 131 S. W. 672.

⁷⁰ Sullivan v. Sullivan Mfg. Co., 24 S. C. 341. Contra, Ferguson v. Gill, 64 Hun (N. Y.) 284, 19 N. Y. Supp. 149.

The debt represented by a note given by directors, which note was given for indebtedness contracted long

§ 2653. — **Entry of judgment.** If a debt is contracted or liability incurred before the liability of the officer commences, a judgment recovered against the corporation for such debt or liability during the time the officer is liable is not a debt contracted within such time.⁷¹

§ 2654. **Unliquidated claims for damages.** A statute making the directors of a corporation liable for "all damages" resulting from their failure to make reports required by statute, includes unliquidated as well as liquidated damages.⁷² So an unliquidated claim for a breach of a contract of employment, if due, is a "debt," within the meaning of a statute making directors liable for corporate debts on failure to file a report.⁷³ So the use of the words "all debts" includes unliquidated claims for breach of contract, at least where the statute involved is considered a remedial one and hence to be liberally construed.⁷⁴

§ 2655. **Extinguished debts.** It has been held that the liability of directors for an original corporate debt, under a statute making them liable for corporate debts on failure to file a report, is not affected by the creditor's recovering a judgment thereon against the corporation, or taking a note therefor.⁷⁵ But this view cannot be sustained where the original debt is thereby extinguished. In such a case they are liable on the new debt, or not at all. They are only liable for debts actually due, and for which a right of action exists

previously, and not by them, is not a debt contracted by them, within the meaning of a statute providing that, if directors act as a corporation before all the stock is subscribed in good faith, they "shall be jointly and severally liable for all debts and liabilities made by them." *Hoyt v. Hasse*, 80 Ill. App. 187.

⁷¹ *Armstrong v. Cowles*, 44 Conn. 44; *Weber v. Draper*, 170 Mich. 550, Ann. Cas. 1914 B 149, 136 N. W. 596; *McHarg v. Eastman*, 4 Robt. (N. Y.) 635, 7 Robt. 137.

⁷² *MacVeagh v. Wild*, 95 Fed. 84, construing Indiana statute.

⁷³ *Green v. Easton*, 74 Hun (N. Y.) 329, 26 N. Y. Supp. 553; *Cady v. Sanford*, 53 Vt. 632. Contra, see *Lock-*

hart v. Van Alstyne, 31 Mich. 76, 78, 18 Am. Rep. 156; *Victory Webb Printing & Folding Mach. Mfg. Co. v. Beecher*, 26 Hun (N. Y.) 48.

⁷⁴ *Proctor-Gamble Co. v. Warren Cotton Oil Co.*, 180 Fed. 543, decided under Arkansas statute.

⁷⁵ *Novelty Mfg. Co. v. Connell*, 88 Hun (N. Y.) 254, 34 N. Y. Supp. 717; *Jones v. Barlow*, 6 Jones & S. (N. Y.) 142; *Deming v. Puleston*, 3 Jones & S. (N. Y.) 309; *McHarg v. Eastman*, 7 Robt. (N. Y.) 137.

This rule is explained in *Byers v. Franklin Coal Co.*, 106 Mass. 131, 136, by holding that the debt is not merged so far as any concurrent remedy against other parties is concerned.

against the corporation; and whatever will defeat or abate an action against the corporation on a debt will be a defense to them.⁷⁶ Where a corporate creditor secured by a chattel mortgage on machinery and tools, with a power of sale in case of default, undertook to sell under the power, but sold at auction at a place on the premises where all the property could not be seen, and as a whole, instead of in parcels, and when no one was present except himself and the secretary of the company, and the creditor bid in the property for very much less than the debt, whereas it was worth more than the debt, it was held that the creditor had no claim against the corporation for the deficiency, and could not hold the directors liable therefor because of their failure to file an annual report.⁷⁷

§ 2656. Ultra vires contracts or transactions. A statute making directors personally liable for corporate debts does not render them liable for an alleged indebtedness under an ultra vires contract, if the circumstances are such that the corporation is not bound, for in such a case there is no corporate debt.⁷⁸ But, of course, if the corporation is liable, notwithstanding the ultra vires character of the transaction, it is otherwise.⁷⁹

§ 2657. Corporate bonds. Bonds issued by a corporation, and secured by a mortgage on its real estate, are debts, within the meaning of a statute making the directors liable for all debts on failure to file a report.⁸⁰

§ 2658. Taxes. A tax duly assessed against a corporation, and presently payable, is a debt, within the meaning of a statute making directors liable for corporate debts on filing a false certificate.⁸¹

§ 2659. Judgments. A judgment against a corporation for the recovery of money is a "debt," within a statute making directors liable for corporate debts in case of failure to file a report of its condition, and may be counted on in an action against a director

⁷⁶ Jones v. Barlow, 62 N. Y. 202.

⁷⁷ Sherman v. Slayback, 58 Hun (N. Y.) 255, 12 N. Y. Supp. 291.

⁷⁸ National Park Bank of New York v. Remsen, 43 Fed. 226, involving an accommodation indorsement.

⁷⁹ Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504; First Nat.

Bank of Baldwinsville v. Cornell, 8 N. Y. App. Div. 427, 40 N. Y. Supp. 850.

⁸⁰ Morgan v. Hedstrom, 164 N. Y. 224, 58 N. E. 26, aff'g 25 N. Y. App. Div. 547, 49 N. Y. Supp. 1049.

⁸¹ Felker v. Standard Yarn Co., 148 Mass. 226, 19 N. E. 220.

without pleading the original indebtedness.⁸² But a judgment recovered after failure to file a report, on a debt contracted before, or a judgment recovered after a person became a director, on a debt contracted before he became such, is not within a statute making directors liable for debts contracted during the time of their neglect to file a report, or for debts contracted while they are directors, as the case may be.⁸³ And a judgment for a tort is not a "debt contracted," within the meaning of a statute making directors personally liable for debts contracted.⁸⁴ So a judgment for unliquidated damages for breach of contract has been held not a "debt contracted" by the corporation within the meaning of a statute requiring the filing of reports.⁸⁵

§ 2660. Damages for tort and judgments therefor. A statute making directors liable for all "debts" of the company then existing, and all "debts contracted" before the making of a report, cannot be extended by construction to debts not arising ex contractu, and hence does not include liability for a tort or on a judgment for a tort.⁸⁶ So liability for unliquidated damages for infringement of a patent, copyright or trade-mark is not a "debt contracted," within the meaning of a statute making directors personally liable for debts contracted.⁸⁷ It has also been held that a statute making

⁸² *Tabor v. Commercial Nat. Bank of Cleveland*, 62 Fed. 383; *Lewis v. Armstrong*, 8 Abb. N. Cas. (N. Y.) 385.

A judgment for costs is a debt for which a trustee may be liable under a statute making the trustees of a corporation liable, in case of failure to file a report, for all debts existing at the time of the default, and all contracted during default. *Allen v. Clark*, 108 N. Y. 269, 15 N. E. 387; *Matty v. Sampson*, 64 N. Y. App. Div. 1, 71 N. Y. Supp. 731; *Andrews v. Murray*, 9 Abb. Pr. (N. Y.) 8.

⁸³ See *McHarg v. Eastman*, 7 Robt. (N. Y.) 137, 4 Robt. 635.

⁸⁴ See § 2660, *infra*.

⁸⁵ It was a debt but not a "debt contracted." *Weber v. Draper*, 170 Mich. 550, Ann. Cas. 1914 B 149, 136 N. W. 596. To same effect, see *Armstrong v. Cowles*, 44 Conn. 44.

⁸⁶ *United States. Chase v. Curtis*,

113 U. S. 452, 28 L. Ed. 1038; *Proctor-Gamble Co. v. Warren Cotton Oil Co.*, 180 Fed. 543.

Arkansas. *Taylor v. Dexter*, 126 Ark. 122, 189 S. W. 1060.

Missouri. *Cable v. Gaty*, 34 Mo. 573, 86 Am. Dec. 126.

New York. *Esmond v. Bullard*, 16 Hun 65.

Rhode Island. *Leighton v. Campbell*, 17 R. I. 51, 9 L. R. A. 187, 20 Atl. 14.

Rule applied to judgment for injuries received while a passenger on a street car, where the statute read "debts and contracts made by the company." *Savage v. Shaw*, 195 Mass. 571, 122 Am. St. Rep. 272, 12 Ann. Cas. 806, 81 N. E. 303.

⁸⁷ *Child v. Boston & F. Iron Works*, 137 Mass. 516, 50 Am. Rep. 328; *Roberts v. Reed*, 4 Wkly. Notes Cas. (Pa.) 417.

directors liable for debts of the corporation contracted in excess of the capital stock applies only to debts voluntarily created by the directors, and does not render them liable for a judgment recovered against the corporation for damages for a tort.⁸⁸ On the other hand, the owner of personal property negligently injured has been considered a creditor within a statute making officers liable for preferring creditors or transferring property without consideration when insolvent.⁸⁹

D. Defenses

§ 2661. **In general.** In addition to what has already been noted as to defenses as to particular statutes,⁹⁰ it may be said that there are certain defenses which are often sought to be interposed, regardless of the particular statute involved, which will now be referred to. In the first place, the general rule is, where no judgment has first been secured against the corporation or where a judgment has been obtained but it is deemed not to be evidence against the officer in the particular jurisdiction, that officers may make any defense which the corporation might have made against the original indebtedness.⁹¹ In addition, the officer may show as a defense that he is not such an officer as is embraced within the terms of the statute,⁹² or that he was not in office at the time of the act complained of,⁹³ or other facts tending to show that the wrong person has been sued. Fraud on the part of complainant may be a defense, under some circumstances,⁹⁴ and under the wording of some of the statutes the fact that there was no actual loss is a defense.⁹⁵

On the other hand, it is no defense that the corporation is merely a de facto one,⁹⁶ or that the officers are merely de facto officers.⁹⁷ Thus, it is not a defense to an officer that he was not eligible to the office,⁹⁸ or that his election was invalid because of irregularities or informalities of the meeting at which he was elected.⁹⁹ Of course,

⁸⁸ *In re Putman*, 193 Fed. 464, 467; *Cable v. Gaty*, 34 Mo. 573, 86 Am. Dec. 126. And see *Leighton v. Campbell*, 17 R. I. 51, 9 L. R. A. 187, 20 Atl. 14.

⁸⁹ *Cesar v. Bernard*, 156 N. Y. App. Div. 724, 141 N. Y. Supp. 659.

⁹⁰ See § 2636, *supra*, for instance.

⁹¹ *Jones v. Barlow*, 62 N. Y. 202.

⁹² See § 2618, *supra*.

⁹³ See § 2618, *supra*.

⁹⁴ See *Audenried v. East Coast*

Milling Co., 68 N. J. Eq. 450, 59 Atl. 577.

⁹⁵ See § 2615, *supra*.

⁹⁶ See § 2662, *infra*.

⁹⁷ See § 2412, *supra*.

⁹⁸ *St. George Vineyard Co. v. Fritz*, 48 N. Y. App. Div. 233, 62 N. Y. Supp. 775, 30 N. Y. Civ. Proc. 253.

⁹⁹ *Thayer v. New England Lithographic Steam Printing Co.*, 108 Mass. 523.

the filing of a certificate with the county recorder is no defense where the statute also requires that it be filed with the secretary of state.¹ Where a corporation is required to file a paper in the county where the principal business office of the corporation is located, the validity of the act of the corporation in changing the office cannot be inquired into.² Other facts held to constitute no defense, in a few particular actions, are set forth in the note below.³

Want of assent of a director to acts of his co-directors is sometimes a defense, so far as the director is concerned,⁴ and the statutes sometimes expressly provide for the exoneration of directors who protest in a certain way against particular acts of the board.⁵

The necessity for judgment against the corporation before suing officers is treated of under "Conditions Precedent."⁶

Ordinarily ignorance as to the corporate business is no defense.⁷ The statute imposing liability ordinarily is construed as making officers liable for the doing of acts, or the omission to act, regardless of knowledge, except that it is sometimes provided that the directors who are absent from a directors' meeting may protect themselves against liability by thereafter filing a dissent.⁸

§ 2662. Non-existence of corporation or of de jure corporation, and insolvency or dissolution of corporation. Ordinarily, a corporate officer, when sued for mismanagement, is estopped to attack the

¹ *Thatcher v. Salomon*, 16 Colo. App. 150, 64 Pac. 368.

² *Uptegrove v. Schwarzwaelder*, 46 N. Y. App. Div. 20, 61 N. Y. Supp. 623, *aff'd* without opinion 167 N. Y. 587, 60 N. E. 1121.

³ It is no defense that the corporation had no debts prior to the time when the annual report was due, where the report was also required to state the amount of the capital of the corporation and the proportion actually paid in, for the information of those who might afterwards become creditors. *Thatcher v. Salomon*, 16 Colo. App. 150, 64 Pac. 368.

The fact that the seller of bonds was a director and was in default in filing the annual report at the time of his sale of the bonds to the plaintiff,

so that he could not enforce the penalty against his co-directors, is no defense to an action against the directors by the buyer of the bonds to recover his debt because of failure to file the report, since plaintiff succeeded to the title of the director to the bonds but not to the penalties and disabilities consequent upon his personal defeasance as a director of the corporation. *Morgan v. Hedstrom*, 164 N. Y. 224, 58 N. E. 26, *aff'g* 25 N. Y. App. Div. 547, 49 N. Y. Supp. 1049.

⁴ See § 2493 et seq., *supra*.

⁵ See § 2619, *supra*.

⁶ See § 2668, *infra*.

⁷ *Gaffney v. Colvill*, 8 Hill (N. Y.) 567.

⁸ See § 2619, *supra*.

regularity of the creation or organization of the corporation as a defense.⁹ In other words, it is no defense that the corporation is merely a de facto one.¹⁰ So, as a general rule, it is no defense that the corporation has become insolvent and gone out of business or has been placed in the hands of a receiver or assignee;¹¹ and the expiration of the charter of the corporation is no defense, at least in some states.¹² But it seems to have been held that it is a defense, so far as statutory liability is concerned, that there never was any existing corporation either de jure or de facto.¹³

However, the obligation of corporate officers to make and file certificates and reports as to its capital stock, condition or the like, ceases upon dissolution, since thereafter the corporation is carrying on no business and is deprived of the means of carrying it on.¹⁴ Thus, where the entire property of the corporation passes to a receiver or assignee or bankruptcy or the like before the expiration of the time for filing an annual report, the officers cannot be held liable for failure to file such a report.¹⁵ So it is a defense to an action against the president of a corporation to recover from him personally a corporate debt, under a statute making certain officers liable where they refuse to make a certificate stating the amount of capital stock paid in, or where the certificate is false, that the corporation was insolvent before the cause of action arose and had been adjudged a bankrupt under the federal

⁹ Merchants' & Planters' Line v. Waganer, 71 Ala. 581; Newcomb v. Reed, 12 Allen (Mass.) 362.

¹⁰ Seymour v. Richardson Fueling Co., 103 Ill. App. 625, rev'd on other grounds 205 Ill. 77, 68 N. E. 716.

¹¹ The fact that the affairs of the corporation have been placed in the hands of a receiver neither takes away nor suspends the right of a creditor to sue, at least where he may sue alone in an action at law. Bailey v. O'Neal, 92 Ark. 327, 135 Am. St. Rep. 185, 122 S. W. 503; Patterson v. Stewart, 41 Minn. 84, 4 L. R. A. 745, 16 Am. St. Rep. 671, 42 N. W. 926.

It is no defense to liability for failure to file the annual report that the corporation has made an assignment for the benefit of creditors and has gone out of business. Horrocks Desk Co. v. Fangel, 71 N. Y. App. Div. 313, 75 N. Y. Supp. 967.

So a corporation does not finally abandon its business so as to excuse the failure to file an annual report merely because it discontinues business as unprofitable where it sues the municipality to establish its claimed exclusive right, where the municipality put in a rival plant. Stevenson v. Cowan, 84 N. Y. App. Div. 135, 82 N. Y. Supp. 78.

¹² Hargroves v. Chambers, 30 Ga. 580, 604. Contra, Moultrie v. Hoge, 21 Ga. 513.

¹³ Corey v. Morrill, 61 Vt. 598, 17 Atl. 840.

¹⁴ Benjamin v. Laffray, 79 N. J. L. 310, 75 Atl. 775.

¹⁵ Bonnell v. Griswold, 80 N. Y. 123; Huguenot Nat. Bank v. Studwell, 74 N. Y. 621.

laws and restrained from doing business, or that a state court had appointed a receiver and restrained the corporation from doing business.¹⁶ On the other hand, the insolvency of a corporation, and the transfer of its assets to a receiver or the like, "after" the duty to make a certificate or report has become absolute, is no defense.¹⁷ Liability for failure to file an annual report is not excused because the corporation is out of existence before the note held by a creditor becomes due, where it was in existence at the date the statute required the statement to be filed.¹⁸

It is no defense to an action for failure to file an annual report, that after the certificate of incorporation had been issued by the secretary of state no steps were taken to organize the corporation by the adoption of by-laws, the election of officers, etc., although the statute provides that on omission of such steps "its corporate powers cease," since it is held that such omission does not ipso facto work a dissolution nor permit the question of want of organization to be urged collaterally.¹⁹

§ 2663. Advice of counsel. Advice of counsel may be a defense, under some circumstances, especially where the default is an alleged false certificate and the alleged falsity related to a matter involving a question of law as to which the officer sought to be held liable followed the advice of reputable counsel.²⁰

§ 2664. Waiver, release or discharge. A creditor of a corporation, having a right to enforce his debt against a director or other officer under a statute, may waive his right or release the officers.²¹

¹⁶ Benjamin v. Laffray, 79 N. J. L. 310, 75 Atl. 775.

¹⁷ Benjamin v. Laffray, 79 N. J. L. 310, 75 Atl. 775.

¹⁸ Ginsburg v. Von Seggern, 59 N. Y. App. Div. 595, 69 N. Y. Supp. 758, aff'd without opinion 172 N. Y. 662, 65 N. E. 1116.

¹⁹ Daily v. Marshall, 47 Mont. 377, 133 Pac. 681.

²⁰ Harvey-Watts Co. v. Worcester Umbrella Co., 193 Mass. 138, 78 N. E. 886. See also § 2643, supra.

²¹ A creditor who, at the time his debt is contracted, agrees with the directors that it shall not be necessary for them to file their report, cannot afterwards hold them liable for fail-

ure to file the same. Caraher v. Mulligan, 54 Hun. (N. Y.) 638, 8 N. Y. Supp. 42.

But directors of a corporation are not exempt from liability for failure to file an annual report because a bond of the corporation, which constituted one of its debts at the time of such failure, contained a provision that no stockholder should be individually liable upon or in respect to it. Swan-coat v. Remsen, 78 Fed. 592.

And it has been held that the directors of an insurance company cannot exempt themselves from a personal liability imposed upon them by statute by inserting a provision in policies that they shall not be liable. Greene

And he may do so by releasing the corporation.²² So a waiver of a tort, as against the corporation, is also a waiver as to its officers.²³ However, it seems to have been held in one case that a part of the directors liable, less than all, cannot be released from liability.²⁴

But a creditor who files his claim with an assignee of the corporation for the benefit of creditors does not thereby waive his right to enforce the personal liability of the directors.²⁵

Nor does a creditor waive his right to enforce the personal liability of directors by proceeding against stockholders to enforce their personal liability, and recovering judgment against them;²⁶ or by recovering a judgment against the corporation,²⁷ unless the liability is on the original debt only, and not secondary, and the original debt is thereby extinguished. So obtaining a mechanic's lien on the property, where nothing is realized therefrom, does not waive the right to sue.²⁸

After the assignment of a judgment against a corporation for which the directors are personally liable, the assignor cannot release the directors so as to affect the rights of the assignee, at least, if the directors have notice of the assignment.²⁹

§ 2665. Discharge of officer in bankruptcy. Claims against corporate officers, as based on statutes, are not provable in bankruptcy against the estate of the officer, and hence a discharge in bankruptcy does not bar an action to enforce the statutory liability of the bankrupt officer.³⁰

v. Walton, 59 Hun (N. Y.) 102, 13 N. Y. Supp. 147, 59 Hun (N. Y.) 618, 14 N. Y. Supp. 943.

Evidence not sufficient to show release, see Slater v. Taylor, 146 Ill. App. 97, aff'd 241 Ill. 102, 89 N. E. 271.

²² Raber v. Jones, 40 Ind. 436. See also Jones v. Barlow, 62 N. Y. 202.

²³ Birdsell Mfg. Co. v. Oglevee, 187 Ill. 149, 58 N. E. 231, aff'g 87 Ill. App. 351, where goods were converted.

²⁴ Murphy v. Penniman, 105 Md. 452, 121 Am. St. Rep. 583, 66 Atl. 282.

²⁵ Loverin v. McLaughlin, 161 Ill. 417, 44 N. E. 99.

So the proving of their demands in bankruptcy against the corporation;

and the receipt of dividends thereon is no defense. First Nat. Bank v. Hingham Mfg. Co., 127 Mass. 563, 567.

²⁶ Vincent v. Sands, 42 How. Pr. (N. Y.) 231.

Pendency of suit against stockholders is no defense. First Nat. Bank v. Hingham Mfg. Co., 127 Mass. 563, 566.

²⁷ Byers v. Franklin Coal Co., 106 Mass. 131; McHarg v. Eastman, 35 How. Pr. (N. Y.) 205.

²⁸ Kruse v. Humpert, 21 Ky. L. Rep. 985, 53 S. W. 657.

²⁹ Bolen v. Crosby, 49 N. Y. 183.

³⁰ Old Colony Boot & Shoe Co. v. Parker-Sampson-Adams Co., 183 Mass. 557, 67 N. E. 870; First Nat. Bank v. Hingham Mfg. Co., 127 Mass. 563.

§ 2666. **Discharge of corporation in bankruptcy.** The discharge of a corporation in bankruptcy under the federal Bankruptcy Law of 1898 does not discharge directors from a statutory liability for its debts, since the act expressly provides that the discharge of a bankrupt shall not affect the liability of any person who is a co-debtor with him, or who is a guarantor or in any manner a surety for him.³¹ So, by the amendatory act of February 5, 1903, it is provided that the bankruptcy of a corporation does not release its officers, directors or stockholders, as such, from any liability under the laws of a state or territory of the United States.³²

E. Conditions Precedent

§ 2667. **In general.** Conditions precedent must all be complied with.³³ Under an Oklahoma statute providing for individual liability of directors in case of incurring debts beyond the debt limit or diversion of assets, the words "in the event of its dissolution" limit the right of creditors to sue to cases where the corporation has been dissolved, and it is held that the mere fact of the corporation having been declared a bankrupt does not work a dissolution.³⁴ A statute requiring service of a written notice of intent to hold a director personally liable has been held not applicable to an action commenced after the enactment of the statute but for a default occurring prior to its enactment.³⁵

In New York the liability of directors for corporate debts for failure to file an annual report was repealed in 1901, saving the rights of any creditor "providing action thereon be commenced within six months after this takes effect." It was held thereunder that a condition precedent—and not a statute of limitations—was

³¹ In re Marshall Paper Co., 95 Fed. 419; Wood & Selick v. Vanderveer, 55 N. Y. App. Div. 549, 67 N. Y. Supp. 371. See also Chickasaw Hotel Co. v. C. B. Barker Const. Co., 135 Tenn. 305, L. R. A. 1916 F 106, 186 S. W. 115.

³² Brandenburg, Bankruptcy (4th Ed.), § 1353.

³³ See State Bank of Rock Island v. Pope, 179 Ill. App. 282.

³⁴ Swofford Bros. Dry Goods Co. v. Owen, 37 Okla. 616, L. R. A. 1916 C 189, 133 Pac. 193.

There is no "dissolution," the statute expressly provides, until the expiration of the time fixed in the charter or until the corporation is dissolved by the judgment of a competent court. Topeka Paper Co. v. Oklahoma Pub. Co., 7 Okla. 220, 54 Pac. 455.

³⁵ Shepard v. Fulton, 171 N. Y. 184, 63 N. E. 966, aff'g 55 N. Y. App. Div. 329, 66 N. Y. Supp. 861, failure to file annual report. See also Staten Island Midland R. Co. v. Hinchliffe, 170 N. Y. 473, 63 N. E. 545.

imposed, and that an agreement to waive the condition converted the conditional right to sue into an absolute right.³⁶

§ 2668. Necessity for judgment and execution against the corporation. Whether a creditor of a corporation must obtain a judgment against the corporation and attempt to enforce it by execution, before suing officers on their statutory liability depends to some extent upon the wording of the governing statute. Of course, if the statute uses the words "judgment creditors," then a mere simple creditor cannot sue; and the same is true where a statute expressly requires a judgment against the corporation as a condition precedent.³⁷ Ordinarily, however, the statute in no way refers to this question, in which case there is some conflict in the authorities as to whether a judgment is necessary before suing. Some of the statutes making directors or other officers of corporations personally liable for corporate debts in case of certain defaults or misconduct are construed as imposing an original and primary liability directly to creditors, so that a creditor may maintain an action against them on his debt without first recovering a judgment against the corporation and having an execution returned unsatisfied.³⁸

³⁶ *Watertown Nat. Bank of Watertown v. Bagley*, 62 N. Y. Misc. 380, 116 N. Y. Supp. 772.

³⁷ For instance, see statutes in Massachusetts as set out in *Train v. Marshall Paper Co.*, 180 Mass. 513, 62 N. E. 967.

³⁸ **California.** *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153, 69 Pac. 77, 64 Pac. 692.

Illinois. *Woolverton v. George H. Taylor Co.*, 43 Ill. App. 424.

Massachusetts. *Westinghouse Elec. & Mfg. Co. v. Reed*, 194 Mass. 590, 120 Am. St. Rep. 576, 80 N. E. 621; *Merchants' Bank v. Stevenson*, 5 Allen 398.

Michigan. *M. I. Wilcox Cordage & Supply Co. v. Mosher*, 114 Mich. 64, 72 N. W. 117.

Minnesota. *Patterson v. Stewart*, 41 Minn. 84, 4 L. R. A. 745, 16 Am. St. Rep. 671, 42 N. W. 926.

New Hampshire. *Swan v. Burn-*

ham, 70 N. H. 580, 49 Atl. 93.

New York. *Manhattan Co. v. Kaldenberg*, 27 App. Div. 31, 50 N. Y. Supp. 265, 165 N. Y. 1, 58 N. E. 790; *Milsom Rendering & Fertilizer Co. v. Baker*, 16 App. Div. 581, 44 N. Y. Supp. 999; *Camp Mfg. Co. v. Reamer*, 14 App. Div. 408, 43 N. Y. Supp. 1027, rev'g 18 Misc. 619, 43 N. Y. Supp. 673; *Rose v. Chadwick*, 9 App. Div. 311, 41 N. Y. Supp. 190; *Strauss v. Trotter*, 6 Misc. 77, 26 N. Y. Supp. 20; *Merritt v. Goodrich*, 2 Misc. 578, 21 N. Y. Supp. 949; *Cochran v. Smith*, 22 Jones & S. 117; *State Bank of Rock Valley v. Andrews*, 18 N. Y. Supp. 167, 2 Misc. 394, 21 N. Y. Supp. 948.

The statutory right of action against officers, where their liability is primary, does not depend upon the insolvency of the company. *First Nat. Bank of Missoula v. Cottonwood Land Co.*, 51 Mont. 544, 154 Pac. 582.

Other statutes, either in express terms or by implication, are held to impose a secondary liability, so that a creditor cannot sue directors until he has exhausted his remedy against the corporation by recovery of a judgment and issue of an execution,³⁹ unless he shows that such a step was impossible or would have been nugatory. As said by Justice Mitchell in a case in Minnesota, "assuming it to be true that he must establish his claim against the corporation, he may, as was done in this case, make it a co-defendant with the directors, and establish the claim in the same action."⁴⁰ In New York, the Court of Appeals said that "while there is no express direction to that effect in the statute, it is the general rule that it is to be implied from the nature of the liability * * * in the absence of some provision clearly importing the contrary. * * * The general policy of the law in this respect is expressed in the fifty-fifth section of the Stock Corporation Law, which provides that no action shall be brought against a stockholder for any corporate debt until judgment has been obtained against the corporation, and an execution returned unsatisfied. The directors are, of course, stockholders, and it is reasonable to assume that it was not intended to charge them with personal liability on any other conditions than apply to all the members of the corporation."⁴¹

³⁹ **United States.** *Hornor v. Henning*, 93 U. S. 228, 23 L. Ed. 879, followed in *Stone v. Chisolm*, 113 U. S. 302, 28 L. Ed. 991.

Massachusetts. *Thacher v. King*, 156 Mass. 490, 31 N. E. 648; *Priest v. Essex Hat Mfg. Co.*, 115 Mass. 380; *Norfolk v. American Steam Gas Co.*, 103 Mass. 160; *Kinsley v. Rice*, 10 Gray 325.

Michigan. *McKee v. City Garbage Co.*, 140 Mich. 497, 103 N. W. 906, 12 Det. L. N. 227.

New York. *National Bank of Auburn v. Dillingham*, 147 N. Y. 603, 49 Am. St. Rep. 692, 42 N. E. 338; *Paulsen v. Van Steenbergh*, 65 How. Pr. 342.

Pennsylvania. *Archer v. Rose*, 3 Brewst. 264; *Bacon v. Morris*, 10 Phila. 93.

Tennessee. *Johnson v. Churchwell*, 1 Head 146.

The fact that an execution against

the corporation, on which a creditors' suit against the directors is based, was falsely returned unsatisfied, is no defense, unless there was collusion on the part of the plaintiff. *Berwind-White Coal Min. Co. v. Wadsworth*, 27 N. Y. App. Div. 550, 50 N. Y. Supp. 501.

In New York, only a "judgment" creditor can sue to compel officers to account under the statute giving a cause of action for mismanagement to a "creditor." *Steele v. Isman*, 164 N. Y. App. Div. 146, 149 N. Y. Supp. 488; *Buckley v. Stansfield*, 155 N. Y. App. Div. 735, 140 N. Y. Supp. 953.

⁴⁰ *Patterson v. Stewart*, 41 Minn. 84, 93, 4 L. R. A. 745, 16 Am. St. Rep. 671, 42 N. W. 926.

⁴¹ *National Bank of Auburn v. Dillingham*, 147 N. Y. 603, 611, 49 Am. St. Rep. 692, 42 N. E. 338, rev'g 86 Hun (N. Y.) 100, 34 N. Y. Supp. 267.

In any event, it is held in some states, where the liability exists independently of statute, as in case of a waste of assets, the claims of creditors must first be established against the corporation either at law or in equity.⁴²

Of course, if judgment against the corporation is impossible or would clearly have been nugatory, it may be dispensed with.⁴³ In Massachusetts, however, if the corporation is discharged in bankruptcy, pending suit against it, no judgment can be entered therein so as to be the basis of a suit against the officers as individuals—the statute making such a judgment a condition precedent.⁴⁴

§ 2669. Dissolution of company as condition precedent. Under the Montana statute providing that in case of certain violations of duty directors shall be liable to creditors, in the event of the “dissolution” of the company, there is no dissolution merely because the corporation has become insolvent and has ceased to do business—it being said that the creditor’s right arises only when the corporation expires, viz., when it is so far dissolved that it has no capacity to sue.⁴⁵

XXXII. REMEDIES AND PROCEDURE TO ENFORCE LIABILITY OF OFFICERS

§ 2670. Remedy as in equity or at law—In general. It is important to determine whether the liability of corporate officers may be enforced at law or in equity, and whether it may be enforced both in law and in equity. Generally, if the liability may be enforced in equity it is preferable to do so, at least in the federal courts and in those states which have not adopted codes, for the reason that the relief which may be granted embraces a much wider scope. In determining the remedy, the primary question is whether the rules govern which are applicable to liabilities created by stat-

⁴² *Edwards v. National Window Glass Jobbers’ Ass’n* (N. J. Ch.), 58 Atl. 527. See also *Strelow v. American Color Co.*, 162 Mich. 709, 127 N. W. 716, 17 Det. L. N. 754.

⁴³ *National Bank of Auburn v. Dillingham*, 147 N. Y. 603, 49 Am. St. Rep. 692, 42 N. E. 338; *Lilienthal v. Betz*, 108 N. Y. App. Div. 222, 95 N. Y. Supp. 849, rev’d on other grounds 185 N. Y. 153, 7 Ann. Cas. 41, 77 N. E. 1002; *Whitney v. Pugh*,

58 N. Y. App. Div. 316, 68 N. Y. Supp. 992; *Solomon v. Bates*, 118 N. C. 311, 54 Am. St. Rep. 725, 24 S. E. 478.

As for instance, where a creditor has been enjoined from suing a debtor corporation. *Whitney v. Pugh*, 58 N. Y. App. Div. 316, 68 N. Y. Supp. 992.

⁴⁴ *Train v. Marshall Paper Co.*, 180 Mass. 513, 62 N. E. 967.

⁴⁵ *Boomer v. Rowe*, 244 Fed. 307. See also § 2667, supra.

ute,⁴⁶ or liabilities to the corporation, or its representative upon insolvency, for mismanagement, where the liability is not created by statute,⁴⁷ or liabilities independent of statute in favor of creditors as such,⁴⁸ or liabilities for tort in favor of a third person.⁴⁹

Actions by stockholders in behalf of the corporation must be brought in equity rather than at law.⁵⁰

§ 2671. — To enforce common-law liability of officers for mismanagement, where action brought by corporation or representative if insolvent. When the directors, trustees, or other officers of a corporation are guilty of mismanagement or negligence in conducting its affairs under such circumstances as to become liable for the loss or injury to the corporation, the corporation may maintain an action at law against them—at common law, an action on the case—to recover damages.⁵¹ However, this right to sue at law does not ordinarily preclude the right to sue in equity, since the general rule is that for wilful breach of trust, or for actionable negligence, corporate officers may be sued by the corporation either at law or in equity.⁵² This doctrine was announced by Lord Hardwicke in a leading English case,⁵³ and has been followed almost universally in this country by holding that a corporation, or, in case of its insolvency, its representative, may sue its officers in equity, as distinguished from a court of law, for negligence or other mismanagement,⁵⁴ on the theory that there is such a fiduciary relation between the officers and the corporation as to confer equity juris-

⁴⁶ See § 2672, *infra*.

⁴⁷ See § 2671, *infra*.

⁴⁸ See § 2673, *infra*.

⁴⁹ See § 2674, *infra*.

⁵⁰ See §§ 2680, 2681, *infra*.

⁵¹ **Alabama.** *Godbold v. Branch Bank at Mobile*, 11 Ala. 191, 46 Am. Dec. 211.

Michigan. *Commercial Bank of Bay City v. Chatfield*, 121 Mich. 641, 80 N. W. 712.

Minnesota. *Horn Silver Min. Co. v. Ryan*, 42 Minn. 196, 44 N. W. 56.

New York. *Dykman v. Keeney*, 154 N. Y. 483, 48 N. E. 894; *Metropolitan El. Ry. Co. v. Kneeland*, 120 N. Y. 134, 8 L. R. A. 253, 17 Am. St. Rep. 619, 24 N. E. 381; *Seventeenth Ward Bank v. Smith*, 51 App. Div. 259, 64

N. Y. Supp. 888; *Franklin Fire Ins. Co. v. Jenkins*, 3 Wend. 130.

Wisconsin. *North Hudson Mut. Building & Loan Ass'n v. Childs*, 82 Wis. 460, 33 Am. St. Rep. 57, 52 N. W. 600.

England. *Cullerne v. London & S. General Permanent Bldg. Society*, 25 Q. B. Div. 485.

⁵² *Toledo Sav. Bank v. Johnston*, 94 Iowa 212, 217, 62 N. W. 748.

⁵³ *Charitable Corporation v. Sutton*, 2 Atk. 400.

⁵⁴ *Murphy v. Penniman*, 105 Md. 452, 121 Am. St. Rep. 583, 66 Atl. 282; *Emerson v. Gaither*, 103 Md. 564, 8 L. R. A. (N. S.) 738, 7 Ann. Cas. 1114, 64 Atl. 26; *Fisher v. Parr*, 92 Md. 245, 48 Atl. 621; *Ventress v. Wallace*,

diction,⁵⁵ or upon the theory that the misconduct of the manager or director of the corporation is a constructive fraud, which gives courts of law and equity concurrent jurisdiction.⁵⁶ The reasons for permitting a suit in equity have been held to be not only to prevent a multiplicity of actions,⁵⁷ but also to better assure complete justice to all parties than can be done in an action at law.⁵⁸ Especially is it true that equity has jurisdiction where the relief in a court of law would be inadequate,⁵⁹ as where an accounting⁶⁰

111 Miss. 357, L. R. A. 1917 A 971, 71 So. 636. *North Hudson Mut. Building & Loan Ass'n v. Childs*, 82 Wis. 460, 33 Am. St. Rep. 57, 52 N. W. 600.

⁵⁵ *Fisher v. Parr*, 92 Md. 245, 48 Atl. 621.

But it has been held that a bill by a corporation to recover profits made by a director in making purchases for the corporation cannot be brought in equity upon the theory that it was a bill to enforce a trust. *American Spirits Mfg. Co. v. Easton*, 120 Fed. 440, rev'd without opinion 129 Fed. 1004 (mem. dec.).

⁵⁶ *Toledo Sav. Bank v. Johnston*, 94 Iowa 212, 218, 62 N. W. 748.

⁵⁷ *Emerson v. Gaither*, 103 Md. 564, 8 L. R. A. (N. S.) 738 with note, 7 Ann. Cas. 1114, 64 Atl. 26.

⁵⁸ *Emerson v. Gaither*, 103 Md. 564, 8 L. R. A. (N. S.) 738, 7 Ann. Cas. 1114, 64 Atl. 26.

⁵⁹ *Cockrill v. Cooper*, 86 Fed. 7; *Fisher v. Parr*, 92 Md. 245, 48 Atl. 621.

Misapplication of assets after knowledge of insolvency does not create a cause of action enforceable in an action at law against corporate officers, but the remedy of creditors is solely equitable after first procuring a judgment at law against the corporation. *Pelton v. Gold Hill Canal Co.*, 72 Ore. 353, 142 Pac. 769.

⁶⁰ *United States*. *Hunter v. Robbins*, 117 Fed. 920; *Cooper v. Hill*, 94 Fed. 582, 587.

New York. *Bosworth v. Allen*, 168 N. Y. 157, 55 L. R. A. 751, 85 Am. St. Rep. 667, 61 N. E. 163; *Brooklyn Heights Realty Co. v. Kurtz*, 115 App. Div. 74, 100 N. Y. Supp. 723; *Gray v. Heinze*, 82 Misc. 618, 144 N. Y. Supp. 1045.

Pennsylvania. *Rushbrook Coal Co. v. Jenkins*, 214 Pa. 517, 63 Atl. 891.

South Carolina. *McKellar v. Stanton*, 104 S. C. 248, 88 S. E. 527.

Wisconsin. *Consolidated Vinegar Works v. Brew*, 112 Wis. 610, 88 N. W. 603.

If an accounting and discovery are necessary, a suit in equity will not be dismissed upon the ground of an adequate remedy at law. *Loan Society of Philadelphia v. Eavenson*, 241 Pa. 65, 88 Atl. 295.

Equity has jurisdiction to compel a full and complete accounting by the managing agent of a corporation, at the suit of the corporation, even though the ultimate object is merely to obtain a money judgment, since the officer is to be considered as a trustee. *Providence Mining & Milling Co. v. Nicholson*, 178 Fed. 29, 34.

A corporation may sue its president for an accounting. *Mutual Life Ins. Co. v. McCurdy*, 118 N. Y. App. Div. 822, 103 N. Y. Supp. 840.

So a corporation may sue in equity for an accounting to recover secret profits. *Asphalt Const. Co. v. Bouker*, 150 N. Y. App. Div. 691, 135 N. Y. Supp. 714.

In assumpsit by a corporation

or where a discovery or injunction⁶¹ is necessary. Moreover, it has been held that equity has jurisdiction notwithstanding there is an adequate remedy at law,⁶² although there is some authority to

against its treasurer for moneys diverted, defendant cannot set up that he and another were the sole stockholders and obtain, in such an action at law, a settlement of intricate and disputed accounts between them. *Leigh v. National Hollow Brake Beam Co.*, 223 Ill. 407, 79 N. E. 175.

In a New York case the court said: "The corporation has the right to call upon them to account, not only for all the property intrusted to their care, but also for all moneys furtively made by them at its expense. It is the peculiar province of courts of equity to supervise the execution of trusts and to call trustees to an accounting for their management of trust estates, and especially for every violation of their primary duty not to deal with trust property for their own advantage. Equitable jurisdiction extends to all culpable acts and omissions of the directors, by which the pecuniary interests of the corporation are or may be injured. If they are treacherous to its interests and appropriate its property, or intentionally waste its assets, or take money for official action, or 'sell out' by resigning and thus giving control to others, they are liable to account in equity to the corporation or its representatives, not only for the money or property in their hands, but also for such as they fraudulently disposed of or wasted, as well as for the damages naturally resulting from their official misconduct; and even * * * for money received by virtue of their office. * * * A court of equity has power, at the instance of the proper party, through its flexible and comprehensive action for an accounting, to inquire into every official act of the officers and directors, and testing them by the standard of

good faith and the absence of gross negligence, to compel restitution of property withheld, with compensation for assets wasted, and to award damages for the natural consequences of official misconduct, when such damages are claimed, in connection with equitable relief, on account of a general course of injurious action or a conspiracy to despoil the corporation. Even if part of the relief could be had in actions at law, still, when it is sought in connection with strictly equitable relief, such as the discovery of trust property and the recovery thereof, and the right to all relief springs from a common cause, such as a conspiracy, all may be included in the sweeping action for an accounting." *Bosworth v. Allen*, 168 N. Y. 157, 55 L. R. A. 751, 85 Am. St. Rep. 667, 61 N. E. 163. See also *Consolidated Vinegar Works v. Brew*, 112 Wis. 610, 88 N. W. 603.

The right to an accounting from an officer of a corporation in relation to excess charges under a contract between him and the corporation whereby he furnished a dental specialty to the corporation—it being produced according to a secret formula devised by him—on the basis of actual cost, will not be denied because of contract provisions to keep the process secret and also requiring the corporation to accept his sworn statement of cost. *Forbes v. Wilson*, 243 Fed. 264, 267.

⁶¹ See *Emerson v. Gaither*, 103 Md. 564, 8 L. R. A. (N. S.) 738, 7 Ann. Cas. 1114, 64 Atl. 26.

⁶² *Citizens' Loan Ass'n v. Lyon*, 29 N. J. Eq. 110, aff'd 30 N. J. Eq. 340, 732. See also *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775.

A court of equity has jurisdiction in such a case because of the fiduci-

the contrary.⁶³ Thus, a receiver may sue in equity, independently of statute, for negligence or other mismanagement of corporate officers, and is not confined to an action at law.⁶⁴

"A court of equity has power," it has been said, "at the instance of the proper party, through its flexible and comprehensive action for an accounting, to inquire into every official act of the officers and directors, and, testing them by the standard of good faith and the absence of gross negligence, to compel restitution of property withheld, with compensation for assets wasted, and to award damages for the natural consequences of official misconduct, when such damages are claimed, in connection with equitable relief, on account of a general course of injurious action or a conspiracy to despoil the corporation. Even if part of the relief could be had in actions at law, still, when it is sought in connection with strictly equitable relief, such as the discovery of trust property and the recovery thereof, and the right to all relief springs from a common cause, such as a conspiracy, all may be included in the sweeping action for an accounting."⁶⁵

In New York, however, the decisions have quite generally held that there is no remedy in equity if there is an adequate remedy at law,⁶⁶ and the difficulties with respect to misjoinder of causes of action and of parties made the remedy at law practically use-

any relation between the corporation and its officers, notwithstanding the existence of an adequate remedy at law. *Citizens' Building, Loan & Savings Ass'n v. Coriell*, 34 N. J. Eq. 383; *Lyon v. Citizens' Loan Ass'n*, 30 N. J. Eq. 340, 732; *Citizens' Loan Ass'n v. Lyon*, 29 N. J. Eq. 110.

⁶³ *Godfrey v. McConnell*, 151 Fed. 783; *Stephens v. Overstolz*, 43 Fed. 771; *Bay City Bridge Co. v. Van Etten*, 36 Mich. 210; *Thompson v. Greeley*, 107 Mo. 577, 17 S. W. 962; *Overend, Gurney & Co. v. Gurney*, L. R. 4 Ch. 701.

Whether there is an adequate remedy at law so as to prevent a suit in equity by the corporation, is governed by the general rules relating to equity jurisdiction. *Mobile Land Improvement Co. v. Gass*, 129 Ala. 214, 29 So. 920.

⁶⁴ *Emerson v. Gaither*, 103 Md. 564, 8 L. R. A. (N. S.) 738, 7 Ann. Cas. 1114, 64 Atl. 26, reviewing New York cases to the contrary but refusing to follow them.

⁶⁵ *Bosworth v. Allen*, 168 N. Y. 157, 55 L. R. A. 751, 85 Am. St. Rep. 667, 61 N. E. 163, rev'g 57 N. Y. App. Div. 633, 67 N. Y. Supp. 1133.

⁶⁶ *Dykman v. Keeney*, 154 N. Y. 483, 48 N. E. 894, rev'g 21 N. Y. App. Div. 114, 47 N. Y. Supp. 352, and reviewing at some length earlier New York cases. See also *Mason v. Henry*, 152 N. Y. 529, 46 N. E. 837; *O'Brien v. Fitzgerald*, 143 N. Y. 377, 38 N. E. 371, 6 N. Y. App. Div. 509, 39 N. Y. Supp. 707, aff'd 150 N. Y. 572, 44 N. E. 1126.

For extensive review of New York cases on this subject, see note in 7 Ann. Cas. 1121.

less; ⁶⁷ but, in that state, in 1913, an amendment was added to the statutes which has been construed as permitting the corporation to sue in equity.⁶⁸

§ 2672. — To enforce liability created by statute. When a statute making the directors or other officers of a corporation liable for corporate debts prescribes a special remedy for enforcing the same, such remedy is exclusive, and must be strictly followed.⁶⁹ Sometimes it is expressly provided that the liability shall be enforced by a bill in equity, and in such a case the remedy in equity is exclusive.⁷⁰ Whether the remedy is in law or in equity, in the absence of express provision on the subject, depends upon the terms of the statute and the nature of the liability. Some of the statutes impose a primary and several or joint and several liability upon the part of each director, or all the directors, to each creditor, which may be enforced by an action at law.⁷¹ Such is the case, for ex-

⁶⁷ See note in 9 Bench and Bar, New Series, p. 259.

⁶⁸ General Corporation Law (N. Y.) § 91a, as construed in *German American Coffee Co. v. Diehl*, 86 N. Y. Misc. 547, 149 N. Y. Supp. 413.

⁶⁹ *Priest v. Essex Hat Mfg. Co.*, 115 Mass. 380; *Dewey v. Baker*, 16 Gray (Mass.) 130.

In Rhode Island, the statutory mode of relief by action on the case, where the debt limit is exceeded, is exclusive. *W. E. A. Legg & Co. v. Dewing*, 25 R. I. 568, 57 Atl. 373. And where an action is brought in a federal court against a director of a Rhode Island corporation the same rule applies. *Pond v. Newell*, 162 Fed. 579.

In New Jersey, see P. L. 1896 (N. J.) p. 306.

⁷⁰ *McRae v. Locke*, 114 Mass. 96; *Thayer v. New England Lithographic Steam Printing Co.*, 108 Mass. 523; *Cochrane v. Reed*, 13 Allen (Mass.) 455; *Bond v. Morse*, 9 Allen (Mass.) 471; *Merchants' Bank v. Stevenson*, 10 Gray (Mass.) 232.

⁷¹ *United States. Pennsylvania R. Co. v. Peddrick*, 234 Fed. 781, 222

Fed. 75, construing New York statute forbidding transfers by insolvent corporations to its officers and making the officers who transfer the property personally liable to creditors for any loss they may "respectively" sustain; *Fitzgerald v. Weidenbeck*, 76 Fed. 695 (Montana statute).

Colorado. *Gregory v. German Bank of Denver*, 3 Colo. 332, 25 Am. Rep. 760.

Illinois. *Loverin v. McLaughlin*, 161 Ill. 417, 44 N. E. 99, aff'd 46 Ill. App. 373.

Kentucky. *Nuckels v. Robinson-Pettett Co.*, 159 Ky. 214, 166 S. W. 972.

Michigan. *M. I. Wilcox Cordage & Supply Co. v. Mosher*, 114 Mich. 64, 72 N. W. 117.

Minnesota. *Patterson v. Stewart*, 41 Minn. 84, 4 L. R. A. 745, 16 Am. St. Rep. 671, 42 N. W. 926.

New York. *Marsh v. Kaye*, 44 App. Div. 68, 60 N. Y. Supp. 439, aff'd 168 N. Y. 196, 61 N. E. 177; *Milsom Rendering & Fertilizer Co. v. Baker*, 16 App. Div. 581, 44 N. Y. Supp. 999; *Camp Mfg. Co. v. Reamer*, 14 App. Div. 408, 43 N. Y. Supp. 1027, rev'g

ample, under a statute providing that a corporation shall file and publish an annual report of its condition, and that, if it shall fail to do so, the directors or trustees shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before the report shall be made,⁷³ and of a statute providing that if the report required by statute to be made by the officers of a corporation shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all debts of the corporation contracted while they are officers thereof, etc.⁷³ Other statutes have been construed as imposing a liability for the common benefit of all the creditors, which, like the similar liability on the part of stockholders, is enforceable only by a creditors' suit in equity.⁷⁴ Such was held to be the effect of a statute in New York providing that

18 Misc. 619, 43 N. Y. Supp. 673; *Rose v. Chadwick*, 9 App. Div. 311, 41 N. Y. Supp. 190; *Empire State Sav. Bank of Buffalo v. Beard*, 81 Hun 184, 30 N. Y. Supp. 756; *Bauer v. Platt*, 72 Hun 326, 25 N. Y. Supp. 426; *Kugelman v. Hirschman*, 23 Misc. 773, 53 N. Y. Supp. 1107, *aff'g* 22 Misc. 533, 49 N. Y. Supp. 1012.

Ohio. *Sturges v. Burton*, 8 Ohio St. 215, 72 Am. Dec. 582.

The officer, when sued by several creditors in separate actions cannot, it seems, at least where he has no defense, restrain the prosecution of the actions at law to prevent a multiplicity of suits, until the receivership was concluded. *Jones v. Harris*, 90 Ark. 51, 117 S. W. 1077.

Where the only relief demanded is a money judgment, the action of course is one at law rather than in equity. *Swartley v. Oak Leaf Creamery Co.*, 135 Iowa 573, 113 N. W. 496.

⁷³ *Sanborn v. Lefferts*, 58 N. Y. 179; *Garrison v. Howe*, 17 N. Y. 458.

⁷⁴ *Huntington v. Attrill*, 118 N. Y. 365, 23 N. E. 544; *Pier v. Hanmore*, 86 N. Y. 95.

⁷⁴ **United States.** *Stone v. Chisolm*, 113 U. S. 302, 28 L. Ed. 991; *Hornor v. Henning*, 93 U. S. 228, 23 L. Ed. 879; *Lyman v. Hilliard*, 154

Fed. 339, construing Vermont statute, and contra to decision in same case in 138 Fed. 469; *James H. Rice Co. v. Libbey*, 85 Fed. 821, construing Illinois statute.

California. *Gardiner v. Bank of Napa*, 160 Cal. 577, 117 Pac. 667; *Winchester v. Mabury*, 122 Cal. 522, 55 Pac. 393.

Georgia. *Hill & Merry v. Jackson Stores*, 137 Ga. 174, 73 S. E. 13; *Rozar v. Rosenheim Shoe Co.*, 14 Ga. App. 13, 80 S. E. 24.

Illinois. *Gay v. Kohlsaat*, 223 Ill. 260, 79 N. E. 77; *Woolverton v. Taylor*, 132 Ill. 197, 22 Am. St. Rep. 521, 23 N. E. 1007; *Low v. Buchanan*, 94 Ill. 76; *Buchanan v. Bartow Iron Co.*, 3 Ill. App. 191.

Mississippi. *Metzger v. Joseph*, 111 Miss. 385, 71 So. 645.

New York. *Bauer v. Parker*, 82 App. Div. 289, 81 N. Y. Supp. 995; *Whitney v. Pugh*, 58 App. Div. 316, 68 N. Y. Supp. 992; *Whitney v. Wilcox*, 58 App. Div. 57, 68 N. Y. Supp. 667; *American Grocery Co. v. Flint*, 5 App. Div. 263, 39 N. Y. Supp. 153; *McClave v. Thompson*, 36 Hun 365; *Anderson v. Speers*, 21 Hun 568.

Tennessee. *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, 95 Tenn. 634, 31 L. R. A. 593, 49 Am. St. Rep.

the directors of a corporation creating or consenting to the creation of any debt of the corporation, unsecured by mortgage, in excess of its paid-up capital stock, should "be personally liable therefor to the creditors of the corporation." It was held that this statute imposed liability upon directors creating or assenting to the creation of debts in excess of the paid-up capital stock, to the extent of such excess, not for the benefit of any particular creditor, but for the benefit of all, that the liability was secondary and could only be resorted to after exhausting the usual remedies against the corporation, and that a single creditor whose debt was created in excess of the limitation could not maintain an action at law against the directors to recover the amount of the debt as a primary liability, but that the liability must be enforced in equity in a suit to which all the creditors and the corporation itself were parties or represented, and in which an accounting could be had and all the equities adjusted.⁷⁵ And this is the rule in practically all the states so far as statutory liability for incurring debts in excess of the debt limit is concerned.⁷⁶ Where the liability imposed by statute is not

943, 32 S. W. 1097; *Moulton v. Connell-Hall-McLester Co.*, 93 Tenn. 377, 27 S. W. 672.

Vermont. *Charles E. Brown & Co. v. Ware*, 87 Vt. 121, 88 Atl. 507. Compare, however, *Windham Provident Institution v. Sprague*, 43 Vt. 502.

Wisconsin. *Williams v. Brewster*, 117 Wis. 370, 93 N. W. 479.

An individual creditor cannot sue under section 90 of the General Corporation Law, on the ground of misappropriation of corporate assets, to recover the amount of his claim, since an individual action at law cannot be maintained and the only relief is a representative action in equity. *Davis v. Wilson*, 150 N. Y. App. Div. 704, 135 N. Y. Supp. 825.

The action to enforce the liability cannot be brought at law by a single creditor, but must be brought in equity where "all the parties in interest may be before the court, all the various equities determined, and such a decree rendered in a single action as, in its several elements, shall be equi-

table and just to all concerned"; and if the corporation is not in the hands of a receiver, suit may be brought by all the creditors or, if numerous, by one in behalf of himself and all the others. *Charles E. Brown & Co. v. Ware*, 87 Vt. 121, 88 Atl. 507.

Suit need not be filed by a receiver, at least where none has been appointed. *Charles E. Brown & Co. v. Ware*, 87 Vt. 121, 88 Atl. 507.

⁷⁵ *National Bank of Auburn v. Dillingham*, 147 N. Y. 603, 49 Am. St. Rep. 692, 42 N. E. 338 (overruling *Patterson v. Robinson*, 36 Hun [N. Y.] 622, 37 Hun [N. Y.] 341, and explaining *Patterson v. Robinson*, 116 N. Y. 193, 22 N. E. 372).

⁷⁶ **United States.** *Stone v. Chisolm*, 113 U. S. 302, 28 L. Ed. 991; *Hornor v. Henning*, 93 U. S. 228, 23 L. Ed. 879; *Lyman v. Hilliard*, 154 Fed. 339, construing Vermont statute.

Illinois. *Gay v. Kohlsaat*, 223 Ill. 260, 79 N. E. 77.

New York. *National Bank of Auburn v. Dillingham*, 147 N. Y. 603, 49 Am. St. Rep. 692, 42

for all the debts of the corporation, but only for its debts "to the extent of its capital stock," the liability "being, to this limited extent, for all the debts and contracts of the company, is not to be enforced for the benefit of the creditor who may first seek to avail himself thereof, which might result in excluding other creditors by exhausting the fund, but must be made available for the benefit of all the creditors [citing cases]. For the reasons stated in those opinions, it is only in equity that the rights of all parties can be protected, and an adequate remedy given." 77

Justice Mitchell, in a leading case in Minnesota, clearly states what is undoubtedly true, as follows: "The question as to the proper remedy to enforce the personal liability of stockholders or directors or officers for corporate debts depends so much upon the terms of particular statutes, or the remedial systems of different states, that not much aid can be obtained from the decisions of other courts. But we think it will be found generally true that, unless a particular remedy is prescribed by statute, the form of the remedy, whether by action at law by each creditor against one or more stockholders or officers, or by bill in equity in which all persons in interest or to be affected are made parties, is made to depend upon the character of the liability. If its object is to create a common fund, limited in amount, for the benefit of all creditors, or all of a particular class, so that if one were allowed to proceed alone he might exhaust the fund or get more than his share; or if the liability was only for the deficiency of corporate assets, or only for the excess of debts contracted over the amount permitted by the charter, so that an accounting is necessary; or if for any similar reason an action at law would be inadequate to furnish a complete remedy or protect the rights of all persons interested,—the courts have generally held, in the absence of any express statutory provision, that a suit in the nature of a bill in equity, bringing in all interested parties, must be resorted to. * * * But no such reason obtains here. The liability of each director is unlimited except by the amount of the corporate debts which fall within the terms of the statute. What one creditor may collect will not reduce the amount which another may recover. No accounting

Tennessee. *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, 95 Tenn. 634, 31 L. R. A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097; *Moulton v. Connell-Hall-McLester Co.*, 93 Tenn. 377, 27 S. W. 672.

Vermont. *Charles E. Brown & Co. v. Ware*, 87 Vt. 121, 88 Atl. 507. 77 *Westinghouse Elec. & Mfg. Co. v. Reed*, 194 Mass. 590, 120 Am. St. Rep. 576, 80 N. E. 621.

is necessary in order to ascertain the amount of the deficiency of corporate assets, for the creditor is not bound to resort to them first; nor is his recovery limited to the extent of such deficiency. In fact, a direct action by any creditor against any director not only furnishes an adequate remedy, but it interferes with the rights of no one else."⁷⁸ The rule which should govern is also well stated by Justice Ingraham in a New York decision as follows: "Where the statute imposes upon a stockholder or director a liability for all the debts of the company, making the directors' liability as broad as the liability of the corporation, then each creditor has his remedy against the corporation and the director, and there is no more reason for allowing him to come into equity to enforce it against the director than for allowing him to enforce it in equity against the corporation. Both the director and the corporation are liable for all the debts, and that liability is a common-law liability to be enforced in an action at law. Where, however, the statute imposes upon directors and stockholders a liability which is not measured by the debts of the corporation, but is measured either by an arbitrary amount fixed by the statute, by an amount to be ascertained by the par value of the stockholders' stock, or by the amount of debts in excess of the capital of the corporation, or by any other method not fixed by the amount of indebtedness of the corporation, but limited to an amount less than such indebtedness, then the liability must be enforced in an action in equity, and enforced for the benefit of all the creditors."⁷⁹

Equity will not refuse jurisdiction of a suit by creditors or a receiver against directors for paying an illegal dividend, merely because the statute creating such liability imposes a penalty, since it is penalties created by contract between private persons that equity refuses to enforce, and not statutory penalties.⁸⁰

Where liability is imposed by statute, in favor of the corporation, for all losses sustained from the loan of money by a national bank to one person in excess of one-tenth of the capital, the remedy is at law and not in equity, at least where the remedy at law is adequate.⁸¹

⁷⁸ *Patterson v. Stewart*, 41 Minn. 84, 91, 4 L. R. A. 745, 16 Am. St. Rep. 671, 42 N. W. 926.

⁷⁹ *Bauer v. Parker*, 82 N. Y. App. Div. 289, 81 N. Y. Supp. 995, 1002. See also *Whitney v. Pugh*, 58 N. Y.

App. Div. 316, 68 N. Y. Supp. 992.

⁸⁰ *Metzger v. Joseph*, 111 Miss. 385, 71 So. 645.

⁸¹ *Corsicana Nat. Bank v. Johnson*, 218 Fed. 822.

§ 2673. — To enforce common-law liability, if any, in favor of creditors. Creditors cannot themselves ordinarily maintain actions at law against the directors or other officers of a corporation to recover damages for conversion of its assets or loss by reason of misapplication thereof or of negligence, since the injury is to the corporation.⁸² Generally it is held that the proper mode of enforcing the liability, if the creditor has a right to sue, is by a suit in equity on behalf of all the creditors, and to which the corporation itself is a party.⁸³

§ 2674. — To enforce liability for tort in favor of third person. Of course, if no duty on the part of the officer to the corporation, and no fiduciary relation between the officer and the person suing, is relied upon, but one sues merely for a tort causing injury to himself, the action is cognizable at law rather than in equity.

§ 2675. Actions by particular persons—The corporation. The corporation itself, where a going concern, may always sue, in a proper case, for mismanagement of corporate officers resulting in a loss to it, where not precluded by laches or estoppel.⁸⁴ Furthermore, the corporation sometimes may sue officers in a case where the stockholders, one or all, would have no ground for complaint. For instance, it has been held that a corporation may sue directors to compel them to reimburse the company for dividends improperly paid, where the corporation is a going concern, although the stockholders who received the dividend could not complain.⁸⁵ Of course

⁸² Smith v. Poor, 40 Me. 415, 63 Am. Dec. 672; Fusz v. Spaunhorst, 67 Mo. 264; Branch v. Roberts, 50 Barb. (N. Y.) 435; Winter v. Baker, 50 Barb. (N. Y.) 432; Zinn v. Mendel, 9 W. Va. 580. See also Frost Mfg. Co. v. Foster, 76 Iowa 535, 41 N. W. 212; Myer v. Dupont, 79 Ky. 416.

⁸³ Schley v. Dixon, 24 Ga. 273, 71 Am. Dec. 121; Landis v. Sea Isle City Hotel Co., 53 N. J. Eq. 654, 33 Atl. 964; Cunningham v. Pell, 5 Paige (N. Y.) 607.

⁸⁴ A corporation may sue for damages caused by a fraudulent breach of trust on the part of its directors. Cream City Mirror Plate Co. v. Coggeshall, 142 Wis. 651, 135 Am. St. Rep. 1091, 126 N. W. 44.

May sue to cancel stock unlawfully issued by directors to themselves. Central Consumers' Wine & Liquor Co. v. Madden (N. J. Ch.), 68 Atl. 777.

If the managing agent of a company refuses to surrender possession of the corporate property after his term of office has expired, and he threatens to divert corporate assets, an injunction will be granted preventing him from interfering with the management of the property. Maggie Gold Min. Co. v. Sherman, 23 S. D. 232, 20 Ann. Cas. 595, 121 N. W. 770.

⁸⁵ Fliteroft's Case, L. R. 21 Ch. Div. 519.

"The suit is by the corporation, which seeks, under a new manage-

the mere fact of a partial change in the stockholders since the alleged wrongdoing is no defense;⁸⁶ but the rule has been held otherwise where all the stockholders were subsequent ones, and the recovery would be entirely for the benefit and advantage of those who were not stockholders at the time of the alleged misdoings.⁸⁷

A corporation is not estopped to sue one of its officers for diversion of corporate assets or for secret profits because the board of directors voted it was not expedient to sue him, where there was no release executed, since the vote could be rescinded.⁸⁸

A wilful publication of a libel by directors makes them personally liable therefor to the corporation as for a breach of their duty as quasi trustees, where a judgment has been recovered against the corporation therefor.⁸⁹

§ 2676. — Receiver, assignee or trustee in bankruptcy. The liability of directors or other officers of a corporation for mismanagement may be enforced at law or in equity, according to the circumstances, by a receiver of the corporation or official liquidator, or by an assignee for the benefit of creditors, or an assignee in bankruptcy or insolvency.⁹⁰ However, there is conflict, due to some ex-

ment, to reinstate the capital, seriously impaired by the illegal acts of the defendants as directors, and then to continue the business. The corporation, therefore, represents the interests of the creditors as well as the present shareholders, and it may become necessary in the future, if not at the present, to use the capital for payment of debts. The well-recognized distinction between the shareholders and the corporation will permit a suit by the latter when the former would not be heard to complain. If this were an action by the holders of the stock they could not compel the former directors to replace the part of the capital they had already received by way of dividends. But the corporation is a going concern, and is not in liquidation, and hence its rights, as well as its duty, to compel the replacement of its capital. This is necessary for the protection of creditors in the future as well

as the present stockholders who may not be the persons to whom the dividends were paid five years ago." *Loan Soc. of Philadelphia v. Eavenson*, 248 Pa. 407, 94 Atl. 121.

⁸⁶ *Hooker, Corser & Mitchell Co. v. Hooker*, 88 Vt. 335, 92 Atl. 443.

⁸⁷ *Home Fire Ins. Co. v. Barber*, 67 Neb. 644, 60 L. R. A. 927, 108 Am. St. Rep. 716, 93 N. W. 1024.

⁸⁸ *Goodbody v. Delaney*, 82 N. J. Eq. 140, 91 Atl. 724.

⁸⁹ *Hill v. Murphy*, 212 Mass. 1, 40 L. R. A. (N. S.) 1102, Ann. Cas. 1913 C 374, 98 N. E. 781.

⁹⁰ *United States. Briggs v. Spaulding*, 141 U. S. 132, 35 L. Ed. 662; *Gibbons v. Anderson*, 80 Fed. 345; *Main v. Mills*, 6 Biss. 98, Fed. Cas. No. 8,974; *Gindrat v. Dane*, 4 Cliff 260, Fed. Cas. No. 5,455.

Connecticut. New Haven Trust Co. v. Doherty, 74 Conn. 353, 50 Atl. 887.

Illinois. Ellis v. Ward, 137 Ill. 509, 25 N. E. 530.

tent to the wording of statutes relating to receivers, as to whether a receiver represents merely the corporation or whether he represents both the corporation and the creditors.⁹¹ Under some statutory receiverships, the receiver represents the corporation only and cannot recover damages accruing merely to the corporate creditors and not to the corporation itself.⁹² Generally, however, a suit or action brought by a receiver is to be treated as the same as one brought by the corporation itself,⁹³ although in most cases he is to be treated as representing both the corporation and stockholders and also the creditors of the corporation.⁹⁴ A receiver represents "both the cor-

Maine. *In re Brockway Mfg. Co.*, 89 Me. 121, 56 Am. St. Rep. 401, 35 Atl. 1012.

Maryland. *Foutz v. Miller*, 112 Md. 458, 76 Atl. 1111.

Missouri. *Thompson v. Greeley*, 107 Mo. 577, 17 S. W. 962; *Alexander v. Relfe*, 74 Mo. 495.

New Jersey. *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775.

New York. *Mason v. Henry*, 152 N. Y. 529, 46 N. E. 837; *Hun v. Cary*, 82 N. Y. 65, 37 Am. Rep. 546; *Gillet v. Phillips*, 13 N. Y. 114; *Dykman v. Keeney*, 21 App. Div. 114, 47 N. Y. Supp. 352, 154 N. Y. 483, 48 N. E. 894.

Pennsylvania. *Gunkle's Appeal*, 48 Pa. St. 13.

England. *In re National Funds Assur. Co.*, 10 Ch. Div. 118; *Evans v. Coventry*, 25 L. J. Ch. 489.

See generally, *infra*, chapter on Receivers, and see § 2571, *supra*.

An assignee for the benefit of creditors may sue. *Union Nat. Bank v. Hill*, 148 Mo. 380, 71 Am. St. Rep. 615, 49 S. W. 1012; *Swentzel v. Penn Bank*, 147 Pa. St. 140, 15 L. R. A. 305, 30 Am. St. Rep. 718, 23 Atl. 405, 415.

However, the right to sue does not pass, it has been held, to an assignee for the benefit of creditors of the corporation, where the right did not belong to the corporation as a part of its assets. *First Nat. Bank v.*

Hingham Mfg. Co., 127 Mass. 563.

A trustee in bankruptcy represents the creditors, and as such may recover from a director for knowingly taking from the treasury of the company what does not belong to him. *Baldwin v. Wolff*, 82 Conn. 559, 74 Atl. 948.

⁹¹ See *Folsom v. Smith*, 113 Me. 83, 92 Atl. 1003, and see *infra*, chapter on Receivers.

⁹² *Folsom v. Smith*, 113 Me. 83, 92 Atl. 1003.

⁹³ *Green v. Officers & Directors of Knoxville Banking & Trust Co.*, 133 Tenn. 609, 182 S. W. 244.

A suit brought by a receiver of a corporation against its officers to hold them personally liable for fraud, wilful mismanagement, and negligence, resulting in the insolvency of the company, has been held to be "in legal effect an action by the corporation itself," and not subject to the objection of misjoinder of parties complainant, on the theory that the bill was substantially one filed by creditors and stockholders as such to enforce their respective rights. *Green v. Officers & Directors of Knoxville Banking & Trust Co.*, 133 Tenn. 609, 182 S. W. 244.

⁹⁴ "The receiver is, it is true, the representative of creditors, but he is also the representative of the corporation and of its stockholders. If either the corporation or its stock-

poration and its creditors for the purpose of recovering from the delinquent directors the damages which their misconduct has occasioned to the corporation." ⁹⁵ It follows that where an action is brought by a receiver, it is no defense that the assets are sufficient to pay all the debts of the corporation, since the receiver represents not only the creditors but also the stockholders. ⁹⁶ An action by a receiver is not necessarily an action merely on behalf of the creditors of the corporation, and this is so although the caption of the complaint describes the complainant as "suing herein by order of court, for benefit of all creditors" of the corporation, where the bill itself shows that the suit is really one in behalf of the defunct corporation. ⁹⁷

If the suit against officers for misconduct is brought by receivers, it has been held no objection that one of the receivers was also one of the directors against whom suit was brought, where the suit is in equity and the court directed attorneys to institute and conduct the proceedings in the name of the receivers so that the attorneys really have charge of the case. ⁹⁸

Suit cannot be brought by a general receiver of the corporation, in behalf of creditors, especially where each injured creditor has a separate cause of action entirely distinct from the cause of action of other creditors. ⁹⁹ Thus, a statutory right of action in favor of depositors against a bank officer for receiving deposits when the

holders may inquire into the acts charged in this bill, the receiver may." *Hays v. Pierson*, 65 N. J. Eq. 353, 58 Atl. 728, 45 Atl. 1091. In this case it was held that it could not be claimed that, "as the salary was voted and the contract was made while the celluloid company was a going concern and solvent, the directors did not then sustain toward the creditors of the company the relation of trustees, and that they are not liable to account to the creditors, or to their representative, the receiver, for their management or mismanagement of its affairs. * * * The rule thus formulated may, in general, be true; but it has no application to a case in which the mismanagement producing insolvency consists in diverting all the assets of the company to the directors themselves, or to a

company of which they are the sole stockholders. * * * Besides, the argument rests upon the assumption that the right of the receiver is identical with that of the creditor. This is not the case."

The receiver of a bank represents not only the corporate body, but also the depositors and other creditors. *Williams v. McKay*, 40 N. J. Eq. 189, 196, 53 Am. Rep. 775.

⁹⁵ *Bowers v. Male*, 186 N. Y. 28, 78 N. E. 577.

⁹⁶ *Coddington v. Canaday*, 157 Ind. 243, 61 N. E. 567.

⁹⁷ *Ventress v. Wallace*, 111 Miss. 357, L. E. A. 1917 A 971, 71 So. 636.

⁹⁸ *Murphy v. Penniman*, 105 Md. 452, 121 Am. St. Rep. 583, 66 Atl. 282.

⁹⁹ *Kinter v. Connolly*, 233 Pa. 5, 81 Atl. 905.

bank was insolvent does not become an asset of the bank so as to authorize the receiver to sue.¹

§ 2677. — Stockholders. Stockholders, where they have a cause of action accruing to them as individuals, may sue corporate officers thereon, in an action at law. For instance, if they purchase stock in reliance on false representations of directors or other officers, they may sue such officers at law for the tort.² So concealment of material facts, in a purchase of stock by an officer from a stockholder, gives a cause of action at law to the stockholder as an individual, in some jurisdictions.³ On the other hand, a stockholder cannot sue in an action at law as the representative of the corporation,⁴ but his only remedy is in equity.⁵

§ 2678. — Creditors. Actions by creditors against corporate officers for wrongs primarily to the corporation itself are not common, except where the right to sue is created by statute, and the common-law liability of officers to the corporation or its stockholders cannot generally be enforced by creditors nor can the creditor sue as an individual, under ordinary circumstances.⁶ Oftentimes, however, a statute creates a liability in favor of creditors.⁷

§ 2679. Stockholders' suits—In general. In a subsequent volume, the rules governing stockholders' suits, i. e., actions by one or more stockholders to redress injuries to the corporation, are set forth at length. These actions are sometimes brought merely for an injunction, sometimes merely to set aside a corporate contract, and sometimes to hold corporate officers personally liable for injuries to the corporation. The latter phase of the subject is herein considered, without any attempt to go into details, since the general rules applicable to stockholders' suits seem to govern suits brought to recover damages as well as suits for other relief, and reference should be made to a subsequent volume in connection with what is herein stated.

§ 2680. — Right of stockholder to sue in action at law. It is necessary to distinguish between the right of a stockholder to sue as an individual, as the sole party injured, and his right to sue on behalf

¹ *Mallon v. Hyde*, 76 Fed. 388.

² See § 2544, *supra*.

³ See § 2564, *supra*.

⁴ See § 2680, *infra*.

⁵ See § 2681, *infra*.

⁶ See § 2569 et seq., *supra*.

⁷ See § 2591 et seq., *supra*.

of the corporation for an injury primarily inflicted upon the corporation.⁸ Individual stockholders cannot sue the officers at law for damages on the theory that they are entitled to damages because the mismanagement has rendered their stock of less value or worthless, since the injury is, in law, not to them individually, but to the corporation—to the stockholders collectively.⁹ In other words, the stockholder cannot sue at law where he sustains no loss in addition to the loss sustained by the corporation.¹⁰ The test seems to be whether the injury to the complaining shareholder is the same as to every other shareholder, i. e., merely a depreciation in the value of their shares. If this is so, an individual stockholder cannot sue the officers at law to recover damages.¹¹ Thus, where the shares of stock held by plaintiff were depreciated in value by wrongful acts of corporate officers making possible the issue of several hun-

⁸ See *Turner v. Markham*, 155 Cal. 562, 102 Pac. 272.

⁹ *United States. Singers-Bigger v. Young*, 166 Fed. 82, 85.

Illinois. Eldred v. Ripley, 97 Ill. App. 503.

Massachusetts. Barlett v. New York, N. H. & H. R. Co., 221 Mass. 530, 109 N. E. 452; *Strout v. United Shoe Machinery Co.*, 215 Mass. 116, 102 N. E. 312; *Smith v. Hurd*, 12 Mete. 371, 46 Am. Dec. 690.

New York. Niles v. New York Cent. & H. River R. Co., 176 N. Y. 119, 68 N. E. 142, *aff'g* 69 App. Div. 144, 74 N. Y. Supp. 617; *Loewenstein v. Diamond Soda Water Mfg. Co.*, 94 App. Div. 383, 88 N. Y. Supp. 313.

Oregon. Wills v. Nehalem Coal Co., 52 Ore. 70, 96 Pac. 528.

The reason is that a judgment in favor of one stockholder would be no bar to an action by a creditor, nor a judgment by both, to an action by the corporation. *Eldred v. Ripley*, 97 Ill. App. 503.

A single stockholder cannot sue at law to recover damages from corporate officers for negligence. *Hanna v. People's Nat. Bank*, 76 N. Y. App. Div. 224, 78 N. Y. Supp. 516, modified in 179 N. Y. 107, 71 N. E. 778.

Stockholders cannot sue at law for

malfeasance of corporate officers resulting in loss of corporate assets. *Singers-Bigger v. Young*, 166 Fed. 82.

If there has been no damage to the stock as distinguished from damage to the property of the corporation itself, the stockholders cannot sue. *Loewenstein v. Diamond Soda Water Mfg. Co.*, 94 N. Y. App. Div. 383, 88 N. Y. Supp. 313.

It is clear "that an action may be maintained against the directors for gross negligence resulting in the waste and loss of the capital, where there are no debts, and where the shareholders are the only persons to whom the damages recovered could be distributed. At law the remedy must be enforced through the corporation itself, or by a receiver representing the common interest. In equity the directors may be held liable as trustees for a fraudulent breach of trust, even at the suit of an individual shareholder." *Coddington v. Canaday*, 157 Ind. 243, 257, 61 N. E. 567.

¹⁰ *Wells v. Dane*, 101 Me. 67, 63 Atl. 324.

¹¹ *Wells v. Dane*, 101 Me. 67, 63 Atl. 324; *Niles v. New York Cent. & H. River R. Co.*, 176 N. Y. 119, 68 N. E. 142.

dred shares of stock without payment therefor, the wrong is primarily against the corporation, and an action to recover damages therefor must be brought by the corporation.¹²

In this respect, it is immaterial that plaintiff owns and controls a majority of the stock.¹³ Moreover, the fact that plaintiff has parted with his stock, and that he claims that the suit is by an individual against individuals rather than by a stockholder against directors, does not change the rule where whatever injury befell him he suffered as a stockholder.¹⁴

However, a stockholder may sue at law officers of the corporation for an injury solely to himself, as for instance for refusing to allow him to examine the corporate books.¹⁵ So if corporate officers falsely represent that they are selling treasury stock, the injury is only to those who purchase stock on the faith of the representation, and not to the corporation; and hence where a stockholder sues such officers, he must sue as an individual and not as a representative of the corporation.¹⁶

§ 2681. — Right to sue in equity as representative of the corporation, and nature of action. Primarily, the injury resulting from mismanagement or wrongful use of corporate property by corporate officers is to the corporation, and a suit for the damages suffered should be by the corporation rather than by the stockholders.¹⁷ However, if the officers refuse to sue, or a demand to sue is unnecessary, stockholders may sue in equity in their own names, for the benefit of the corporation, bringing the suit on behalf of themselves and such other stockholders as may come in, and making the corporation and the guilty officers defendants.¹⁸

¹² Wells v. Dane, 101 Me. 67, 63 Atl. 324.

¹³ Wells v. Dane, 101 Me. 67, 63 Atl. 324.

¹⁴ "Neither does it matter that the misconduct is charged against the defendants as individuals, and not as officers. By whomsoever the wrongful acts were committed, and in whatsoever capacity the wrongful doers acted, their acts directly injured the corporate body. Redress must be sought by the party injured. The plaintiff was injured only indirectly

and collaterally. When the corporation is indemnified the plaintiff ceases to be a loser." Wells v. Dane, 101 Me. 67, 63 Atl. 324.

¹⁵ Bourdette v. Sieward, 52 La. Ann. 1333, 27 So. 724.

¹⁶ Turner v. Markham, 155 Cal. 562, 102 Pac. 272.

¹⁷ Hanna v. People's Nat. Bank, 76 N. Y. App. Div. 224, 78 N. Y. Supp. 516; Lindemann v. Busk, 125 Wis. 210, 104 N. W. 119.

¹⁸ Alabama. Montgomery Light Co. v. Lahey, 121 Ala. 131, 25 So. 1006.

Such an action is in reality one brought on behalf of the cor-

Illinois. Voorhees v. Masen, 245 Ill. 256, 91 N. E. 1056.

Iowa. Schoening v. Schwenk, 112 Iowa 733, 84 N. W. 916.

Maine. Conners v. Conners Bros. Co., 110 Me. 428, 86 Atl. 843.

Massachusetts. Granara v. Italian Catholic Cemetery Ass'n, 218 Mass. 387, 105 N. E. 1073; Hill v. Murphy, 212 Mass. 1, 40 L. R. A. (N. S.) 1102, Ann. Cas. 1913 C 374, 98 N. E. 781; Wineburgh v. United States Steam & Street Ry. Advertising Co., 173 Mass. 60, 73 Am. St. Rep. 261, 53 N. E. 145; Blair v. Telegram Newspaper Co., 172 Mass. 201, 51 N. E. 1080; Peabody v. Flint, 6 Allen 52.

Michigan. Flynn v. Third Nat. Bank, 122 Mich. 642, 81 N. W. 572.

Minnesota. Pencille v. State Farmers' Mut. Hail Ins. Co., 74 Minn. 67, 73 Am. St. Rep. 326, 76 N. W. 1026.

Mississippi. Kelley v. Applewhite, 75 So. 753.

Montana. Kleinschmidt v. American Min. Co., 49 Mont. 7, 139 Pac. 785; McConnell v. Combination Mining & Milling Co., 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194, aff'd 31 Mont. 563, 79 Pac. 248.

New York. Holmes v. Camp, 219 N. Y. 359, 114 N. E. 841; Continental Securities Co. v. Belmont, 206 N. Y. 7, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914 A 777, 99 N. E. 138, aff'g 150 App. Div. 298, 134 N. Y. Supp. 635, 75 Misc. 234, 133 N. Y. Supp. 560; Bloom v. National United Ben. Saving & Loan Co., 152 N. Y. 114, 46 N. E. 166; Brinckerhoff v. Bostwick, 88 N. Y. 52; Ebling v. Nekarda, 148 App. Div. 193, 132 N. Y. Supp. 309; Brewster v. F. G. Brewster Co., 138 App. Div. 139, 122 N. Y. Supp. 1019; Welcke v. Trageser, 131 App. Div. 731, 116 N. Y. Supp. 166; Sayles v. White, 18 App. Div. 590, 46 N. Y. Supp. 194; Scharf v. Warren-Scharf

Asphalt Paving Co., 15 App. Div. 480, 44 N. Y. Supp. 481; Lawrence v. Weber, 65 Misc. 603, 120 N. Y. Supp. 289; Roth v. Robertson, 64 Misc. 343, 118 N. Y. Supp. 351; Kavanaugh v. Commonwealth Trust Co. of New York, 64 Misc. 303, 118 N. Y. Supp. 758; Sayles v. Central Nat. Bank of Rome, 18 Misc. 155, 41 N. Y. Supp. 1063; Watkins v. Watkins & Turner Lumber Co., 17 Misc. 227, 40 N. Y. Supp. 1042; Robinson v. Smith, 3 Paige 222, 24 Am. Dec. 212.

Ohio. Larwill v. Burke, 19 Ohio Cir. Ct. 449, 513, 10 Ohio Cir. Dec. 605.

Oklahoma. Checotah Hardware Co. v. Hensley, 42 Okla. 260, 141 Pac. 422.

Oregon. Davis v. Hofer, 38 Ore. 150, 63 Pac. 56.

Rhode Island. Hodges v. New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624.

South Carolina. Kickbusch v. Ruggles, 105 S. C. 525, 90 S. E. 163.

South Dakota. Glover v. Manila Gold Mining & Milling Co., 19 S. D. 559, 104 N. W. 261.

Tennessee. Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448.

Utah. Warren v. Robison, 19 Utah 289, 75 Am. St. Rep. 734, 57 Pac. 287.

West Virginia. Kyle v. Wagner, 45 W. Va. 349, 32 S. E. 213.

Wisconsin. Cunningham v. Wechselsberg, 105 Wis. 359, 81 N. W. 414.

England. Atwool v. Merryweather, L. R. 5 Eq. Cas. 464, note.

Canada. Earle v. Burland, 27 Ont. App. 540.

Demand on corporation to sue as condition precedent, see § 2682, *infra*.

Sufficiency of complaint, see Continental Securities Co. v. Belmont, 206 N. Y. 7, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914 A 777, 99 N. E. 138, aff'g

poration,¹⁹ and the stockholder who sues as a representative of the corporation must show a right of action in the corporation.²⁰ Thus, stockholders may sue directors or other officers for conversion or misappropriation of funds in a proper case.²¹ And, in a proper case, a stockholder may sue in a representative capacity to recover from directors, for the benefit of all, moneys improperly paid out by them to themselves or others, whether called dividends or additional salaries,²² and this also applies to unreasonable salaries.²³ Equity has jurisdiction of an action by stockholders against directors or other officers for an account.²⁴ A stockholder may sue directors for an accounting, although not strictly a creditor of the corporation, since their liability to account does not depend upon statutes giving such a remedy to creditors.²⁵ Stockholders may sue for an accounting showing the amount of the losses caused by the mismanagement of officers, although a recovery at law could be had as to some of the transactions.²⁶ A stockholder's suit asking

150 N. Y. App. Div. 298, 134 N. Y. Supp. 635, 75 N. Y. Misc. 234, 133 N. Y. Supp. 560.

The court will have equitable jurisdiction of a suit against directors for an accounting brought by stockholders where the directors admit in their pleadings that moneys collected in behalf of the corporation were secured by them, make no denial of the receipt by them of the amount set out in the complaint, do not plead a stated account, nor deny that they are indebted to the corporation. *Davis v. Hofer*, 38 Ore. 150, 63 Pac. 56.

But where the managing officers of a corporation are the guilty parties complained of, it has been held that a stockholder who owned nearly all of the stock could sue in his own name rather than in the name of the corporation, to cancel a deed. *Hughes Manufacturing & Lumber Co. v. Culver*, 126 Ark. 72, 189 S. W. 850.

¹⁹ *McConnell v. Combination Mining & Milling Co.*, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194, *aff'd* 31 Mont. 563, 79 Pac. 248.

Fraud in inducing purchase of stock is irrelevant in a stockholder's suit for the benefit of all stockholders. *Sedgwick v. Seward Development Co.*, 144 N. Y. App. Div. 455, 129 N. Y. Supp. 209.

²⁰ *Rosenbaum v. Rice*, 86 N. Y. App. Div. 617, 83 N. Y. Supp. 494.

²¹ *Hayes v. Pierson*, 65 N. J. Eq. 353, 58 Atl. 728, 45 Atl. 1091; *Simon v. Weaver*, 143 Wis. 330, 127 N. W. 950.

²² *Godley v. Crandall & Godley Co.*, 212 N. Y. 121, L. R. A. 1915 D 632, 105 N. E. 818, modifying 153 N. Y. App. Div. 697, 139 N. Y. Supp. 236.

²³ *Donald v. Manufacturers' Export Co.*, 142 Ala. 578, 38 So. 841; *Bixler v. Summerfield*, 195 Ill. 147, 62 N. E. 849.

²⁴ *Davis v. Hofer*, 38 Ore. 150, 63 Pac. 56.

²⁵ *Cunningham v. Wechselberg*, 105 Wis. 359, 81 N. W. 414.

²⁶ *McKinnon v. Morse*, 177 Fed. 576.

for an accounting and alleging a violation of fiduciary obligations is a suit in equity rather than an action at law.²⁷

If the corporation is insolvent, however, stockholders cannot sue unless facts are stated to show that there will be something left after paying creditors.²⁸ And where the right to sue is limited by statute to cases where the corporation is insolvent, a stockholder cannot sue in behalf of the corporation, where the corporate assets are sufficient to pay the creditors.²⁹ So, if the directors refuse to sue, a stockholder cannot sue in equity unless he shows that the result of the action will be to promote justice and not inequitable results.³⁰ It has been held that stockholders of a dissolved corporation cannot sue to set aside that part of an order procured by the receiver releasing directors from personal liability, where the order contained other provisions beneficial to the stockholders.³¹

§ 2682. — Request or demand on officers to sue. Stockholders cannot sue in their own behalf in equity, or in behalf of themselves and other stockholders, unless they show that they have unsuccessfully made every reasonable effort to have the corporation sue, or that any such effort would have been useless.³² When a request

²⁷ *Pollitz v. Wabash R. Co.*, 207 N. Y. 113, 100 N. E. 721.

²⁸ *Williams v. Neville*, 98 Miss. 268, 53 So. 594.

²⁹ *Siegman v. Maloney*, 63 N. J. Eq. 422, 51 Atl. 1003.

³⁰ *Siegman v. Maloney*, 63 N. J. Eq. 422, 51 Atl. 1003, *aff'd* 65 N. J. Eq. 372, 54 Atl. 405, 65 N. J. Eq. 374, 54 Atl. 1125.

³¹ *Craig v. James*, 89 N. Y. App. Div. 541, 85 N. Y. Supp. 583, *aff'd* 181 N. Y. 538, 73 N. E. 1121.

³² *United States*. *Monmouth Inv. Co. v. Means*, 151 Fed. 159; *Harrison v. Thomas*, 112 Fed. 22.

Alabama. *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897.

Illinois. *Merle v. Beifeld*, 194 Ill. App. 364.

Indiana. *Tevis v. Hammersmith*, 31 Ind. App. 281, 66 N. E. 79, 912, *aff'd* 161 Ind. 74, 67 N. E. 672.

Maine. *Hershey v. Vaazie*, 24 Me. 9, 41 Am. Dec. 364.

Massachusetts. *Bartlett v. New York, N. H. & H. R. Co.*, 115 N. E. 976; *Bartlett v. New York, N. H. & H. R. Co.*, 221 Mass. 530, 109 N. E. 452; *Converse v. United Shoe Machinery Co.*, 209 Mass. 539, 95 N. E. 929.

Mississippi. *Beckett v. Planters' Compress & Bonded Warehouse Co.*, 107 Miss. 305, 65 So. 275.

Missouri. *Hingston v. Montgomery*, 121 Mo. App. 451, 97 S. W. 202.

Montana. *McConnell v. Combination Mining & Milling Co.*, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194, *aff'd* 31 Mont. 563, 79 Pac. 248.

New Jersey. *Herrick v. Dempster*, 73 N. J. Eq. 145, 75 Atl. 810; *Siegman v. Maloney*, 65 N. J. Eq. 372, 54 Atl. 405, *aff'g* 63 N. J. Eq. 422, 51 Atl. 1003.

New York. *Moran v. Vreeland*, 81 Misc. 664, 143 N. Y. Supp. 522.

Oregon. *Wills v. Nehalem Coal Co.*, 52 Ore. 70, 96 Pac. 528.

to sue will be deemed useless, as determined by the courts, is governed by the rules in regard thereto applicable to stockholders' suits in general;³³ and it is only necessary to state in this connection that no demand is necessary where it is clear that it would be futile,³⁴ as where the officers sought to be held liable are themselves in control of the corporation.³⁵ If the corporation has been dissolved but it still, by statute, exists for the purpose of bringing actions, a stockholder cannot sue for a wrong to the corporation without showing a demand on the corporation to sue or a good excuse for not making a demand.³⁶ If the corporation is in the hands of a receiver or other trustee, demand must first be made

Pennsylvania. *Kelly v. Thomas*, 234 Pa. 419, 51 L. R. A. (N. S.) 122, 83 Atl. 307; *Commonwealth Title Insurance & Trust Co. v. Seltzer*, 227 Pa. 410, 136 Am. St. Rep. 896, 76 Atl. 77.

South Carolina. *Kickbusch v. Ruggles*, 105 S. C. 525, 90 S. E. 163.

Tennessee. *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448.

Texas. *Caffall v. Bandera Tel. Co.*, — Tex. Civ. App. —, 136 S. W. 105.

A contrary statement in *Braswell v. Pamlico Insurance & Banking Co.*, 159 N. C. 628, 42 L. R. A. (N. S.) 101, 75 S. E. 813, was probably a mere oversight.

Whether reasonable time was given directors to act, where letters were sent one week before filing a bill to the twenty-three directors, many of them living in other states, see *Bartlett v. New York, N. H. & H. R. Co.*, 221 Mass. 530, 109 N. E. 452.

Service of demand on secretary of corporation is sufficient. *The Telegraph v. Lee*, 125 Iowa 17, 98 N. W. 364.

³³ *Infra*, chapter on Stockholders.

³⁴ **United States.** *Columbia Nat. Sand Dredging Co. v. Washed Bar Sand Dredging Co.*, 136 Fed. 710.

Iowa. *Schoening v. Schwenk*, 112 Iowa 733, 84 N. W. 916.

Massachusetts. *Von Arnim v. Ameri-*

can Tube Works, 188 Mass. 515, 74 N. E. 680.

Michigan. *Robinson v. De Luxe Motor Car Co. of New Jersey*, 170 Mich. 163, 135 N. W. 897.

New York. *Jacobson v. Brooklyn Lumber Co.*, 184 N. Y. 152, 76 N. E. 1075; *Hanna v. Lyon*, 179 N. Y. 107, 71 N. E. 778; *Polhemus v. Polhemus*, 114 App. Div. 781, 100 N. Y. Supp. 263.

³⁵ *Forbes v. Wilson*, 243 Fed. 264, 267.

For a forcible statement of the rule, quite characteristic of the late Justice Gaynor of New York, see *Polhemus v. Polhemus*, 43 N. Y. Misc. 141, 88 N. Y. Supp. 273, in which he stated that the decision to the contrary in *Fitchett v. Murphy*, 46 N. Y. App. Div. 181, 61 N. Y. Supp. 182, was "so obviously contrary to law that it is deemed inadvertent, and not one that bench or bar should heed as authority."

A stockholder may sue corporate officers for an accounting because of their mismanagement, where defendants hold a majority of the stock, since it would be useless to request the corporation to sue. *Grout v. First Nat. Bank of Grand Junction*, 48 Colo. 557, 21 Ann. Cas. 418, 111 Pac. 556.

³⁶ *Elmergreen v. Weimer*, 138 Wis. 112, 119 N. W. 836.

on him to sue.³⁷ If the governing body is not the board of directors but is the grand lodge of a fraternal order, application for redress must first be made to such lodge.³⁸

In the federal courts, this rule is found in the rules of court governing stockholders' actions.³⁹

§ 2683. — Demand on stockholders as a body to sue. It is not necessary, as a condition precedent, to show an appeal to the body of the stockholders, as a whole, to act, according to the better line of authorities.⁴⁰ In Alabama, however, it is held that demand must not only be made upon the board of directors or other governing body but also upon the stockholders as a body where relief cannot be obtained from the board of directors.⁴¹ In any event, a stockholder need not first demand action by a meeting of stockholders where the alleged wrongdoer controls a majority of the stock.⁴²

Where a statute makes directors personally liable to the corporation for unlawful payment of dividends, a succeeding board of directors is in duty bound to enforce such liability of prior directors; and if they refuse to do so, it has been held that a single stockholder may sue, in behalf of the corporation, one or more of the guilty directors, even though such stockholder had appealed from the decision of the board of directors not to sue to the stockholders as a body and was there defeated, since such action of the directors and majority stockholders does not pertain to the management of the internal affairs of the corporation.⁴³

³⁷ *Planten v. National Nassau Bank of New York*, 174 N. Y. App. Div. 254, 160 N. Y. Supp. 297.

³⁸ *Howze v. Harrison*, 165 Ala. 150, 51 So. 614.

³⁹ *Field v. Western Life Indemnity Co.*, 166 Fed. 607, 610.

Rule 27 of the Rules of Practice in Equity for the federal courts, formerly rule 94, provides that a stockholders' bill must "set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action, or the

reason for not making such effort."

⁴⁰ *Planten v. National Nassau Bank of New York*, 174 N. Y. App. Div. 254, 160 N. Y. Supp. 297; *Continental Securities Co. v. Belmont*, 150 N. Y. App. Div. 298, 134 N. Y. Supp. 635, aff'd 206 N. Y. 7, 51 L. B. A. (N. S.) 112, Ann. Cas. 1914 A 777, 99 N. E. 138.

⁴¹ *Hagwood v. Smith*, 162 Ala. 512, 50 So. 374; *Montgomery Light Co. v. Lahey*, 121 Ala. 131, 25 So. 1006.

⁴² *Forbes v. Wilson*, 243 Fed. 264, 267.

⁴³ *Siegman v. Electric Vehicle Co.*, 140 Fed. 117, under New Jersey statute.

§ 2684. — Status as stockholder as necessary. One who holds stock as collateral security has the same right as any other stockholder to sue in equity, on a proper showing, to hold the directors and other officers liable to the corporation for misappropriation of its property or funds or mismanagement.⁴⁴

On the other hand, a stockholder cannot bring a stockholder's suit where he had ceased to be a stockholder at the time the action was commenced.⁴⁵ But where one formerly a stockholder sues, but he had no right to sue because he had ceased to be a stockholder at the commencement of the action, but the action is brought on behalf of all the stockholders, the action should not be dismissed as to an intervening stockholder who on his own motion had been made a party plaintiff.⁴⁶ Moreover, it is no defense to an action by some stockholders against directors to recover secret profits, that they had sold their stock before the action was commenced, where the injury was to them individually and not to the company, and where the sale was the result of the illegal acts of the directors complained of.⁴⁷

A stockholder who has opposed the sale of all the corporate property, and who has not yet been paid the value of his stock as required by statute in such a case, may sue to recover misappropriations by corporate officers.⁴⁸

§ 2685. — Right of subsequent stockholder to sue. There is some conflict as to whether a stockholder may sue to recover for mismanagement committed before he became a stockholder. In some states it is held that no such right exists,⁴⁹ and also that a stock-

⁴⁴ *Green v. Hedenberg*, 159 Ill. 489, 50 Am. St. Rep. 178, 42 N. E. 851; *Smith v. Smith, Sturgeon & Co.*, 125 Mich. 234, 84 N. W. 144. Contra, see *Erny v. G. W. Schmidt Co.*, 197 Pa. 475, 47 Atl. 877.

The pledgee of stock may hold directors liable to the amount of his claim in the stock pledged. *Smith v. Smith, Sturgeon & Co.*, 125 Mich. 234, 84 N. W. 144, 7 Det. L. N. 477.

⁴⁵ *Hanna v. Lyon*, 179 N. Y. 107, 71 N. E. 778, modifying 76 N. Y. App. Div. 224, 78 N. Y. Supp. 516; *Rafferty v. Donnelly*, 197 Pa. 423, 47 Atl. 202.

One who was a stockholder at the time of the commission of the acts

complained of, but who has ceased to be a stockholder at the time of the commencement of the action, cannot sue. *Hanna v. Lyon*, 179 N. Y. 107, 71 N. E. 778.

⁴⁶ *Hanna v. Lyon*, 179 N. Y. 107, 71 N. E. 778.

⁴⁷ *Porter v. Healy*, 244 Pa. 427, 91 Atl. 428.

⁴⁸ *Cole v. Wells*, 224 Mass. 504, 113 N. E. 189.

⁴⁹ *Matthews v. Headley Chocolate Co.*, 130 Md. 523, 100 Atl. 645, reviewing authorities at some length; *Home Fire Ins. Co. v. Barber*, 67 Neb. 644, 60 L. R. A. 927, 108 Am. St. Rep. 716, 93 N. W. 1024.

holder cannot sue where the acts complained of had been consented to by the transferror of the stock owned by plaintiff⁵⁰ or have long been acquiesced in by the corporation.⁵¹ In other states, a stockholder may sue although he became a stockholder after the transaction of which he complains.⁵²

Rule 27 of the Rules of Practice in equity for the federal courts, formerly rule 94, provides that a stockholders' bill "must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law."

This question is considered more at length in a subsequent chapter in dealing with the effect of transfers of shares of stock.⁵³

§ 2686. Effect of appointment of receiver as precluding suit by corporation, stockholders or creditors. Ordinarily, if the corporation has gone into the hands of a receiver, he is the proper party to bring suit against offending officers of the corporation;⁵⁴ and a stockholder cannot sue, after a receiver has been appointed for the corporation, except by leave of court.⁵⁵ So, if the corporation is in the hands of a receiver, it is held in Idaho that a creditor, or depositor in a bank, cannot sue the officers for mismanagement,⁵⁶ although it would seem that the appointment of a receiver does not preclude the right of a creditor to enforce a liability created by statute in his favor as an individual.⁵⁷

In any event, where the receiver is himself charged with hav-

A purchaser of stock cannot complain of illegal salaries paid before his purchase. *Rankin v. Southwestern Brewery & Ice Co.*, 12 N. M. 54, 73 Pac. 614.

⁵⁰ *Ward v. Smith*, 95 N. Y. App. Div. 432, 88 N. Y. Supp. 700.

⁵¹ *Erny v. G. W. Schmidt Co.*, 197 Pa. 475, 47 Atl. 877.

⁵² *Continental Securities Co. v. Belmont*, 206 N. Y. 7, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914 A 777, 99 N. E. 138, following *Pollitz v. Gould*, 202 N. Y. 11, 38 L. R. A. (N. S.) 988, Ann. Cas. 1912 D 1098, 94 N. E. 1088.

⁵³ See, *infra*, chapter on Stockholders. For review of conflicting authorities, see *Pollitz v. Gould*, 202 N. Y. 11, 38 L. R. A. (N. S.) 988, Ann.

Cas. 1912 D 1098, 94 N. E. 1088.

⁵⁴ *Weslosky v. Quarterman*, 123 Ga. 312, 51 S. E. 426, and see § 2570, *supra*.

⁵⁵ *Kelly v. Dolan*, 233 Fed. 635; *Cunningham v. Wechselberg*, 105 Wis. 359, 81 N. W. 414.

⁵⁶ "If the receiver fails or refuses to do his duty in this regard, that matter ought to be called to the attention of the court, and the court ought to compel him to do so or remove him." *McTamany v. Day*, 23 Idaho 95, 128 Pac. 563, where, however, it is recognized that there are some decisions to the contrary.

⁵⁷ *Patterson v. Minnesota Mfg. Co.*, 41 Minn. 84, 4 L. R. A. 745, 16 Am. St. Rep. 671, 42 N. W. 926.

ing been one of the officials guilty of the wrongdoing, an equitable proceeding may be maintained by the stockholders,⁵⁸ provided, it has been held, that the corporation and the receiver are both made defendants.⁵⁹

If a receiver has been appointed, and the court has refused to permit him to sue officers for negligence because of the existence of a complete defense, a stockholder cannot sue in equity even though the court has given him permission to sue, where no order was made purporting to assign to the stockholder the claim vested in the receiver, nor to confer on him a right to enforce the legal right vested in the receiver.⁶⁰

Where a corporation is in the hands of a receiver, and leave to sue the directors has been granted by the court to minority stockholders, there is no merit in the contention that the suit is premature because brought while the affairs of the company are still being liquidated, where the available assets will probably all go to the creditors.⁶¹

This subject is considered more in detail in a subsequent chapter relating to receivers.

§ 2687. Administrative suit as remedy. In some jurisdictions the liability of corporate officers is ordinarily enforced by a general administrative suit brought by creditors solely to wind up the corporation and to enforce all liabilities of the stockholders and officers existing at the time in favor of creditors as a class. Thus, in Wisconsin the remedy, by statute, is in equity where it is sought to enforce a liability against stockholders and directors in which all the creditors of the corporation are interested,⁶² and where the primary pur-

⁵⁸ *Weslosky v. Quarterman*, 123 Ga. 312, 51 S. E. 426; *Brinckerhoff v. Bostwick*, 88 N. Y. 52, 60, writ of error dismissed 106 U. S. 3, 27 L. Ed. 73.

Where the corporation is in the hands of a receiver, and he was one of the guilty officers sought to be held liable, it is unnecessary to allege any demand made upon the receiver to sue, since he could not be permitted to sue himself. *Weslosky v. Quarterman*, 123 Ga. 312, 51 S. E. 426.

If a director is appointed receiver, and he is chargeable together with other directors, a stockholder may sue

without first requesting the receiver to sue. *Flynn v. Third Nat. Bank*, 122 Mich. 642, 81 N. W. 572.

⁵⁹ *Weslosky v. Quarterman*, 123 Ga. 312, 51 S. E. 426.

⁶⁰ *Kelly v. Dolan*, 233 Fed. 635, 638.

⁶¹ *Weslosky v. Quarterman*, 123 Ga. 312, 51 S. E. 426.

⁶² *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909; *Williams v. Brewster*, 117 Wis. 370, 93 N. W. 479.

In Wisconsin, all liabilities of officers, stockholders and directors of a corporation that can in any event be enforced for the benefit of creditors of a corporation generally or as a

pose of the suit is to enforce any one of the liabilities mentioned in the statute, the other liabilities that may exist, mentioned in the statute, are germane thereto, and must be joined therewith if enforced at all;⁶³ and this includes statutory liabilities of directors of a penal character,⁶⁴ although it does not include a liability of a purely personal nature merely to the particular creditor imposed upon, such as liability for deceit.⁶⁵ In Canada the liability of directors is generally enforced by a liquidator under what is called a "misfeasance summons."

§ 2688. Form of action at common law—In general. Where the statute does not provide the form of remedy, it has been held in New Hampshire that a creditor may employ any form of action adapted to enforce a statutory liability, and hence may recover in an action of debt; and the court said, in regard to the question of contribution: "If an officer would be entitled to contribution, were it enforced in equity, he is entitled to it, if the liability is enforced in an action at law; for it is the character of the liability—not the form of action by which it is enforced—which is determinative of his right to contribution."⁶⁶ If the corporation has given a note, the holder of it should sue the officer on the debt rather than on the note.⁶⁷

§ 2689. — Action for money had and received. An action for money had and received lies against the president and general manager of a corporation, who, as such, received money to which plaintiff was entitled, where such officer knew of the plaintiff's right to the money.⁶⁸

§ 2690. Remedy for injury from false representations. The remedy of shareholders against the general manager who has induced them to sell their stock to him, by false representations as to its value, is not confined to an action for rescission, but includes an action against such officer, in which all the defrauded stockholders may

class, may be dealt with in a single suit and are so connected with each other as to constitute but a single cause of action. *Hurlbut v. Marshall*, 62 Wis. 590, 22 N. W. 852.

⁶³ *Gager v. Marsden*, 101 Wis. 598, 77 N. W. 922.

⁶⁴ *Williams v. Brewster*, 117 Wis. 370, 93 N. W. 479.

⁶⁵ *Killen v. Barnes*, 106 Wis. 546,

82' N. W. 536, explained in *Williams v. Brewster*, 117 Wis. 370, 93 N. W. 479.

⁶⁶ *Coulombe v. Eastman*, 75 N. H. 531, 77 Atl. 936.

⁶⁷ *First Nat. Bank of Missoula v. Cottonwood Land Co.*, 51 Mont. 544, 154 Pac. 582.

⁶⁸ *Alexander v. Coyne*, 143 Ga. 696, 85 S. E. 831.

join, to require him to account for the profits obtained by him by a resale.⁶⁹

§ 2691. **Remedy in case of transaction voidable because officer adversely interested or where he has profited thereby.** The corporation has several courses open to it, where it has contracted or dealt with one or more of its officers, and the contract is voidable. First, it may, if it deems it advisable, hold the officer on the contract according to its terms.⁷⁰ Second, it may repudiate the contract and sue to set it aside, although if other officers represented the corporation in the deal it is generally necessary to show unfairness or bad faith.⁷¹ Third, the corporation may elect to affirm the contract and hold the officer for profits received.⁷² Thus, where directors or other officers, conspiring with other directors of the corporation, sell land to the corporation at a price largely in excess of its value, the corporation may either (1) sue the officers for their secret profits, without tendering a reconveyance of the lands or otherwise disaffirming the sale, or (2) may rescind the sale if the parties can be placed in statu quo and even in some instances, by leave of court, where the parties can only partially be put in statu quo.⁷³ The law governing is clearly stated as follows: "As a general rule, a trustee or agent cannot purchase on his own account what he sells on account of another nor purchase on account of another what he sells on his own account. He cannot unite in himself the opposite characters of buyer and seller. And if he does do so, the cestui que trust or principal, unless upon the fullest knowledge of all the facts, he elects to confirm the act of the trustee or agent, may repudiate it, or he may charge the profits made by the trustee or agent with an implied trust for his benefit."⁷⁴ The remedy for secret profits is ordinarily an action for an accounting.⁷⁵ If a director or other corporate officer derives a personal benefit, which is provided for in connection with a contract between the corporation and a third person,

⁶⁹ *Black v. Simpson*, 94 S. C. 312, 46 L. R. A. (N. S.) 137, 77 S. E. 1023. See, however, dissenting opinion of Justice Fraser as to misjoinder of parties.

⁷⁰ *Rutland Elec. Light Co. v. Bates*, 68 Vt. 579, 54 Am. St. Rep. 904, 35 Atl. 480.

⁷¹ See §§ 2345-2348, *supra*.

⁷² *Rutland Elec. Light Co. v. Bates*,

68 Vt. 579, 54 Am. St. Rep. 904, 35 Atl. 480.

⁷³ *United Zinc Companies v. Harwood*, 216 Mass. 474, Ann. Cas. 1915 B 948, 103 N. E. 1037.

⁷⁴ *Parker v. Nickerson*, 112 Mass. 195, 196.

⁷⁵ *Metcalf v. American School Furniture Co.*, 122 Fed. 115, 123.

the corporation has two remedies, if not more. It may sue to set aside the contract,⁷⁶ or it may hold the officer, as a trustee for its benefit, for the amounts or value of the benefits received by him.

In England, however, where a director who sold property to the corporation was under no duty to purchase it in the first place for the company, and was in no sense a trustee for the company as to the purchased property, and he resold it to the company without disclosing the price he paid for it, the corporation cannot affirm the sale and recover the profit realized on the resale, it is held, but must either rescind in toto or stand by the contract.⁷⁷

§ 2692. Assignment of cause of action. If the cause of action survives, it is assignable; otherwise, it is not assignable. Therefore, reference should be made to the section stating the law as to abatement and revival of these actions.⁷⁸ The right of a corporation to sue officers for fraud in selling it land at an excessive price, or to rescind the sale because thereof, is not assignable at law or in equity.⁷⁹

§ 2693. Venue of actions. Actions to hold corporate officers personally liable to a creditor or creditors, pursuant to the terms of a statute, for debts of the corporation, are generally considered within a statutory provision that an action for the recovery of a "penalty or forfeiture" imposed by statute shall be tried in the county where the cause of action arose.⁸⁰ Generally, the question of venue under such a statute narrows itself down to whether the liability imposed by the corporation statute is penal—a question already discussed at length.⁸¹ If the corporation statute is penal, then the penal statute applies. If it is not penal, then the penal statute does not apply.⁸² Where a statute merely makes corporate officers liable for fraud, unfaithfulness or dishonesty to the extent creditors are specially injured by such acts, it is held in Minnesota that the statute imposes no penalty within such a statute relating to venue,⁸³ and it would

⁷⁶ *Guild v. Parker*, 43 N. J. L. 430.

⁷⁷ *Burland v. Earle*, [1902] A. C. 83, 98, 99.

⁷⁸ See §§ 2705, 2706, *infra*.

Assignment under Michigan statute, see *Hicks v. Steel*, 142 Mich. 292, 4 L. R. A. (N. S.) 279, 105 N. W. 767.

⁷⁹ *United Zinc Companies v. Harwood*, 216 Mass. 474, Ann. Cas. 1915 B 948, 103 N. E. 1037.

⁸⁰ *Woodworth v. Henderson*, 28 Colo.

381, 65 Pac. 25, where question as to whether statute was penal was not discussed; *Veeder v. Baker*, 83 N. Y. 163.

⁸¹ See § 2597 et seq., *supra*.

⁸² See *Hutchinson v. Young*, 80 N. Y. App. Div. 246, 80 N. Y. Supp. 259, false reports.

⁸³ *Flowers v. Bartlett*, 66 Minn. 213, 68 N. W. 976, overruling *Merchants' Nat. Bank of Chicago v. Northwestern*

seem that this decision is undoubtedly correct since the statute imposes no new liability.

§ 2694. Conditions precedent. The right of the corporation to sue its officers, independently of statute, does not depend upon the solvency or insolvency of the corporation.⁸⁴ Where a receiver sues, it has been held that it is necessary to exhaust the remedy against stockholders before directors can be held personally liable for issuing paid-up stock to stockholders upon payment of only fifty per cent. thereof.⁸⁵ If the action is for a personal tort, it is not necessary to exhaust remedies against the corporation as a condition precedent.⁸⁶

§ 2695. Action as premature. It has been held that "a treasurer holding money of a corporation is bound to keep it distinct, and, if he appropriates it and makes himself a debtor by wrong instead of a trustee, he may be sued by the corporation at once, whether his office continues or not."⁸⁷ So an action by a receiver against the directors of an insolvent corporation to recover sums abstracted by the cashier, is not premature merely because the total loss suffered by the corporation has not been ascertained with precision.⁸⁸

§ 2696. Limitations, laches and estoppel—In general. As will be noticed there is considerable conflict in regard to this question. The right of a corporation to avoid a transaction between it and an officer, or where the officer is adversely interested, as barred by laches, has already been stated.⁸⁹

§ 2697. — Whether statute runs in favor of directors or other officers. Some of the courts have held that the relation between the directors and other officers of a corporation and the corporation, or the stockholders collectively, is that of trustee and cestui que trust to such an extent that the statute of limitations does not run

Manufacturing & Car Co., 48 Minn. 349, 51 N. W. 117.

⁸⁴ Campbell v. Watson, 62 N. J. Eq. 396, 50 Atl. 120. But see, as to necessity of first recovering judgment against corporation, § 2668.

⁸⁵ Wait v. McKee, 95 Ark. 124, 128, 128 S. W. 1028.

⁸⁶ Solomon v. Bates, 118 N. C. 311,

54 Am. St. Rep. 725, 24 S. E. 478. And see Braswell v. Pamlico Insurance & Banking Co., 159 N. C. 628, 42 L. R. A. (N. S.) 101, 75 S. E. 813.

⁸⁷ Marlborough Ass'n v. Peters, 179 Mass. 61, 60 N. E. 396.

⁸⁸ Campbell v. Watson, 62 N. J. Eq. 396, 50 Atl. 120.

⁸⁹ See §§ 2401, 2402, supra.

against a suit in equity against them to compel them to account or pay damages for misapplication of assets or mismanagement,⁹⁰ at least until they have ceased to occupy the relation.⁹¹ This view, however, is contrary to the weight of authority. Even if the relation between a corporation and its officers is that of trustee and cestui que trust the trust is not an "express" trust as to which only limitations do not run; and in most jurisdictions it is held that the statute of limitations applies both to actions at law and suits in equity to compel officers to account for assets misappropriated by them, or to hold them liable for losses caused by their wrongful or unauthorized acts, or by other negligence.⁹² So, by the weight of authority, the statute of limitations applies to an action at law or suit in equity by

⁹⁰ *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530; *Southern Mut. Ins. Co. v. Pike*, 32 La. Ann. 483; *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775. Compare *Ventress v. Wallace*, 111 Miss. 357, L. R. A. 1917 A 971, with note, 71 So. 636.

⁹¹ *Sperling's Appeal*, 71 Pa. St. 11, 10 Am. Rep. 684; *Danville, Hazelton & W. R. Co. v. Kase* (Pa.), 39 Atl. 301. See also *Murray v. Smith*, 166 N. Y. App. Div. 525, 152 N. Y. Supp. 102.

The statute of limitations does not begin to run against a suit by a national bank against its officers and directors to enforce their liability under U. S. Rev. St. § 5239, for loss resulting from violation of the national banking law, until such officers have surrendered control of the bank to their successors. *National Bank of Commerce of Tacoma, Washington v. Wade*, 84 Fed. 10, approved in *Ventress v. Wallace*, 111 Miss. 357, L. R. A. 1917 A 971, 71 So. 636.

⁹² *United States. Dannmeyer v. Coleman*, 11 Fed. 97.

Connecticut. Lippitt v. Ashley, 89 Conn. 451, 94 Atl. 995, applying rule to directors of savings banks, and distinguishing *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775, as involving a violation of express terms of the charter and by-laws.

Kentucky. Lexington & O. R. Co.

v. Bridges, 7 B. Mon. 556, 46 Am. Dec. 528.

Maine. Baxter v. Moses, 77 Me. 465, 52 Am. Rep. 783, 1 Atl. 350.

Maryland. Emerson v. Gaither, 103 Md. 564, 8 L. R. A. (N. S.) 738, 7 Ann. Cas. 1114, 64 Atl. 26.

Massachusetts. Hensdale v. Larned, 16 Mass. 65.

Missouri. Landis v. Saxton, 105 Mo. 486, 24 Am. St. Rep. 403, 16 S. W. 912.

New Jersey. Williams v. Halliard, 38 N. J. Eq. 373.

New York. Brinckerhoff v. Bostwick, 99 N. Y. 185, 1 N. E. 663; *Mason v. Henry*, 83 Hun 546, 31 N. Y. Supp. 1068, 152 N. Y. 529, 46 N. E. 837.

Pennsylvania. Watts' Appeal, 78 Pa. St. 370.

Tennessee. Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448.

England. In re Lands Allotment Co., [1894] 1 Ch. 616; *Metropolitan Bank v. Heiron*, 5 Exch. Div. 319; *Whitworn v. Watkins*, 78 L. T. (N. S.) 188.

Directors are not trustees of an express trust with respect to the property, or funds of the corporation, but of an implied or resulting trust created by operation of law, and hence the statute of limitations and laches may be invoked in their de-

a corporation or a stockholder to recover secret profits made by officers in transactions on behalf of the company, or to set aside a transaction because of their personal interest or fraud.⁹³ Thus, by the better rule, officers of a national bank are not the trustees of an express, but of an implied, trust, for the bank, and statutes of limitation and the doctrine of laches may be invoked in their defense.⁹⁴

In some states, however, particular statutes imposing liability expressly provide that no statute of limitation shall be a bar to any suit against officers thereunder.⁹⁵

§ 2698. — What laws governs. An action to enforce the common-law liability of directors for mismanagement is governed by the statute of limitations of the forum rather than the statute of the domicile of the corporation;⁹⁶ but the reverse is true where the action is to enforce a statutory liability.⁹⁷ In 1903, the Supreme Court of

fense when sued for a breach of trust. *Cooper v. Hill*, 94 Fed. 582; *Winston v. Gordon*, 115 Va. 899, 912, 914, 80 S. E. 756.

In Wisconsin, it was held that directors are trustees of an express trust and therefore that the statute of limitations does not run in their favor against the creditors of the corporation; and the court distinguished contrary decisions as being in actions brought by the corporation or by a receiver: but on a rehearing, the court reversed itself and held that directors are not trustees of an express trust so far as they may be sued at law, and that limitations run in their favor. *Boyd v. Mutual Fire Ass'n of Eau Claire*, 116 Wis. 155, 61 L. R. A. 918, 96 Am. St. Rep. 948 with note, 94 N. W. 171, 90 N. W. 1086.

Savings banks directors are not to be treated as trustees of a direct or express trust, but are trustees of an implied trust, so far as the statute of limitation is concerned; and limitations begin to run as soon as the cause of action accrues and is not postponed until the end of the term of office of the directors, where based on passive negligence. *Lippitt v. Ashley*, 89 Conn. 451, 94 Atl. 995.

⁹³ *United States. Dannmeyer v. Coleman*, 11 Fed. 97.

Kentucky. Covington & L. R. Co. v. Bowler's Heirs, 9 Bush 468.

Missouri. Landis v. Saxton, 105 Mo. 486, 24 Am. St. Rep. 403, 16 S. W. 912.

New York. Brinckerhoff v. Bostwick, 99 N. Y. 185, 1 N. E. 663; *Mason v. Henry*, 83 Hun 546, 31 N. Y. Supp. 1068, 152 N. Y. 529, 46 N. E. 837; *Pierson v. Morgan*, 20 Abb. N. Cas. 428.

Pennsylvania. Watts' Appeal, 78 Pa. St. 370.

Tennessee. Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448.

England. Metropolitan Bank v. Heiron, 5 Exch. Div. 319.

⁹⁴ *Cooper v. Hill*, 94 Fed. 582, 590.

⁹⁵ See, for instance, Cal. Civ. Code, § 309.

⁹⁶ *Great Western Min. & Mfg. Co. v. Harris' Estate*, 111 Fed. 38, rev'd on other grounds 128 Fed. 321.

⁹⁷ *Davis v. Mills*, 113 Fed. 678, following *Brunswick Terminal Co. v. National Bank of Baltimore*, 99 Fed. 635, 48 L. R. A. 625, which latter case, however, was an action against a stockholder.

the United States held that a director sued under a statute in a sister state may avail himself of the period of limitation expressly fixed by the laws of the domicile of the corporation for such actions.⁹⁸ If the jurisdiction of a court of equity of a suit by a stockholder to recover damages from corporate officers for their negligence is concurrent with that of a court of law to litigate the claim at the instance of the receiver, the statute of limitations of the forum controls a federal court, since in such a case a court of equity is equally bound with a court of law to apply the statute of limitations.⁹⁹

§ 2699. — Rule in equity. If the action is maintainable either at law or in equity, and suit is brought in equity, the court of equity will follow the statute of limitations, unless unusual or extraordinary circumstances render its application inequitable in a particular case.¹

§ 2700. — Period of limitations which governs in general. In some states a special statute expressly fixes the period of limitations as to actions against directors or other officers on a cause of action created by statute² or even in case of common-law liability.³ In other states, the period of limitations is that applicable to "all actions founded upon any contract or liability, expressed or implied, not in writing."⁴ In still other states, the period is that fixed for actions upon a "liability created by statute"⁵ or "for relief against fraud."⁶

If the action is not based on a statute, then actions for mismanagement are sometimes held to be based on a contract rather than on a tort. Thus, in one case the limitation applicable to actions "on contract not otherwise provided for" was held to govern in an ac-

⁹⁸ *Davis v. Mills*, 194 U. S. 451, 48 L. Ed. 1067.

⁹⁹ *Kelly v. Dolan*, 233 Fed. 635, 639.

¹ *Cooper v. Hill*, 94 Fed. 582.

² See *Davis v. Mills*, 121 Fed. 703, citing Montana statutes; *Cockrill v. Cooper*, 86 Fed. 7, rev'g 78 Fed. 679, construing Arkansas statute governing "special actions on the case."

In Arkansas, the action must be brought within three years. *Zimmerman v. Western & S. Fire Ins. Co.*, 121 Ark. 408, Ann. Cas. 1917 D 513, 181 S. W. 283.

³ In Pennsylvania, a statute ex-

pressly fixes six years as the limit for actions against directors for negligence and the like. Act March 28, 1867, referred to in *Kelly v. Dolan*, 233 Fed. 635, 640.

⁴ *Nebraska Nat. Bank v. Walsh*, 68 Ark. 433, 82 Am. St. Rep. 301, 59 S. W. 952.

⁵ *Frame v. Ashley*, 59 Kan. 477, 53 Pac. 474, rev'g 4 Kan. App. 265, 45 Pac. 927; *Seglem v. Yaeger*, 8 Kan. App. 655, 56 Pac. 508.

⁶ *Brown v. Clow*, 158 Ind. 403, 62 N. E. 1006.

tion by a stockholder in behalf of the corporation against directors for mismanagement, on the theory that "the relation of a director to a corporation implies a contract that he will use ordinary diligence in the discharge of the duties he undertakes by accepting the office" and "for a breach of this duty, an action lies."⁷ In Virginia, an action against directors for mismanagement is held not based on contract, within the three-year statute, but on a breach of duty as to which suits are not barred until five years have elapsed, provided the cause of action survives the death of a party.⁸ In New York, a suit by stockholders in behalf of the corporation against directors for mismanagement, where not based on any statute, was held to be governed by the ten-year limitation.⁹ In particular cases, the statute applicable has been held the one governing actions to enforce an implied or constructive trust,¹⁰ actions not otherwise provided for,¹¹ and actions for negligence.¹²

The limitation applicable to an action by the corporation at law is equally applicable to the suit of the stockholder upon the corporate right of action in equity.¹³ If the right of the corporation to sue is barred by limitations, a stockholder cannot sue as representing the corporation.¹⁴ Where the action is brought before the statute has run, by a stockholder in behalf of himself and all other stockholders, other stockholders who come in by name as parties but after the statute has run are not barred.¹⁵

§ 2701. — Period of limitations governing action to enforce penalty as applicable. In determining what period of limitations is applicable, it is first necessary, where the action is based on a statute, to ascertain whether the statute is a penal one so as to be within the short period fixed for actions for a statutory penalty.¹⁶ If deemed

⁷ *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448.

⁸ *Winston v. Gordon*, 115 Va. 899, 80 S. E. 756, holding action survived.

⁹ *Brinckerhoff v. Bostwick*, 99 N. Y. 185, 1 N. E. 663.

¹⁰ *Covington & L. R. Co. v. Bowler's Heirs*, 9 Bush (Ky.) 468.

¹¹ *Brinckerhoff v. Bostwick*, 99 N. Y. 185, 1 N. E. 663; *Murray v. Smith*, 166 N. Y. App. Div. 528, 152 N. Y. Supp. 102; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448.

¹² *Stone v. Rottman*, 183 Mo. 552, 82 S. W. 76.

¹³ *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448.

¹⁴ *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448.

¹⁵ *Brinckerhoff v. Bostwick*, 99 N. Y. 185, 1 N. E. 663.

¹⁶ Whether statutes deemed penal or remedial, see §§ 2597-2603, supra.

a penal statute, then the action is within the clause of the statute of limitations relating to actions for penalties, or actions "upon a statute for a penalty or forfeiture,"¹⁷ unless otherwise specially provided.¹⁸ On the other hand, if the statute is deemed to be a remedial rather than a penal statute, then such short period of limitation is not applicable.¹⁹ The liability imposed upon the directors or other officers of a corporation may be contractual or quasi contractual, and not penal in its nature; and in such a case it will be governed by the clause of the statute of limitations relating to actions *ex contractu*, or to actions to enforce a liability created by statute, and not by the clause limiting the time of commencing actions for the recovery of a penalty.²⁰ Thus, actions by or in behalf of creditors to recover from directors or other corporate officers moneys paid out by them as dividends, where based on a statute creating such liability, have been held not actions for a penalty so as to be barred by the short statute of limitations applicable to actions to recover a

¹⁷ **United States.** *Davis v. Mills*, 194 U. S. 451, 48 L. Ed. 1067, construing Montana statutes; *Davis v. Mills*, 113 Fed. 678, decided under Montana statute and also under Connecticut statute; *Patterson v. Thompson*, 86 Fed. 85.

Colorado. *Dart v. Hughes*, 49 Colo. 465, 109 Pac. 952; *Clough v. Rocky Mountain Oil Co.*, 25 Colo. 520, 55 Pac. 809.

Indiana. *Brown v. Clow*, 158 Ind. 403, 411, 62 N. E. 1006.

Minnesota. *Merchants' Nat. Bank of Chicago v. Northwestern Manufacturing & Car Co.*, 48 Minn. 349, 51 N. W. 117.

Montana. *State Sav. Bank of Butte City v. Johnson*, 18 Mont. 440, 33 L. R. A. 552, 56 Am. St. Rep. 591, 45 Pac. 662.

New York. *Knox v. Baldwin*, 80 N. Y. 610; *Wiles v. Suydam*, 64 N. Y. 173; *Jones v. Barlow*, 62 N. Y. 202; *Merchants' Bank of New Haven v. Bliss*, 35 N. Y. 412.

To same effect, *Sturges v. Burton*, 8 Ohio St. 215, 72 Am. Dec. 582.

Effect of requiring written notice of intention to hold officer personally

liable for failure to file report, to be served within three years, see *Staten Island Midland R. Co. v. Hinchcliffe*, 34 N. Y. Misc. 624, 70 N. Y. Supp. 601.

¹⁸ *Davidson v. Witthaus*, 106 N. Y. App. Div. 182, 94 N. Y. Supp. 428.

Six months' limit to sue for failure to file an annual report was held not unreasonable. *Davidson v. Witthaus*, 106 N. Y. App. Div. 182, 94 N. Y. Supp. 428.

¹⁹ *McDonald v. Mueller*, 123 Ark. 226, 183 S. W. 751; *Nebraska Nat. Bank v. Walsh*, 68 Ark. 433, 82 Am. St. Rep. 301, 59 S. W. 952; *Hargroves v. Chambers*, 30 Ga. 580; *Neal v. Moultrie*, 12 Ga. 104; *American Credit-Indemnity Co. v. Ellis*, 156 Ind. 212, 59 N. E. 679; *St. John v. Stafford*, 26 Ind. App. 695, 59 N. E. 1075.

Rule applied to statute making directors liable for debts contracted in excess of debt limit, but not prohibiting them from contracting such debts. *Woolverton v. Taylor*, 132 Ill. 197, 22 Am. St. Rep. 521, 23 N. E. 1007, rev'g 30 Ill. App. 70.

²⁰ *Brown v. Clow*, 158 Ind. 403, 62 N. E. 1006.

penalty.²¹ In Kansas, an action against bank officers for recovery of deposits received by them while the bank was insolvent is held to be based upon a "liability created by statute" rather than upon a "statute for penalty or forfeiture," so far as the statute of limitations is concerned.²²

The action is not one "for any forfeiture upon any penal statutes," so as to be within the one-year limitation of the Connecticut statute.²³ So in Arkansas, a statute providing that "all actions upon penal statutes, where the penalty, or any part thereof, goes to the state or any county or person suing for the same" shall be commenced within two years, has been held inapplicable to actions by creditors against directors to recover their debts under the statute making directors so liable where they fail to file an annual report, on the theory that statutes giving the remedy to the party aggrieved are not penal, and also that the word "person" as used therein means simply "any other person who sues as a common informer, and not one having a special interest by reason of any injury or grievance."²⁴

§ 2702. — Time when statute begins to run. Generally, where the cause of action is not based upon a statute, the cause of action begins to run from the time of the alleged wrongful act or omission,²⁵ subject to the exception that ordinarily, in case of fraud or concealment, the statute does not begin to run until discovery of the wrongful conduct, or the lapse of time after when it should have been discovered in the exercise of reasonable diligence,²⁶ and sub-

²¹ "The object of section 923 is to compel restitution of the very money unlawfully paid out under the guise of a dividend, and, so far as the interests of creditors is affected, is remedial and compensatory." *Metzger v. Joseph*, 111 Miss. 385, 71 So. 645.

²² *Frame v. Ashley*, 59 Kan. 477, 53 Pac. 474, rev'g 4 Kan. App. 265, 45 Pac. 927.

²³ *Davis v. Mills*, 121 Fed. 703, 704.

²⁴ *Nebraska Nat. Bank v. Walsh*, 68 Ark. 433, 82 Am. St. Rep. 301, 59 S. W. 952, distinguishing New York cases because decided under a statute relating to actions upon a statute for a penalty "when the action is given to the person aggrieved" or to that person and the people of the state.

²⁵ *Cooper v. Hill*, 94 Fed. 582, 585.

²⁶ *Brinckerhoff v. Roosevelt*, 143 Fed. 478; *Lexington & O. R. Co. v. Bridges*, 7 B. Mon. (Ky.) 556, 46 Am. Dec. 528; *Ventress v. Wallace*, 111 Miss. 357, L. R. A. 1917 A 971 with note, 71 So. 636.

The statute, when applicable, will not begin to run until the corporation has knowledge of the fraudulent or wrongful acts, and the knowledge of the guilty officers is not imputable to it. *Coxe v. Huntsville Gas Light Co.*, 106 Ala. 373, 17 So. 626; *Bent v. Priest*, 86 Mo. 475; *Metropolitan Bank v. Heiron*, 5 Exch. Div. 319; *In re Fitzroy Bessemer Steel, etc., Co.*, 50 L. T. (N. S.) 144.

Limitations begin to run against the common-law right of action

ject to a further exception where the offending directors are in control, in which case the statute does not begin to run until they cease to be directors.²⁷ Whether ignorance of the cause of action prevents the running of the statute is governed by the general rules applicable to all actions, including the question of the effect where fraud is the ground for relief.²⁸

Generally, where liability is created by statute, limitations commence to run against a creditor as soon as his cause of action accrues.²⁹ If the statutory liability is for all debts of the corporation "contracted" during the period of the neglect or refusal, the cause of action accrues at once when the debt is contracted.³⁰ If the stat-

against directors for mismanagement from the time the wrong was done, in the absence of fraud or concealment, rather than from the time the party suing obtained knowledge of the facts. *Winston v. Gordon*, 115 Va. 899, 919, 80 S. E. 756.

Construction of New York statute expressly declaring that cause of action for fraud shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud, as limited to actions which formerly were solely cognizable by the court of chancery, see *Mason v. Henry*, 152 N. Y. 529, 46 N. E. 837.

Action against directors for unauthorized reduction of corporate capital was held not based upon fraud, and hence not within statute providing that in actions for fraud the cause of action does not accrue until discovery of the fraud. *Thomas v. Richter*, 88 Wash. 451, 153 Pac. 333.

In case of directors of savings banks, where it was held that the directors stood both as to the bank and its depositors in the position of trustees of a direct trust, limitations do not begin to run until knowledge of their wrongdoing has been obtained. *Greenfield Sav. Bank v. Abercrombie*, 211 Mass. 252, 39 L. R. A. (N. S.) 173, Ann. Cas. 1913B 420, 97 N. E. 897.

"It is universally held that mere ignorance of his rights on the part of the plaintiff, without any fraud by the defendant, will not toll the statute." *Link v. McLeod*, 194 Pa. St. 566, 45 Atl. 340.

In action for secret profits, the statute does not begin to run until the corporation has notice of the facts, or is chargeable with notice. *Coxe v. Huntsville Gas Light Co.*, 106 Ala. 373, 17 So. 626; *Bent v. Priest*, 86 Mo. 475; *Metropolitan Bank v. Heiron*, 5 Exch. Div. 319; *In re Fitzroy Bessemer Steel, etc., Co.*, 50 L. T. (N. S.) 144.

²⁷ *National Bank of Commerce of Tacoma, Washington v. Wade*, 84 Fed. 10, 15; *Ventress v. Wallace*, 111 Miss. 357, L. R. A. 1917 A 971 with note, 71 So. 636.

²⁸ See Wood, *Limitations* (4th Ed.), §§ 274-276f.

²⁹ *Patterson v. Thompson*, 86 Fed. 85; *Morgan v. Hedstrom*, 164 N. Y. 224, 58 N. E. 26; *Chapman v. Lynch*, 156 N. Y. 551, 51 N. E. 275; *Losee v. Bullard*, 79 N. Y. 404; *Jones v. Barlow*, 62 N. Y. 202; *Blake v. Clausen*, 10 N. Y. App. Div. 223, 41 N. Y. Supp. 772, 158 N. Y. 727, 53 N. E. 1123.

³⁰ *Continental Nat. Bank of Memphis, Tennessee v. Buford*, 107 Fed. 188, aff'd 114 Fed. 290, construing Arkansas statute; *Bassett v. St. Albans Hotel Co.*, 47 Vt. 313. See also

ute makes officers liable "for the debts of the corporation then existing or incurred while they remain in office," the cause of action accrues on the maturity of the claim against the corporation.³¹ In any event, the right of action which is created by statute accrues not later than when the debt is due, after the commission or omission of the act referred to in the statute.³² If the action is based on the statute requiring the filing of annual reports, it is generally held that the statute commences to run from the maturity of plaintiff's debt rather than from the time of default in making the report,³³ and that the occurrence of succeeding defaults does not change the time from which the statute runs;³⁴ and since there is no default until after the time the report is required to be filed, the cause of action does not accrue until after the expiration of such time and also after the maturity of plaintiff's debt.³⁵ In Colorado, however, it is held that the one-year limitation begins to run when the default of the directors in failing to file their annual report occurred, and not when the cause of action accrues to the creditor; that the statute begins to run at that time, not only as to company debts already contracted, but also as to those which may be thereafter contracted; and that it is then set in motion not only as to liabilities accrued but also as to contingent ones; and that the dates when

Swan v. Burnham, 70 N. H. 580, 49 Atl. 93.

³¹ Patterson v. Wade, 115 Fed. 770, construing Oregon statute; Patterson v. Thompson, 86 Fed. 85, 87; Woolverton v. Taylor, 132 Ill. 197, 22 Am. St. Rep. 521, 23 N. E. 1007, rev'g 30 Ill. App. 70; Jones v. Barlow, 62 N. Y. 202; Sullivan v. Sullivan Mfg. Co., 20 S. C. 79.

The statute begins to run against a creditor under such a statute from the maturity of his debt, and not from the time it is originally created, e. g., from the maturity of a note, and not from its date. Woolverton v. Taylor, 132 Ill. 197, 208, 22 Am. St. Rep. 521, 23 N. E. 1007, rev'g on this ground 30 Ill. App. 70.

³² Patterson v. Thompson, 86 Fed. 85.

The statute of limitations begins to run against the statutory action for failure to file an annual report not

later than the maturity of the debt held by the creditor. Continental Nat. Bank of Memphis, Tennessee v. Buford, 114 Fed. 290; McDonald v. Mueller, 123 Ark. 226, 183 S. W. 751.

³³ State Sav. Bank of Butte City v. Johnson, 18 Mont. 440, 33 L. R. A. 552, 56 Am. St. Rep. 591, 45 Pac. 662; Morgan v. Hedstrom, 164 N. Y. 224, 58 N. E. 26, aff'g 25 N. Y. App. Div. 547, 49 N. Y. Supp. 1049; Duckworth v. Roach, 81 N. Y. 49.

The right of holders of corporate bonds to sue to enforce the personal liability of the directors, because of their failure to file a report, does not accrue until the bonds mature, and the statute of limitations does not commence to run until then. Morgan v. Hedstrom, 164 N. Y. 224, 58 N. E. 26.

³⁴ See § 2703.

³⁵ See cases cited in note 30.

company debts are contracted or fall due have no bearing upon the running of the statute.³⁶

§ 2703. — Renewal or extension of cause of action. The statutory cause of action accruing to creditors of a corporation against the directors or trustees who fail to file an annual report, as required by statute, is not renewed or extended by the continuance of the default, or by subsequent defaults in filing reports.³⁷ Nor is it extended by renewals or extensions of time of payment given to the corporation by the creditor, without the director's consent, or by part payments made by the corporation.³⁸ Under a statute making directors liable where they contract debts in excess of the debt limit, new causes of action do not accrue to existing creditors each time the indebtedness of the corporation is increased after the debt limit has been passed.³⁹ Furthermore a new cause of action

³⁶ *Dart v. Hughes*, 49 Colo. 465, 109 Pac. 952, approving *Hazelton v. Porter*, 17 Colo. App. 1, 67 Pac. 170 which is said to overrule *Larsen v. James*, 1 Colo. App. 313, 29 Pac. 183, and *Colorado Fuel & Iron Co. v. Lenhart*, 6 Colo. App. 511, 41 Pac. 834, in so far as they hold that as to subsequent debts the statute begins to run from the date a cause of action accrued thereon against the company; *Clough v. Rocky Mountain Oil Co.*, 25 Colo. 520, 55 Pac. 809.

The right of a creditor to sue a director to enforce his statutory liability because of failure to file an annual report does not accrue before the time for filing the report has expired, and the statute of limitations does not commence to run before then. *Clough v. Rocky Mountain Oil Co.*, 25 Colo. 520, 55 Pac. 809.

³⁷ *State Sav. Bank of Butte City v. Johnson*, 18 Mont. 440, 33 L. R. A. 552, 56 Am. St. Rep. 591, 45 Pac. 662; *Morgan v. Hedstrom*, 164 N. Y. 224, 58 N. E. 26; *Chapman v. Lynch*, 156 N. Y. 551, 51 N. E. 275; *Losee v. Bulard*, 54 How. Pr. (N. Y.) 319, 79 N. Y. 404. Compare *Trinity Church v. Vanderbilt*, 98 N. Y. 170.

In a New York case it was held that, where the act of a corporation in receiving money on deposit is *ultra vires*, the depositor's right to maintain an action for money had and received accrues at the time of the deposit, and, the directors having failed to file an annual report prior to the time of the deposit, the statute of limitations against an action to enforce their personal liability runs from the time of the deposit, and is not interrupted by credits of payment or charges of interest on the account, or by subsequent failures to file reports. *Chapman v. Lynch*, 156 N. Y. 551, 51 N. E. 275.

³⁸ *Patterson v. Wade*, 115 Fed. 770; *Patterson v. Thompson*, 86 Fed. 85; *Blake v. Clausen*, 10 N. Y. App. Div. 223, 41 N. Y. Supp. 772, 158 N. Y. 727, 53 N. E. 1123.

Extensions of time of payment of note does not extend time to sue, since the action is based on the statute and not on the note. *Continental Nat. Bank v. Buford*, 107 Fed. 188, aff'd 114 Fed. 290.

³⁹ *Swan v. Burnham*, 70 N. H. 580, 49 Atl. 93.

is not created by the fact of reducing the claims to judgment.⁴⁰

§ 2704. — **Laches and estoppel.** An action by a corporation against its officers to hold them liable for losses on the ground of mismanagement may be barred by laches, or the corporation may be estopped by having consented to or acquiesced in the acts complained of.⁴¹ And individual stockholders may be estopped to sue by reason of participation or acquiescence⁴² or by laches.⁴³ However, laches or acquiescence is no bar to an action by a stockholder to compel a director to pay into the treasury loans made by himself in violation of a statute expressly forbidding such loans.⁴⁴

What constitutes laches in suing in equity is not peculiar to corporation law. Generally the court will follow the statute of limitations, unless unusual conditions or extraordinary circumstances make it inequitable to do so.⁴⁵ Laches cannot be imputed where the cause of action was effectually concealed by the officers sued, although a period longer than the statute of limitations has elapsed.⁴⁶

⁴⁰ *Swan v. Burnham*, 70 N. H. 580, 49 Atl. 93.

⁴¹ *Higgins v. Lansingh*, 154 Ill. 301, 40 N. E. 362; *Stetson v. Northern Inv. Co.*, 104 Iowa 393, 73 N. W. 869; *Raymond v. Palmer*, 41 La. Ann. 425, 17 Am. St. Rep. 398, 6 So. 692; *Holmes, Booth & Haydens v. Willard*, 125 N. Y. 75, 11 L. R. A. 170, 25 N. E. 1083.

⁴² A stockholder who tacitly consents to the drawing of an unauthorized salary by an officer is estopped to sue for relief in equity. *Brown v. De Young*, 167 Ill. 549, 47 N. E. 863, aff'g 66 Ill. App. 212.

⁴³ *United States. Streight v. Junk*, 59 Fed. 321.

Georgia. *Alexander v. Searcy*, 81 Ga. 536, 12 Am. St. Rep. 337, 8 S. E. 630.

Illinois. *Brown v. De Young*, 167 Ill. 549, 47 N. E. 863, aff'g 66 Ill. App. 212.

Massachusetts. *Wafren v. Para Rubber Shoe Co.*, 166 Mass. 97, 44 N. E. 112; *Snow v. Boston Blank Book Mfg. Co.*, 158 Mass. 325, 33 N. E. 588; *Dunphy v. Traveller Newspaper*

Ass'n, 146 Mass. 495, 16 N. E. 426; *Peabody v. Flint*, 6 Allen 54.

Michigan. *Keeney v. Converse*, 99 Mich. 316, 58 N. W. 325.

Minnesota. *Pinkus v. Minneapolis Linen Mills*, 65 Minn. 40, 67 N. W. 643.

Pennsylvania. *Erny v. G. W. Schmidt Co.*, 197 Pa. 475, 47 Atl. 877.

⁴⁴ *Murray v. Smith*, 166 N. Y. App. Div. 528, 152 N. Y. Supp. 102, citing *Story, Equity Jurisprudence* (13th Ed.), § 298, where he states that "the reason is that the public interest requires that the relief should be given, and it is given to the public through the party."

⁴⁵ *Cooper v. Hill*, 94 Fed. 582, 590.

⁴⁶ *Lawrence v. Stearns*, 79 Fed. 878, 884.

Where a stockholder places reliance on the management of the corporation conducted by her relatives, she being kept in ignorance of the status of the corporation, the trustees of her estate being refused access to the corporate books, an action by the trustees

§ 2705. Abatement and revival—Where action not based on a statute. This question is governed largely by the statutes in the particular state where the question arises, and these statutes vary considerably in the different states. Generally a cause of action against a corporate officer to hold him personally liable for his misconduct survives his death, at least where he is sought to be charged because of his fiduciary relation, under the liberal survival statutes now in force in most of the states;⁴⁷ but there is some authority to the contrary.⁴⁸ If the action against directors is brought by or

against the officers for misappropriation of corporate funds cannot be defeated on the ground of laches. *Von Arnim v. American Tube Works*, 188 Mass. 515, 74 N. E. 680.

⁴⁷ **United States.** *Allen v. Luke*, 163 Fed. 1018, applying rule to action against director of national bank; *Boyd v. Schneider*, 131 Fed. 223.

Alabama. See *Wynn v. Tallapoosa County Bank*, 168 Ala. 469, 53 So. 228.

Massachusetts. *Von Arnim v. American Tube Works*, 188 Mass. 515, 74 N. E. 680; *Wineburgh v. United States Steam & Street Ry. Advertising Co.*, 173 Mass. 60, 73 Am. St. Rep. 261, 53 N. E. 145; *Warren v. Para Rubber Shoe Co.*, 166 Mass. 97, 44 N. E. 112.

New Jersey. *Wilkinson v. Dodd*, 42 N. J. Eq. 234, 7 Atl. 327.

New York. *O'Brien v. Blaut*, 17 App. Div. 288, 45 N. Y. Supp. 217.

Utah. See *Warren v. Robinson*, 21 Utah 429, 61 Pac. 28.

Virginia. *Marshall v. Farmers' & Mechanics' Sav. Bank of Alexander*, 85 Va. 676, 2 L. R. A. 534, 17 Am. St. Rep. 84, 8 S. E. 586.

The cause of action for mismanagement survives the death of some of the directors. *Williams v. Brady*, 232 Fed. 740.

A common-law cause of action against directors for mismanagement is based on damage to property so as to survive the death of a party. *Winston v. Gordon*, 115 Va. 899, 80 S. E. 756.

An action at common law by a receiver against directors to compel them to account for misappropriation of funds does not abate, under the New York statute, by the death of one of the defendants pending the action. *Pierson v. Morgan*, 52 Hun (N. Y.) 611, 4 N. Y. Supp. 898.

Common-law claims are sometimes held to survive the death of the officer on the theory that they are demands for an injury to personal estate, so as to come within the survival statute. *Lindemann v. Rusk*, 125 Wis. 210, 104 N. W. 119.

If the action in equity is brought by a stockholder to compel restitution of property converted by officers, the death of one of the officers does not prevent his executor or administrator being joined as a party. *Von Arnim v. American Tube Works*, 188 Mass. 515, 74 N. E. 680.

⁴⁸ The common-law cause of action against directors for mismanagement does not survive the death of directors under the Vermont law. *Witters v. Foster*, 26 Fed. 737; *Brandon Bank v. Briggs' Estate*, 70 Vt. 599, 41 Atl. 586.

Claims against corporate officers for negligence are classified as torts which do not survive the death of the officer unless it is otherwise provided by statute. *Brandon Bank v. Briggs' Estate*, 70 Vt. 599, 41 Atl. 586.

It has been held in a federal court that action to charge a corporate officer with liability for misfeasance,

on behalf of the corporation for damages from mismanagement, the common-law cause of action has been held to survive on the theory that it is *ex contractu* rather than *ex delicto*; ⁴⁹ and this applies, it has been held, to an action by a receiver where he sues because of injury resulting to the stockholders or creditors. ⁵⁰

However, as to torts where the fiduciary relationship is immaterial, as where the injury is directly to the plaintiff and not to the corporation, there is some conflict. Generally, perhaps, it is held that, like other actions *ex delicto*, unless otherwise provided by statute, such an action does not survive the death of the owner of the cause of action, and the claim is not assignable; ⁵¹ and hence it does not survive the death of the officer. ⁵² In New York, however, an action by a stockholder for damages for false representations inducing the purchase of stock does not abate upon the death of plaintiff. ⁵³ In Alabama, it was held that demands and liabilities for which a deceased officer could have been charged, on an accounting between him and the corporation, or for which an action of *assumpsit* would lie, survive; but demands "for which he would be liable only in case, or which are purely as for torts, for a neglect to perform some per-

where he has permitted corporate assets to be wrongfully diverted, does not, on general principles, survive the death of such officer; that where suit is brought for such purpose in equity, seeking also to recover for the corporation moneys taken by the officer personally, or wrongfully permitted to be diverted to others, and during the pendency of the action the defendant dies, the action may be revived as against the executors of the officer for the recovery of such funds only as have accrued to the benefit of the estate of the defendant. *Great Western Min. & Mfg. Co. v. Harris' Estate*, 111 Fed. 38. Compare, however, *Allen v. Luke*, 141 Fed. 694, where the court holds that an action against a director of a national bank for the recovery of funds lost to the bank through the director's negligence survives as against his executors.

⁴⁹ *Bates v. Dresser*, 229 Fed. 772, 798; *Boyd v. Schneider*, 131 Fed. 223.

"If the action is based on the

breach of implied contract" to properly perform their duties as directors, the cause of action survives. *Curtis v. Phelps*, 208 Fed. 577.

⁵⁰ *Bates v. Dresser*, 229 Fed. 772, 798; *Curtis v. Phelps*, 208 Fed. 577; *Allen v. Luke*, 141 Fed. 694.

A cause of action by a receiver of a corporation for the benefit of stockholders and creditors, to recover from directors for losses resulting from mismanagement, survives the death of directors because it is *ex contractu* rather than *ex delicto*. *Bates v. Dresser*, 229 Fed. 772, 798.

⁵¹ *Lee v. Fisk*, 222 Mass. 418, 109 N. E. 833.

⁵² See *Wynn v. Tallapoosa County Bank*, 168 Ala. 469, 53 So. 228.

⁵³ *Squiers v. Thompson*, 73 N. Y. App. Div. 552, 76 N. Y. Supp. 734, aff'd without opinion in 172 N. Y. 652, 65 N. E. 1122; *Bennett v. Wolfolk*, 80 Hun (N. Y.) 390, 30 N. Y. Supp. 328.

sonal or official duty to the bank, as to which he acquired no benefit or profit, he could be held liable therefor only in an action of tort" and such cause of action did not survive.⁵⁴

§ 2706. — **Where action based on a statute.** When the statute making directors or other officers of a corporation personally liable is penal in its nature, the liability of an officer does not survive his death, and an action cannot be maintained against his personal representative.⁵⁵ And the death of a director after an action has been commenced against him, but before judgment, will abate the action.⁵⁶ So where the plaintiff dies during the pendency of an action against a trustee based on the making of a false report, or the failure to make a report, the action abates, where the statute is deemed a penal one.⁵⁷ A cause of action created by statute against directors for

⁵⁴ *Wynn v. Tallapoosa County Bank*, 168 Ala. 469, 53 So. 228.

⁵⁵ *Connecticut. Mitchell v. Hotchkiss*, 48 Conn. 9, 40 Am. Rep. 146.

Illinois. Diversey v. Smith, 103 Ill. 378, 42 Am. Rep. 14.

New Jersey. See dicta of Justice Elmer in *Derrickson v. Smith*, 27 N. J. L. 166.

New York. *Carr v. Rischer*, 119 N. Y. 117, 23 N. E. 296; *Brackett v. Griswold*, 103 N. Y. 425, 9 N. E. 438; *Stokes v. Stickney*, 96 N. Y. 323; *Boyle v. Thurber*, 50 Hun 259, 2 N. Y. Supp. 789; *Bank of California v. Collins*, 5 Hun 209; *Reynolds v. Mason*, 54 How. Pr. 213.

Pennsylvania. *Githers v. Clarke*, 158 Pa. St. 616, 28 Atl. 232.

Rhode Island. *Moies v. Sprague*, 9 R. I. 541.

Wisconsin. To same effect, *Killen v. Barnes*, 106 Wis. 546, 570, 82 N. W. 536.

Contra, in *Indiana*, under statute declaring that all causes of action survive, excepting such as are expressly mentioned and excluded by the statute. *Brown v. Clow*, 158 Ind. 403, 62 N. E. 1006, following *Western U. Tel. Co. v. Scircle*, 103 Ind. 227, 2 N. E. 604.

Such statutory actions are generally classed as actions *ex delicto* which do not survive at common law or unless otherwise provided by statute. *Stokes v. Stickney*, 96 N. Y. 323; *Moies v. Sprague*, 9 R. I. 541.

⁵⁶ *Brackett v. Griswold*, 103 N. Y. 425, 9 N. E. 438.

But after a judgment has been recovered by a creditor against a director, the judgment becomes "property with all the attributes of a judgment in an action *ex contractu*," the original wrong being merged therein, and the subsequent death of the director will not affect the right of the creditor to enforce the judgment against his estate. It follows that, where the judgment is reversed and a new trial granted on the director's appeal, an appeal from the judgment of reversal may be prosecuted after the director's death. *Carr v. Rischer*, 119 N. Y. 117, 124, 23 N. E. 296.

⁵⁷ *Blake v. Griswold*, 104 N. Y. 613, 11 N. E. 137; *Brackett v. Griswold*, 103 N. Y. 425, 9 N. E. 438. Contra, *Bonnell v. Griswold*, 15 Abb. N. Cas. (N. Y.) 471.

wrongfully declaring a dividend or making loans to stockholders is not an action "for wrongs done to the property rights or interests of another," within the New York abatement statute, and does not survive after the death of the director who is sued.⁵⁸ In some states, however, a statute providing that actions shall not abate by death or other disability of a party, is deemed to be so broad as to include all actions, and hence to embrace an action for failure to file an annual report.⁵⁹ And under the liberal statutes as to survival of actions now in force in most jurisdictions, a statutory cause of action against directors for illegal declaration of dividends survives the death of a director, whether the cause of action be considered *ex contractu* or *ex delicto*.⁶⁰ Under the New Hampshire statute making the survival of actions almost universal except "those for the recovery of penalties and forfeitures of money under penal statutes," the exception embraces an action to recover the thousand-dollar penalty prescribed by statute, in favor of any person injured, for failure to call a stockholders' meeting to provide for payment of debts which have been demanded and not paid.⁶¹

On the other hand, the rule that actions under a statute to recover a penalty do not survive, does not apply, of course, if the liability, as it may be, is contractual, or remedial and quasi contractual, and not penal in its nature.⁶² Thus, actions against national bank directors, based on section 5239 of the United States Revised Statutes, survive against the personal representatives of a deceased director,⁶³ since the statute is held to be a remedial and not a penal

⁵⁸ *Boston & M. R. R. v. Graves*, 80 Fed. 588.

⁵⁹ *First Nat. Bank of Missoula v. Cottonwood Land Co.*, 51 Mont. 544, 154 Pac. 582.

⁶⁰ *German-American Coffee Co. v. Johnston*, 168 N. Y. App. Div. 31, 153 N. Y. Supp. 866.

⁶¹ *Coulombe v. Eastman*, 77 N. H. 368, 92 Atl. 168.

⁶² *United States. Stephens v. Overstolz*, 43 Fed. 465.

Arkansas. Hughes v. Kelly, 95 Ark. 327, 129 S. W. 784.

Indiana. Brown v. Clow, 158 Ind. 403, 415, 62 N. E. 1006.

New York. McComb v. Kellogg, 48 Hun 621, 1 N. Y. Supp. 206.

Vermont. Farr v. Briggs' Estate,

72 Vt. 225, 82 Am. St. Rep. 930, 47 Atl. 793.

The constitutional provision in California making directors liable "for all moneys embezzled or misappropriated by the officers of such corporation * * * during the term of office of such director or trustee" imposes a contractual rather than penal liability so that the death of a director pending a suit thereunder does not abate it. *Major v. Walker*, 23 Cal. App. 465, 138 Pac. 360, following *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153, 69 Pac. 77, 64 Pac. 692.

⁶³ *Williams v. Brady*, 232 Fed. 740, 742.

statute.⁶⁴ Under a New York statute authorizing a director to sue co-directors for misconduct, it has been held that the action abates if the director ceases to be an officer pending the suit,⁶⁵ as where he fails to be re-elected.⁶⁶

§ 2707. Parties—In general. The general rules governing parties in civil actions are applicable.⁶⁷ Who are necessary parties depends, of course, to some extent, on the particular form and nature of the action.⁶⁸

§ 2708. — Who must or may be joined as plaintiffs. If the action is brought by the corporation, stockholders are not necessary plaintiffs.⁶⁹ Creditors may join as plaintiffs to recover from corporate officers individually a judgment requiring them to make good the minimum capital stock to the extent of all the corporate indebtedness, as provided for by statute making officers individually liable where they transact business before the minimum capital stock has been subscribed for.⁷⁰ If the action is for fraudulent representations in inducing deposits in a bank, it has been held that separate depositors cannot join as plaintiffs.⁷¹ In some cases it is held that stockholders who have been induced to buy or sell stock by fraud may join in suing the officer or officers,⁷² and this applies to an action to compel the officer to account for the profit made by him.⁷³

Whether an individual creditor who has sustained injury from the wrongful act of corporate officers may sue alone, under a statute creating liability in favor of creditors, has been noticed in connection with the law as to whether the remedy is in equity or law.⁷⁴

⁶⁴ *Stephens v. Overstolz*, 43 Fed. 465.

⁶⁵ *Hamilton v. Gibson*, 145 N. Y. App. Div. 825, 130 N. Y. Supp. 684.

⁶⁶ *Hamilton v. Gibson*, 145 N. Y. App. Div. 825, 130 N. Y. Supp. 684.

⁶⁷ *Geoghegan v. Luchow*, 75 N. Y. App. Div. 581, 78 N. Y. Supp. 278.

⁶⁸ See *American Spirits Mfg. Co. v. Easton*, 120 Fed. 440, rev'd without opinion 129 Fed. 1004 (mem. dec.); *Fricker v. Americus Manufacturing & Improvement Co.*, 124 Ga. 165, 52 S. E. 65.

⁶⁹ *Fricker v. Americus Manufacturing & Improvement Co.*, 124 Ga. 165, 52 S. E. 65.

⁷⁰ *John V. Farwell Co. v. Jackson Stores*, 137 Ga. 174, 73 S. E. 13.

⁷¹ *Chester v. Halliard*, 36 N. J. Eq. 313.

⁷² See *Bradley v. Bradley*, 165 N. Y. 183, 58 N. E. 887; *Wells v. Jewett*, 11 How. Pr. (N. Y.) 242; *Austin v. Murdock*, 127 N. C. 454, 37 S. E. 478. But see *Loewenstein v. Diamond Soda Water Mfg. Co.*, 94 N. Y. App. Div. 383, 88 N. Y. Supp. 313; *Cazeaux v. Mali*, 25 Barb. (N. Y.) 578; *Deaderick v. Wilson*, 8 Baxt. (Tenn.) 108.

⁷³ *Black v. Simpson*, 94 S. C. 312, 46 L. R. A. (N. S.) 137, 77 S. E. 1023.

⁷⁴ See §§ 2671, 2672, *supra*.

§ 2709. — **Corporation as proper or necessary defendant.** The corporation is generally a proper party defendant;⁷⁵ and where the action is based on a note plaintiff may join the corporation maker and its officers and the corporation indorser and its officers, as defendants, where a statute permits suit against one or all where persons are bound by contract or statute jointly, jointly and severally, or severally.⁷⁶ The corporation has been held a proper party notwithstanding it had made an assignment and all its assets had been distributed.⁷⁷ The corporation is not a necessary party defendant, it seems, where the right to proceed against the officers never belonged to the corporation and was no part of its assets.⁷⁸ Where suit is brought in a federal court, to enforce a state statute making officers liable for debts in excess of the capital stock, it is held that neither the corporation nor its assignee in insolvency is an indispensable party, and their joinder will not be ordered where it would defeat the jurisdiction of the court.⁷⁹

If the action is brought by stockholders, as representing the corporation, it is a necessary party defendant,⁸⁰ for the reason that any

⁷⁵ *Swartley v. Oak Leaf Creamery Co.*, 135 Iowa 573, 113 N. W. 496, statutory liability for illegal payment of dividends.

⁷⁶ *Swartley v. Oak Leaf Creamery Co.*, 135 Iowa 573, 113 N. W. 496, where liability based on unlawful dividends.

⁷⁷ *Webster v. Whitworth* (Tenn. Ch. App.), 63 S. W. 290.

⁷⁸ *Westinghouse Elec. & Mfg. Co. v. Reed*, 194 Mass. 590, 120 Am. St. Rep. 576, 80 N. E. 621.

⁷⁹ *James H. Rice Co. v. Libbey*, 105 Fed. 825, Illinois statute.

⁸⁰ *Colorado*. *Byers v. Rollins*, 13 Colo. 22, 21 Pac. 894.

Connecticut. *Allen v. Curtis*, 26 Conn. 456.

Georgia. *Bethune v. Wells*, 94 Ga. 486, 21 S. E. 230; *Young v. Moses*, 53 Ga. 628; *Colquitt v. Howard*, 11 Ga. 556.

Kansas. *Deming v. Beatty Oil Co.*, 72 Kan. 614, 84 Pac. 385.

Massachusetts. *Converse v. United Shoe Machinery Co.*, 209 Mass. 539,

95 N. E. 929; *Tibballs v. Bidwell*, 1 Gray 399.

Montana. *McConnell v. Combination Mining & Milling Co.*, 31 Mont. 563, 79 Pac. 248.

New Jersey. *Barry v. Moeller*, 68 N. J. Eq. 483, 59 Atl. 97; *Camp v. Taylor* (N. J. Ch.), 19 Atl. 968.

New York. *Greaves v. Gouge*, 69 N. Y. 154; *Cunningham v. Pell*, 5 Paige 607.

Pennsylvania. *Kelly v. Thomas*, 234 Pa. 419, 51 L. R. A. (N. S.) 122, 83 Atl. 307.

South Carolina. *Charleston Insurance & Trust Co. v. Sebring*, 5 Rich. Eq. 342.

Tennessee. *Deaderick v. Wilson*, 67 Tenn. 108; *Black v. Huggins*, 2 Tenn. Ch. 780.

Wisconsin. *Elmergreen v. Weimer*, 138 Wis. 112, 119 N. W. 836.

It is immaterial that the corporation is a foreign corporation. *Deming v. Beatty Oil Co.*, 72 Kan. 614, 84 Pac. 385.

judgment against defendant must be in favor of the corporation, and a judgment cannot be rendered in favor of one not a party to the action.⁸¹ However, the corporation need not be made a party where it is insolvent and its receiver is made a party,⁸² nor where a suit for an accounting is by the equitable owners of all the stock.⁸³

If depositors in a bank sue to enforce rights of the bank against its officers, where the proper officers of the corporation either actually or virtually refuse to bring suit, the corporation, if a going concern, is a necessary defendant, but it is otherwise if the corporation, for all practical purposes, is defunct, in which case the assignee must be made a party.⁸⁴ So the corporation is often a necessary defendant where a creditor sues.⁸⁵

Sometimes the joinder of the corporation is unnecessary and improper, especially in actions by creditors where the liability is created by statute.⁸⁶

§ 2710. — Joinder of all of directors or guilty parties as defendants. Ordinarily, regardless of who brings the action, one or more of the directors or other officers may be sued, and it is not necessary to join co-directors or other officers although they are equally guilty.⁸⁷

⁸¹ *Peck v. Peck*, 33 Colo. 421, 80 Pac. 1063.

The reason why the corporation is a necessary defendant is that the result of the action may bind it and bar any future action which it might bring for the same cause. *Weslosky v. Quarterman*, 123 Ga. 312, 51 S. E. 426.

⁸² *The Telegraph v. Lee*, 125 Iowa 17, 98 N. W. 364; *McConnell v. Combination Mining & Milling Co.*, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194, *aff'd* 31 Mont. 563, 79 Pac. 248; *Barry v. Moeller*, 68 N. J. Eq. 483, 59 Atl. 97; *Niles v. New York Cent. & H. River R. Co.*, 176 N. Y. 119, 68 N. E. 142; *Craig v. James*, 71 N. Y. App. Div. 238, 75 N. Y. Supp. 813; *Polhemus v. Polhemus*, 43 N. Y. Misc. 141, 88 N. Y. Supp. 273.

⁸³ *Conery v. Sweeney*, 81 Fed. 14.

⁸⁴ *Gores v. Field*, 109 Wis. 408, 85 N. W. 411, 84 N. W. 867.

⁸⁵ *Lyman v. Bonney*, 101 Mass. 562; *Cunningham v. Pell*, 5 Paige (N. Y.)

607; *Brown v. Orr*, 112 Pa. St. 233, 3 Atl. 817.

⁸⁶ *Smith v. Colorado Fire Ins. Co.*, 14 Fed. 399; *Hill v. Frazier*, 22 Pa. St. 320; *Archer v. Rose*, 3 Brewst. (Pa.) 264.

⁸⁷ *United States v. Chesbrough v. Woodworth*, 195 Fed. 875, 880.

Indiana. *Coddington v. Canaday*, 157 Ind. 243, 61 N. E. 567.

Kentucky. *Western Bank of Louisville, Kentucky v. Coldewey's Ex'r*, 120 Ky. 776, 83 S. W. 629.

New Jersey. *Barry v. Moeller*, 68 N. J. Eq. 483, 59 Atl. 97.

New York. *Gaffney v. Colvill*, 6 Hill (N. Y.) 567; *Cunningham v. Pell*, 5 Paige 607. But see *Bauer v. Parker*, 82 App. Div. 289, 81 N. Y. Supp. 995; *Whitney v. Pugh*, 58 App. Div. 316, 68 N. Y. Supp. 992.

South Carolina. *Sigwald v. City Bank*, 82 S. C. 382, 64 S. E. 398.

Tennessee. *Shea v. Knoxville & E. R. Co.*, 65 Tenn. 277.

Directors of national banks ma

since the liability is joint and several.⁸⁸ This rule applies equally well where the action is based on a statute creating the liability.⁸⁹ If the statute makes certain officers "jointly and severally" liable, then, of course, part of the officers may be sued without joining the others who would be liable.⁹⁰ Under a statute expressly authorizing suit against one or more of the directors, an action based on the wrongful act of directors in transferring the corporate property may be brought against one director.⁹¹ Even if the directors are jointly liable by statute, a nonresident director need not be joined.⁹² Of course if the liability is deemed joint rather than several, or joint and several, then all the directors must be sued.⁹³ Officers who jointly misappropriate money belonging to plaintiff may be joined as defendants.⁹⁴ The mere fact that one is a director does not make him a necessary party to a stockholder's suit to recover money converted by former directors.⁹⁵ In any event, it is not necessary to join nonresident directors where the court could not obtain jurisdiction over them under the statutes, by service in another state or otherwise.⁹⁶

Sometimes directors who had ceased to be such before the action was brought may be joined as defendants, as in case where the action is for an accounting.⁹⁷

§ 2711. — Joinder of personal representatives of co-director. If the directors convert the corporate property, the administratrix of

sued for mismanagement either jointly or severally or a part but not all. *Williams v. Brady*, 232 Fed. 740.

Thus the president of a corporation may be sued alone for negligence although the cashier and some of the directors were also negligent. *Western Bank of Louisville, Kentucky v. Coldewey's Ex'x*, 120 Ky. 776, 790, 83 S. W. 629.

⁸⁸ See § 2609, *supra*.

⁸⁹ *German American Coffee Co. v. Diehl*, 86 N. Y. Misc. 547, 149 N. Y. Supp. 413.

⁹⁰ *O'Neil v. Eagle Generator Co.*, 92 Ark. 416, 123 S. W. 373.

⁹¹ "If any equities between the directors can be enforced as against each other, we do not think plaintiff

is required to take part in that litigation, or proceed against all the directors in order to adjust such equities in this action." *Buckley v. Stansfield*, 155 N. Y. App. Div. 735, 140 N. Y. Supp. 953, following *Bartlett v. Drew*, 57 N. Y. 587.

⁹² *White v. How*, Fed. Cas. No. 17,548.

⁹³ *Banks v. Darden*, 18 Ga. 318.

⁹⁴ *Virginia-Carolina Chemical Co. v. Floyd*, 158 N. C. 455, 74 S. E. 465.

⁹⁵ *Mulheran v. Gebhardt*, 93 N. Y. App. Div. 98, 86 N. Y. Supp. 941.

⁹⁶ *Fisher v. Parr*, 92 Md. 245, 48 Atl. 621.

⁹⁷ *Jacobus v. Diamond Soda Water Mfg. Co.*, 94 N. Y. App. Div. 366, 88 N. Y. Supp. 302.

one of them may be joined as a defendant where it may be presumed that the estate in her hands has been enriched by the fraud.⁹⁸

§ 2712. — **Receiver as necessary defendant.** It is proper, where the suit is in equity, to make temporary receivers of the corporation parties defendant "for the purpose of providing a method by which the amount recovered from the trustees under this liability may be properly distributed among the creditors of the corporation."⁹⁹ So where the suit is in equity, it has been held that the receiver of the dissolved corporation is a necessary defendant.¹ A discharged receiver has been held, under some circumstances, not a necessary party.² Receivers having no connection with the default alleged are not proper defendants.³ In an action for false representations by officers inducing the purchase of stock by plaintiff, the receiver of the corporation is not a necessary defendant.⁴

§ 2713. — **Joining other stockholders as defendants.** Other stockholders should not, under ordinary circumstances, be made defendants where the action is brought by stockholders.⁵

§ 2714. — **Intervention.** If the corporation sues offending officers, but it appears that the suit is collusive, it has been held that minority stockholders may intervene; but if they do, the complaint in intervention must allege sufficient facts to show collusion and also to support an independent suit brought by them in behalf of the corporation.⁶ If stockholders sue to recover damages payable to themselves, then it seems that other stockholders, who acquired stock at different times, cannot intervene and become parties.⁷

⁹⁸ *Lewisohn v. Stoddard*, 78 Conn. 575, 63 Atl. 621.

⁹⁹ *Whitney v. Wilcox*, 58 N. Y. App. Div. 57, 68 N. Y. Supp. 667, where action was to enforce liability for consenting to debts in excess of paid-up capital stock.

¹ *Bauer v. Parker*, 82 N. Y. App. Div. 289, 81 N. Y. Supp. 995.

² *Lillenthal v. Betz*, 185 N. Y. 153, 7 Ann. Cas. 41, 77 N. E. 1002, rev'g on this point 108 N. Y. App. Div. 222, 95 N. Y. Supp. 849. Compare *Michel v. Betz*, 108 N. Y. App. Div. 241, 95 N. Y. Supp. 844.

³ *Moran v. Vreeland*, 81 N. Y. Misc. 664, 143 N. Y. Supp. 522.

⁴ *Squiers v. Thompson*, 73 N. Y. App. Div. 552, 76 N. Y. Supp. 734, aff'd without opinion in 172 N. Y. 652, 65 N. E. 1122.

⁵ *McCrea v. McClenahan*, 114 N. Y. App. Div. 70, 99 N. Y. Supp. 689, 37 Civ. Proc. 195, 99 N. Y. Supp. 689.

⁶ *Keystone Copper & Gold Min. Co. v. Evans*, 9 Ariz. 275, 80 Pac. 344.

⁷ *Thomas v. Barthold*, — Tex. Civ. App. —, 171 S. W. 1071.

§ 2715. Multifariousness and misjoinder of causes of action.

Whether a bill in equity is multifarious depends upon the rules of equity procedure, where not regulated by statute; and it is held that in equity "there is no rule on the subject of universal application and much is left to the discretion of the court to be determined by the facts of each particular case."⁸ In most, if not all, of the code states, however, the statutory rules as to joinder of causes of action apply equally well to both actions at law and suits in equity.⁹ Statutes other than the general statutes relating to joinder of causes of action are sometimes construed as authorizing a joinder not otherwise permissible.¹⁰ Under some statutes, an equitable cause of action cannot be joined with a cause of action at law against the same officers.¹¹ Causes of action against the corporation and against officers cannot be joined where the officers are not proper parties to the cause of action against the corporation, and the two causes of action rest upon wholly different principles and must be sustained by quite different facts.¹² It has been held that a cause of action to enforce a stockholder's individual liability cannot be joined with a cause of action to enforce his liability for mismanagement as an officer.¹³ It has been held that it is not misjoinder, in

⁸ *Emerson v. Gaither*, 103 Md. 564, 8 L. R. A. (N. S.) 738, 7 Ann. Cas. 1114, 64 Atl. 26, approved in *Jesson v. Noyes*, 245 Fed. 46, 49.

⁹ *People v. Equitable Life Assur. Soc. of United States*, 124 N. Y. App. Div. 714, 728, 109 N. Y. Supp. 453. See also *Cummings v. American Gear & Spring Co.*, 87 Hun (N. Y.) 598, 34 N. Y. Supp. 541.

Under New York statute, cause of action to set aside contract made by directors may be joined with cause of action to compel directors to account for damages from conspiracy, since both are founded upon claims against trustees arising by operation of law. *Bosworth v. Allen*, 168 N. Y. 157, 55 L. R. A. 751, 85 Am. St. Rep. 667, 61 N. E. 163, rev'g 57 N. Y. App. Div. 633, 67 N. Y. Supp. 1133.

Cause of action to recover damages from wrongful investments cannot be joined with cause of action on bond of officer. *French v. Salter*, 17 Hun (N. Y.) 546.

Causes of action for failure to file a report and for making a false report may be joined. *Bonnell v. Wheeler*, 1 Hun (N. Y.) 332.

¹⁰ See *Bagley & Sewall Co. v. Lennig*, 61 N. Y. App. Div. 26, 70 N. Y. Supp. 242.

¹¹ *People v. Equitable Life Assur. Soc. of United States*, 124 N. Y. App. Div. 714, 734, 109 N. Y. Supp. 453. See also *Searles v. Gebbie*, 115 N. Y. App. Div. 778, 101 N. Y. Supp. 199.

A cause of action in equity for an accounting cannot be joined with one or more causes of action at law for damages from wrongful or negligent acts of corporate officers. *People v. Equitable Life Assur. Soc. of United States*, 124 N. Y. App. Div. 714, 109 N. Y. Supp. 453.

¹² *Cass v. Realty Securities Co.*, 148 N. Y. App. Div. 96, 132 N. Y. Supp. 1074.

¹³ *Sturtevant-Larrabee Co. v. Mast, Buford & Burwell Co.*, 66 Minn. 437, 69 N. W. 324; *Wiles v. Suydam*, 64

an action by depositors in a bank, to join a cause of action to hold an officer of the bank personally liable for negligence, with a cause of action to hold him liable for false representations inducing the deposit.¹⁴ In South Carolina, the liability of directors to creditors, as created by statute, is held to be contractual so that a cause of action against the corporation may be joined with one against the officers under such statute.¹⁵

There is no misjoinder because some of the directors are sought to be held liable for acts of commission while others are charged merely with acts of omission, where all relate to the same matter.¹⁶ But official acts, whether of malfeasance or nonfeasance, where separate and disconnected, do not arise out of the "same transaction" or "transactions connected with the same subject of action," as those terms are used in the statutes permitting joinder of causes of action.¹⁷

A stockholder cannot unite in one action a cause of action to compel an accounting by directors and a restitution to the corporation of property wrongfully received by them, with a cause of action to recover damages which he personally has sustained by reason of the wrongful acts of defendants.¹⁸ So a right of a stockholder to sue corporate officers for fraud and deceit practiced upon him when he purchased his stock, is a personal one which cannot be joined with a cause of action for the benefit of all the stockholders to set aside alleged illegal transfers of property.¹⁹

Generally it is provided by statute that the causes joined must "affect all the parties to the action"; and this has been held to preclude a joinder of directors belonging to the board of directors at different times, part of the directors being officers at different times and some of them being liable only as to part of the causes of action.²⁰ Whether a bill is multifarious, independently of statute,

N. Y. 173, rev'g 3 Hun (N. Y.) 604; Butt v. Cameron, 53 Barb. (N. Y.) 642; Seaman v. Goodnow, 20 Wis. 27.

¹⁴ Foster v. Bank of Abingdon, 88 Fed. 604; Solomon v. Bates, 118 N. C. 311, 24 S. E. 478.

¹⁵ Sullivan v. Sullivan Mfg. Co., 14 S. C. 494.

¹⁶ Murphy v. Penniman, 105 Md. 452, 121 Am. St. Rep. 583, 66 Atl. 282.

¹⁷ People v. Equitable Life Assur. Soc. of United States, 124 N. Y. App. Div. 714, 728, 109 N. Y. Supp. 453.

¹⁸ Brown v. Utopia Land Co., 118 N. Y. App. Div. 364, 103 N. Y. Supp. 50.

¹⁹ Price v. Union Land Co., 187 Fed. 886.

²⁰ Under this statute, causes of action to recover damages for misconduct cannot be joined where some of the defendants were not interested in nor liable on some of the causes of action set forth—no conspiracy being alleged. People v. Equitable Life Assur. Soc. of United States, 124 N.

where persons joined as defendants were directors in different directorates, and served for different periods and at different times, is largely determinable according to the discretion of the court.²¹ Where the suit was to recover against directors individually because of loans negligently made, it was held improper to join in one suit in equity directors who had served a less number of terms than other directors, with the directors who had served all of the terms during which the alleged wrongful acts had continued.²² A bill by depositors to recover from directors for their mismanagement is not multifarious because it fails to state precisely when the directors assumed the duties of their office or when the complainants became depositors.²³

A bill by depositors in a bank has been held not multifarious because of joinder of all the depositors where their contracts with the bank are identical, they are entitled to participate equally in its assets, and they are very numerous.²⁴

§ 2716. Pleading. The bill or complaint must clearly and concisely state the facts to show the existence of a cause of action.²⁵

Y. App. Div. 714, 728, 109 N. Y. Supp. 453.

²¹ *Jesson v. Noyes*, 245 Fed. 46; *Emerson v. Gaither*, 103 Md. 564, 8 L. R. A. (N. S.) 738, 7 Ann. Cas. 1114, 64 Atl. 26.

²² *Green v. Officers & Directors of Knoxville Banking & Trust Co.*, 133 Tenn. 609, 182 S. W. 244.

²³ The claim was that the bill joined matters which occurred when some of the defendants were not directors with matters which occurred when they were. *Saunders v. Bank of Mecklenburg*, 112 Va. 443, Ann. Cas. 1913 B 982, 71 S. E. 714.

"That some of the defendants have been directors longer than others is no ground of demurrer, because the court can discriminate between them, and hold those elected recently only liable for losses incurred during their term of office." *Ackerman v. Halsey*, 37 N. J.-Eq. 356, aff'd 38 N. J. Eq. 501.

²⁴ *Saunders v. Bank of Mecklenburg*, 112 Va. 443, Ann. Cas. 1913 B 982, 71 S. E. 714.

²⁵ *Georgia*. *McRee v. Mexican Gulf Oil & Mineral Co.*, 127 Ga. 383, 56 S. E. 451; *Fricker v. Americus Manufacturing & Improvement Co.*, 124 Ga. 165, 52 S. E. 65.

Illinois. *Wallach v. Billings*, 195 Ill. App. 605, aff'd 277 Ill. 218, 115 N. E. 382.

Maryland. *Citizens' Trust & Deposit Co. v. Tompkins*, 97 Md. 182, 54 Atl. 617.

Montana. *McConnell v. Combination Mining & Milling Co.*, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194, aff'd 31 Mont. 563, 79 Pac. 248.

New York. *Kavanaugh v. Commonwealth Trust Co.*, 181 N. Y. 121, 73 N. E. 562; *Shulman v. Star Suburban Realty Co.*, 113 App. Div. 759, 99 N. Y. Supp. 419; *Michel v. Betz*, 108 App. Div. 241, 95 N. Y. Supp. 844; *Young v. Equitable Life Assur. Soc. of United States*, 49 Misc. 347, 99 N. Y. Supp. 446, aff'd 116 App. Div. 911, 101 N. Y. Supp. 1150.

South Carolina. *Sigwald v. City Bank*, 74 S. C. 473, 55 S. E. 109.

South Dakota. *Glover v. Manila*

It should show that the defendants complained of are officers²⁶ and that they were such at the time of the wrongdoing.²⁷ It must state facts and not mere conclusions, and must be definite and specific.²⁸ If negligence is relied upon, it is not sufficient to merely allege fraud.²⁹ Defenses need not be anticipated.³⁰ If loss to the creditor is the basis of the action, then of course the facts showing the amount of the loss must be alleged.³¹ If illegal loans by directors are relied on, it is not necessary to allege a formal vote by them authorizing or approving such loans.³²

If the action is based on a statute, the bill or complaint must set forth facts sufficient to show a cause of action embraced within some statute;³³ and it has been said that "the law is well settled

Gold Mining & Milling Co., 19 S. D. 559, 104 N. W. 261.

Tennessee. Green v. Officers & Directors of Knoxville Banking & Trust Co., 133 Tenn. 609, 182 S. W. 244.

Complaint for negligence in loaning the funds of the corporation, see Fisher v. Parr, 92 Md. 245, 48 Atl. 621.

²⁶ A complaint against directors for conspiracy in mismanagement of the corporate affairs should allege that they are directors, since directors only have power to control corporate affairs. Brown v. Utopia Land Co., 118 N. Y. App. Div. 364, 103 N. Y. Supp. 50.

²⁷ Where property of a bank is alleged to have been lost through the negligence and fraudulent management of its officers, in an action against such officers therefor each defendant officer should be alleged to have been such at the time of the wrongdoing. Gores v. Elliott, 108 Wis. 465, 84 N. W. 865.

²⁸ Boston & A. R. Co. v. Parr, 104 Fed. 695.

An allegation that directors were guilty of negligence in retaining in office certain officers is not sufficiently specific. Williams v. Brady, 221 Fed. 118.

But if the corporation sues an officer for an accounting, on the theory that he has made secret profits in act-

ing for the corporation in a purchase of land, the complaint need not minutely state all the circumstances. Malden & Melrose Gas Light Co. v. Chandler, 209 Mass. 354, 95 N. E. 791.

²⁹ Fox v. Hale & Norcross Silver Min. Co., 108 Cal. 369, 424, 41 Pac. 308.

³⁰ In an action by the corporation, the complaint need not allege that the stockholders had no notice of the alleged misconduct or did not acquiesce therein. Horn Silver Min. Co. v. Ryan, 42 Minn. 196, 44 N. W. 56.

³¹ Agnelli v. Shatzin, 68 N. Y. Misc. 329, 123 N. Y. Supp. 797.

³² Allen v. Luke, 163 Fed. 1018.

³³ **United States.** Continental Nat. Bank of Memphis, Tennessee v. Buford, 107 Fed. 188; Swancoat v. Remsen, 78 Fed. 592.

California. Winchester v. Howard, 136 Cal. 432, 89 Am. St. Rep. 153, 69 Pac. 77, 64 Pac. 692, holding complaint insufficient as to misappropriations by treasurer.

Colorado. Bradford v. Gulley, 10 Colo. App. 146, 50 Pac. 314.

Indiana. Clow v. Brown, 150 Ind. 185, 49 N. E. 1057, 48 N. E. 1034; Niles v. Dodge, 70 Ind. 147.

Maryland. Fisher v. Parr, 92 Md. 245, 48 Atl. 621.

Massachusetts. Pope v. Leonard, 115 Mass. 286.

that a party who seeks to enforce the liability of corporate officers under a statute must allege and prove affirmatively every fact, default, or contingency upon which his right to recover depends, so as to bring himself clearly, within the statute."³⁴ The complaint must show that the corporation is one embraced within the terms of the statute creating the liability,³⁵ and must show that a debt actually exists by stating the facts in regard thereto.³⁶ Where it is sought to hold one liable under a statute as a director, it must be alleged and proved that he was in fact a director and within the provisions of the statute, and it is not sufficient to allege that he was held out by the corporation with his permission as being its director.³⁷ Where the default relied upon is failure to make and file an annual report, the complaint must set forth all necessary allegations to bring the case within the statute,³⁸ including a state-

New York. *Cesar v. Bernard*, 156 App. Div. 724, 141 N. Y. Supp. 659; *Bagley & Sewall Co. v. Lennig*, 61 App. Div. 26, 70 N. Y. Supp. 242.

Tennessee. *Minton v. Stahlman*, 96 Tenn. 98, 34 S. W. 222.

Complaint based on false report, see *American Credit-Indemnity Co. v. Ellis*, 156 Ind. 212, 59 N. E. 679.

Complaint under statute making directors making a loan to stockholders liable therefor, see *Fisher v. Parr*, 92 Md. 245, 48 Atl. 621.

False certificate as to payment of capital stock, see *Anthony & Scovill Co. v. Metropolitan Art Co.*, 190 Mass. 35, 76 N. E. 289.

³⁴ *J. L. Mott Iron Works v. Arnold*, 35 R. I. 456, 87 Atl. 17.

³⁵ *Pierce & Galloway v. Yeaton*, *McDonald & Loring*, — N. H. —, 97 Atl. 876; *Acker, Merrill & Condit v. Richards*, 63 N. Y. App. Div. 305, 71 N. Y. Supp. 929, action against directors of base ball club.

Rule applied to membership corporation. *Acker, Merrill & Condit v. Richards*, 63 N. Y. App. Div. 305, 71 N. Y. Supp. 929.

In New York, complaint must show that corporation is a stock corporation. *Marshall v. Barr*, 27 N. Y. App. Div. 97, 50 N. Y. Supp. 116. Allega-

tion that corporation is a business corporation is a sufficient allegation that it is not a railroad or a moneyed corporation. *Union Bank of Buffalo v. Keim*, 52 N. Y. App. Div. 135, 64 N. Y. Supp. 1070, aff'd without opinion 169 N. Y. 587, 62 N. E. 1101. But it is not sufficient to merely allege corporation is a domestic one, in *New York. Church v. Butterfield*, 19 N. Y. Misc. 265, 44 N. Y. Supp. 381.

Complaint need not expressly allege corporation is a stock corporation, where necessarily implied from other allegations. *Ginsburg v. Von Seggera*, 59 N. Y. App. Div. 595, 69 N. Y. Supp. 758, aff'd without opinion 172 N. Y. 662, 65 N. E. 1116.

Alleging that corporation was organized for profit is sufficient to show that corporation has capital stock, so as to be within the statute. *Daily v. Marshall*, 47 Mont. 377, 133 Pac. 681.

³⁶ *Boston & A. B. Co. v. Parr*, 104 Fed. 695; *Davis v. Wilson*, 150 N. Y. App. Div. 704, 135 N. Y. Supp. 825.

³⁷ *Edward Davis, Inc. v. Adler*, 173 N. Y. App. Div. 414, 158 N. Y. Supp. 623, rev'g 92 N. Y. Misc. 458, 156 N. Y. Supp. 157.

³⁸ *Bovee v. Boyle*, 25 Colo. App. 165, 136 Pac. 467; *Bradford v. Galley*, 10 Colo. App. 146, 50 Pac. 314; *Sta-*

ment as to when plaintiff's debt was contracted³⁹ and allegations showing that at that time the officers were in default;⁴⁰ but it is not necessary to allege that the directors sued were stockholders during their term of office,⁴¹ nor that a judgment has been recovered and an execution returned unsatisfied against the corporation, where not a condition precedent.⁴² Matters of defense need not be anticipated; and this rule has been applied to an allegation that the failure or refusal to act was wilful,⁴³ or that plaintiff had no knowledge that the corporation had exceeded its charter limit of indebtedness.⁴⁴ Facts must be pleaded and not conclusions.⁴⁵ Ordinarily it is sufficient to follow the words of the statute in alleging the default of the officers.⁴⁶

The necessary allegations in a complaint in an action by a receiver against officers for negligence in management depend upon what a receiver must allege to show his authority to sue, plus the allegations necessary to show the negligence.⁴⁷

If the action is by a stockholder in behalf of the corporation, the complaint must allege (1) the cause of action in favor of the corporation, which should be stated in exactly the same manner and with the same detail of facts as would be proper in case the corporation had brought the action, and (2) the facts which entitle the stockholder to maintain the action in the place of the corporation.⁴⁸

ford v. St. John, 164 Ind. 277, 73 N. E. 596; Clow v. Brown, 150 Ind. 185, 49 N. E. 1057, 48 N. E. 1034; Niles v. Dodge, 70 Ind. 147; Hill v. Weidinger, 110 N. Y. App. Div. 683, 97 N. Y. Supp. 473.

In New York, compliance with the proviso added in 1899 requiring notice to be served on the directors within three years need not be pleaded. Boynton v. Sprague, 100 N. Y. App. Div. 443, 91 N. Y. Supp. 839, aff'd 183 N. Y. 505, 76 N. E. 1089.

³⁹ Continental Nat. Bank of Memphis, Tennessee v. Buford, 107 Fed. 188, aff'd 114 Fed. 290, construing Arkansas statute.

⁴⁰ Continental Nat. Bank of Memphis, Tennessee v. Buford, 107 Fed. 188, aff'd 114 Fed. 290, construing Arkansas statute.

⁴¹ Swancoat v. Remsen, 78 Fed. 592.

⁴² Swancoat v. Remsen, 78 Fed. 592.

⁴³ Miles v. Woodward, 115 Cal. 308, 46 Pac. 1076.

⁴⁴ Nuckels v. Robinson-Pettett Co., 159 Ky. 214, 166 S. W. 972.

⁴⁵ Winchester v. Howard, 136 Cal. 432, 89 Am. St. Rep. 153, 69 Pac. 77, 64 Pac. 692, applying rule where directors charged with misappropriating funds.

⁴⁶ Pope v. Leonard, 115 Mass. 286, allegation that debts of corporation exceeded its capital in a certain amount.

⁴⁷ See Coddington v. Canaday, 157 Ind. 243, 61 N. E. 567, where numerous objections to the complaint are considered.

⁴⁸ Kavanaugh v. Commonwealth Trust Co., 181 N. Y. 121, 73 N. E. 562; Weingreen v. Michelbacher, 139 N. Y. App. Div. 931, 124 N. Y. Supp. 41.

"Ordinarily no other allegations are necessary or material." Kolb v.

The complaint must show that a demand has been made upon the corporation to sue which has been refused or disregarded, or that such a demand would be useless.⁴⁹ It is not necessary to aver when and from whom plaintiffs acquired their stock.⁵⁰

If the action is at common law, and based on deceit, then of course the elements going to make up fraud must be alleged.⁵¹

§ 2717. Action in another state—In general. Where officers of a foreign corporation reside in another state, stockholders may sue them in such state for moneys converted by them as well as for moneys lost by their fraudulent and negligent conduct.⁵²

§ 2718. — Enforcing statute in another state. "The courts of no country execute the penal laws of another," is the concise statement made by Chief Justice Marshall as a fundamental maxim of international law.⁵³ But, "in interpreting this maxim," said Justice Gray in a leading case in the Supreme Court of the United States, "there is danger of being misled by the different shades of mean-

Mortimer, 135 N. Y. App. Div. 542, 120 N. Y. Supp. 543.

⁴⁹ **Alabama.** Jasper Land Co. v. Wallis, 123 Ala. 652, 26 So. 659; Montgomery Light Co. v. Lahey, 121 Ala. 131, 25 So. 1006.

Colorado. Ide v. Bascomb, 18 Colo. App. 415, 72 Pac. 62.

Indiana. Tevis v. Hammersmith, 31 Ind. App. 281, 66 N. E. 79, 912, aff'd 161 Ind. 74, 67 N. E. 672.

Massachusetts. Von Arnim v. American Tube Works, 188 Mass. 515, 74 N. E. 680.

New Jersey. Siegman v. Day, 65 N. J. Eq. 374, 54 Atl. 1125; Siegman v. Maloney, 65 N. J. Eq. 372, 54 Atl. 405.

New York. Kavanaugh v. Commonwealth Trust Co. of New York, 103 App. Div. 95, 92 N. Y. Supp. 543, aff'g 45 Misc. 295, 92 N. Y. Supp. 233; Haltenborg v. Greene, 66 App. Div. 590, 73 N. Y. Supp. 403; Bowne v. Smith, 44 Misc. 575, 90 N. Y. Supp. 204.

North Carolina. Coble v. Beall, 130 N. C. 533, 41 S. E. 793.

Texas. Joy v. Ft. Worth Compress

Co., 24 Tex. Civ. App. 94, 58 S. W. 173.

Virginia. Virginia Passenger & Power Co. v. Fisher, 104 Va. 121, 51 S. E. 198.

General allegations in the complaint, not accompanied by specific and definite facts, are not sufficient to show that demand would have been useless. Bartlett v. New York, N. H. & H. R. Co., 226 Mass. 467, 115 N. E. 976.

⁵⁰ Montgomery Light Co. v. Lahey, 121 Ala. 131, 25 So. 1006.

⁵¹ Pieratt v. Young, 20 Ky. L. Rep. 1815, 49 S. W. 964; Stickel v. Atwood, 25 R. I. 456, 56 Atl. 687.

If deposits are kept in the bank by false statements, the depositor must allege that but for such statements he would have withdrawn his deposits before the failure of the bank. Brady v. Evans, 78 Fed. 558.

⁵² Ganzer v. Rosenfeld, 153 Wis. 442, 141 N. W. 121.

⁵³ The Antelope, 10 Wheat. (U. S.) 66, 123, 6 L. Ed. 268.

ing allowed to the word 'penal' in our language."⁵⁴ Many of the courts have held that this principle applies to statutes of a state imposing upon the directors of a corporation personal liability for its debts as a penalty for failing to file a report of the company's condition, or to do other acts required of them by law, or for doing acts prohibited; that such statutes are penal statutes, within this principle, and that they will not be enforced in the courts of other states.⁵⁵ The more recent cases, however, show that this doctrine is erroneous and cannot be sustained; that the rule of international law that the penal laws of one state or country will not be enforced in another state or country applies only to penal laws in the strict sense—that is, laws imposing a punishment, pecuniary or otherwise, for offenses against the state; and that a statute imposing upon directors a liability for corporate debts is not a penal law in this sense.⁵⁶ The Supreme Court of the United States has in a late decision settled the law in this country in so far as the right of a creditor who has recovered a judgment to enforce the same in another state is concerned. It has held that a judgment recovered by a creditor against a director, under such a statute, in the state in which the corporation was created, is not based upon a penal statute in the sense of the rule of international law under which penal statutes are not enforced in other states, and that for the courts of other states to refuse to enforce the judgment on this ground is to deny to the judgment the full faith, credit and effect to which it is entitled under the Constitution and laws of the United States.⁵⁷ In commenting on this case, it is said in a recent decision in Kansas that "the fact that the action was upon a judgment was not determina-

⁵⁴ *Huntington v. Attrill*, 146 U. S. 657, 666, 36 L. Ed. 1123.

⁵⁵ *Maryland*. *Attrill v. Huntington*, 70 Md. 191, 2 L. R. A. 779, 14 Am. St. Rep. 344, 16 Atl. 651, rev'd 146 U. S. 657, 36 L. Ed. 1123; *First Nat. Bank of Plymouth v. Price*, 33 Md. 487, 3 Am. Rep. 204.

Massachusetts. *Halsey v. McLean*, 12 Allen 439, 90 Am. Dec. 157.

Missouri. *Cary v. Schmeltz*, 141 Mo. App. 570, 125 S. W. 532.

New Jersey. *Salt Lake City Nat. Bank v. Hendrickson*, 40 N. J. L. 52; *Derrickson v. Smith*, 27 N. J. L. 166.

New York. *Hutchinson v. Stadler*, 85 App. Div. 424, 83 N. Y. Supp. 509;

Bird v. Hayden, 2 Abb. Pr. (N. S.) 61; *Price v. Wilson*, 67 Barb. 9.

⁵⁶ *Huntington v. Attrill*, 146 U. S. 657, 36 L. Ed. 1123; *Davis v. Mills*, 99 Fed. 39; *First Nat. Bank of Butte v. Weidenbeck*, 97 Fed. 896, rev'g 87 Fed. 271; *Great Western Mach. Co. v. Smith*, 87 Kan. 331, 41 L. R. A. (N. S.) 379, Ann. Cas. 1913 E 243, 124 Pac. 414; *Cady v. Sanford*, 53 Vt. 632; *Huntington v. Attrill*, [1893] App. Cas. 150.

⁵⁷ *Huntington v. Attrill*, 146 U. S. 657, 36 L. Ed. 1123, rev'g 70 Md. 191, 2 L. R. A. 779, 14 Am. St. Rep. 344, 16 Atl. 651.

tive of the matter, however, because a judgment founded upon a strictly penal statute is not within the protection of the full faith and credit clause of the federal constitution." It was also held by the Kansas court that "the question whether the statute, as interpreted by the court, is penal, in such sense as to deny it all extraterritorial operation, is not one of local, but of general or international, law," and hence the fact that the courts of the state where the statute was enacted regard it as strictly penal is immaterial.⁵⁸

Of course, regardless of the conflict of opinion where a statute is deemed penal, a statute may be so worded or construed as to impose upon the directors or other officers of a corporation a contractual or quasi contractual liability for corporate debts, rather than a penalty,⁵⁹ and such a liability may be enforced in the courts of other states,⁶⁰ subject to the qualifications already stated.

This question of enforcement of such a statute in a sister state is sometimes expressly regulated by statute.⁶¹

§ 2719. Evidence. To prove that defendant was a director, the books of the corporation are admissible.⁶² Negligence or mismanagement will not be presumed but must be shown.⁶³ In actions by stockholders on behalf of the corporation, the burden of proof is upon plaintiff. This rule has been applied to proof of fraud.⁶⁴ However, if defendant is entitled to the reasonable value of his services, the burden is on him to show their reasonable value.⁶⁵ Plaintiff cannot testify whether he would have made the loan which is the basis of the action had he known of the default of the officers relied upon to hold them personally liable.⁶⁶ The seal attached to a report will be presumed to be the seal of the corporation, in the absence of any showing to the contrary.⁶⁷

⁵⁸ *Great Western Mach. Co. v. Smith*, 87 Kan. 331, 41 L. B. A. (N. S.) 379, Ann. Cas. 1913 E 243, 124 Pac. 414.

⁵⁹ See § 2597 et seq., supra.

⁶⁰ *Ex parte Van Riper*, 20 Wend. (N. Y.) 617; *Farr v. Briggs' Estate*, 72 Vt. 225, 82 Am. St. Rep. 930, 47 Atl. 793.

⁶¹ P. L. 1897 (N. J.) p. 124.

⁶² *St. George Vineyard Co. v. Fritz*, 48 N. Y. App. Div. 233, 62 N. Y. Supp. 775, 30 N. Y. Civ. Proc. 253.

⁶³ *Redhead v. Iowa Nat. Bank*, 127

Iowa 572, 103 N. W. 796; *Occidental Const. Co. v. Miller*, 154 N. Y. App. Div. 437, 139 N. Y. Supp. 166.

⁶⁴ *Walsh v. Goulden*, 130 Mich. 531, 90 N. W. 406, 9 Det. L. N. 145; *Polhemus v. Polhemus*, 114 N. Y. App. Div. 781, 920, 100 N. Y. Supp. 263, 267.

⁶⁵ *Greathouse v. Martin*, 100 Tex. 99, 94 S. W. 322, aff'g (Tex. Civ. App.), 91 S. W. 385.

⁶⁶ *Stafford v. John*, 164 Ind. 277, 73 N. E. 596, failure to file annual report.

⁶⁷ *Dart v. Hughes*, 49 Colo. 465, 109 Pac. 952.

§ 2720. Counterclaim and set-off. The officer may set off the amount of his salary which is due and unpaid, where the action is by the corporation.⁶⁸

§ 2721. Discontinuance of suit. The right to discontinue the suit,⁶⁹ the effect as discontinuance as to part of defendants,⁷⁰ and the like, are governed by the same rules applicable to actions against persons as individuals.

§ 2722. Decree, damages recoverable and incidental relief. If the suit is in equity for mismanagement, the decree may fix the respective liabilities of the directors where some of them were in office longer than the others.⁷¹ The decree may, in a proper case, order payment directly to the complaining stockholder or creditor,⁷² but ordinarily, where the right to recover is as the representative of the corporation, the damages should be ordered paid to the corporation.⁷³ The recovery, in case of wrongful transfer of assets, where one creditor sues alone, should be limited to such proportion of the value of the property transferred as his claim as a creditor, in connection with other creditors existing at that time, bears to the value of the property transferred; and he is not necessarily entitled to the full amount of his judgment.⁷⁴ If one sues for all, in a representative capacity, payments made to him after the dismissal of his action belong to him and he need not share them with the other creditors who had taken no steps to come in as parties.⁷⁵ Where directors vote excessive salaries to certain of their members who are also officers or employees of the company, ratification thereof

⁶⁸ *Bevier Black Diamond Coal Co. v. Watson*, 107 Mo. App. 451, 80 S. W. 287.

Where one acting as treasurer and general manager is sued for an accounting by the corporation, a claim by such party for salary under agreement with the corporation may be properly offset. *Bevier Black Diamond Coal Co. v. Watson*, 107 Mo. App. 451, 80 S. W. 287.

⁶⁹ *Williams v. Brewster*, 117 Wis. 370, 93 N. W. 479, holding that suit in equity cannot be discontinued before final judgment without consent of every creditor who appears and desires to prosecute.

⁷⁰ *Bauer v. Parker*, 82 N. Y. App. Div. 289, 81 N. Y. Supp. 995, holding discontinuance as to one director fatal.

⁷¹ *Ackerman v. Halsey*, 37 N. J. Eq. 356, aff'd 38 N. J. Eq. 501.

⁷² *Eaton v. Robinson*, 19 R. I. 146, 29 L. R. A. 100, 32 Atl. 339, 31 Atl. 1058. See also *Hilliard v. Lyman*, 138 Fed. 469, construing Vermont statutes.

⁷³ See *infra*, note 78.

⁷⁴ *Buckley v. Stansfield*, 155 N. Y. App. Div. 735, 140 N. Y. Supp. 953.

⁷⁵ *Davids v. Bauer*, 155 N. Y. App. Div. 97, 140 N. Y. Supp. 55.

at a stockholders' meeting is not binding on a minority stockholder who may obtain a review of the fairness of the salaries in a court of equity, and if it deems them exorbitant, it may determine the value of the services rendered and restrain the corporation from paying in excess thereof; but, unless in an exceptional case, the court cannot fix compensation for services to be rendered in the future nor enjoin the company from paying designated persons more than a certain sum per year for such future services.⁷⁶

If the action is by stockholders on behalf of the corporation, the terms of the decree depend of course largely upon the facts of the particular case.⁷⁷ It should order payment to the corporation itself rather than a pro rata payment to the complaining stockholder,⁷⁸ and the decree should not direct that the money paid to the corporation be distributed among the stockholders, since in effect requiring a dividend.⁷⁹ If directors are sued for an accounting, an accounting may be ordered for six years back where that is the period for which recovery might be had in an action at law.⁸⁰ So if the suit is one for an accounting, the decree may fix the periods for which each director shall be held responsible for the sales made during his term of office, where the directors are chargeable for different periods for sales of corporate property to directors.⁸¹ The amount of damages recoverable depends of course largely upon the

⁷⁶ *Sotter v. Coatesville Boiler Works*, — Pa. —, 101 Atl. 744.

⁷⁷ See *Luther v. C. J. Luther Co.*, 118 Wis. 112, 99 Am. St. Rep. 977, 94 N. W. 69.

A preliminary injunction may be granted. *Moneuse v. Riley*, 40 N. Y. Misc. 110, 81 N. Y. Supp. 325; *Glover v. Manila Gold Mining & Milling Co.*, 19 S. D. 559, 104 N. W. 261.

⁷⁸ *Chicago Macaroni Mfg. Co. v. Boggiano*, 202 Ill. 312, 67 N. E. 17.

The decree in a stockholder's suit, in a suit for an accounting, should not require the offending officers to pay the stockholder filing the bill his pro rata share of corporate assets which the officers diverted. *Voorhees v. Mason*, 245 Ill. 256, 91 N. E. 1056, rev'g on other grounds 148 Ill. App. 647.

If stockholders sue in behalf of all

the stockholders, they cannot recover a separate judgment for the damages sustained by them individually, but the money must be ordered paid to the corporation for the benefit of all the creditors and stockholders, just as if the suit had been brought by the corporation. *Hayden v. Perfection Cooler Co.*, — Mass. —, 116 N. E. 871.

The only decree which can be entered is one requiring payment to the corporation rather than to one or more plaintiffs. *Rafferty v. Donnelly*, 197 Pa. 423, 47 Atl. 202.

⁷⁹ *Miller v. Crown Perfumery Co.*, 125 N. Y. App. Div. 881, 110 N. Y. Supp. 806.

⁸⁰ *Barry v. Moeller*, 68 N. J. Eq. 483, 59 Atl. 97.

⁸¹ *Barry v. Moeller*, 68 N. J. Eq. 483, 59 Atl. 97.

circumstances of the particular case.⁸² Remote and speculative damages cannot be recovered.⁸³ The measure of damages where the acts of officers wreck the company, there being a conspiracy, is the value of the property and franchises before the acts of the conspirators which caused the insolvency, less the amount for which the property sold at foreclosure sale.⁸⁴ Counsel fees should be ordered paid out of the fund recovered;⁸⁵ and if plaintiff obtains only part of the relief sought, he is entitled to recover a reasonable amount for counsel fees but not the whole of such fees and disbursements.⁸⁶

An execution against the corporation, and its return unsatisfied, is sometimes, by statute, made a prerequisite to a sale of the property of a corporate officer for any debt of the corporation.

The measure of damages where an officer acts *ultra vires* depends upon the circumstances of the particular case.⁸⁷

§ 2723. Recovery over against corporation by officer held liable. It is often provided by statute that the officer held liable may recover over against the corporation, but that he can enforce the claim only against the corporate property and not against the property of any stockholder.

XXXIII. CRIMINAL LIABILITY AND PENALTIES

§ 2724. General rules. Corporate officers may be criminally liable for their own acts although performed in their official capacity as such officers.⁸⁸ An officer of a corporation, through whose act the corporation commits an offense against the laws of the state or municipality, is himself also guilty of the same offense.⁸⁹ If the officers of a corporation join in a criminal act, as a corporate act, they are jointly liable with the corporation, if it is an act for which

⁸² *McCourt v. Singers-Bigger*, 145 Fed. 103, 7 Ann. Cas. 287.

⁸³ *Bourdette v. Sieward*, 107 La. 258, 31 So. 630.

⁸⁴ *Niles v. New York Cent. & H. River R. Co.*, 176 N. Y. 119, 68 N. E. 142, *aff'd* 69 N. Y. App. Div. 144, 74 N. Y. Supp. 617.

⁸⁵ *Hechelman v. Geyer*, 252 Pa. 123, 97 Atl. 193.

⁸⁶ *Lillard v. Oil, Paint & Drug Co.*, 70 N. J. Eq. 197, 58 Atl. 188, 56 Atl. 254.

⁸⁷ See *Fergus Falls Woolen Mills*

Co. v. Boyum, 136 Minn. 411, 162 N. W. 516.

⁸⁸ *Overland Cotton Mill Co. v. People*, 32 Colo. 263, 105 Am. St. Rep. 74, 75 Pac. 924; *Moore v. State*, 48 Miss. 147, 12 Am. Rep. 367, writ of error dismissed 21 Wall. (U. S.) 636, 22 L. Ed. 653; *Milbrath v. State*, 138 Wis. 354, 131 Am. St. Rep. 1012, 120 N. W. 252.

Criminal responsibility of agents in general, see 2 Clark & Skyles, Agency, § 607.

⁸⁹ *Overland Cotton Mill Co. v. Peo-*

the corporation may be prosecuted; and, if it is a felony, the directors and officers are individually liable.⁹⁰ The rule that all parties active in promoting a misdemeanor, whether agents or not, are principals, applies to corporate officers and agents.⁹¹

· § 2725. **Necessity for assent to or active participation of officer.**

A corporate officer is criminally liable where he is the actual, present and efficient actor behind the corporation.⁹² On the other hand, the officer is generally held not liable unless he participates in the unlawful act either directly or as an aider, abettor or accessory,⁹³ and this is so even though the offense is the violation of a

ple, 32 Colo. 263, 105 Am. St. Rep. 74, 75 Pac. 924.

"The result, therefore, seems to be that where a statute prohibits the doing of an act by a class of persons, and makes any violation of that act a misdemeanor, all active participants in such violation are equally guilty, be they directors or other agents or servants of the corporation; the directors not because they are directors, but personally; no individual, however, being liable who does not personally participate in the doing of the act, or in the aiding and abetting of the doing of the act; but that mere neglect to act does not constitute a crime, except against the class upon whom the duty is imposed." *People v. Clark*, 8 N. Y. Cr. 169, 179, 14 N. Y. Supp. 642, 655.

⁹⁰*State v. Ross*, 55 Ore. 450, 42 L. R. A. (N. S.) 601, 613, 106 Pac. 1022, 104 Pac. 596.

⁹¹*United States v. Winslow*, 195 Fed. 578, 581.

⁹²*United States v. Winslow*, 195 Fed. 578, 581.

⁹³*Iowa. State v. Carmean*, 126 Iowa 291, 106 Am. St. Rep. 352, 102 N. W. 97.

Missouri. State v. Parsons, 12 Mo. App. 205, indictment of president of oil company for refilling barrels without first erasing brand of state inspector.

New York. People v. England, 27 Hun 139; *People v. Clark*, 8 N. Y. Cr. 169, 14 N. Y. Supp. 642.

Oregon. State v. Ross, 55 Ore. 450, 42 L. R. A. (N. S.) 601, 613, 106 Pac. 1022, 104 Pac. 596.

Canada. Rex v. Hays, 14 Ont. L. Rep. 201, 8 Ann. Cas. 380.

Mere knowledge or acquiescence of the president of a jockey club, in allowing betting on the races, through a lease of the exclusive betting privileges, does not make him liable for keeping a common betting house. *Rex v. Hendrie*, 11 Ont. L. Rep. 202.

But it has been held that where the possession of milk for sale, below a certain standard fixed by statute, is made a crime, the general manager of a dairy company is liable where the company had such milk in its possession, taken from a driver of a wagon, although the manager was not present when the wagon left the dairy and his instructions were to keep the milk up to the standard fixed by law. *State v. Burnam*, 71 Wash. 199, 128 Pac. 218. The court said that the rule imposing criminal liability upon officers "should be extended to a managing agent when the offense consists in the violation of a police regulation when neither a guilty knowledge nor a criminal intent is made an element of the offense."

So, somewhat contrary to what is stated in the text, it is held that the

statute which imposes imprisonment as a penalty.⁹⁴ A corporate officer, without regard to his position, is ordinarily not criminally liable for corporate acts performed by other officers or agents of the corporation.⁹⁵ But it has been held that it is not necessary to the conviction of an officer for nuisance that he should have been actually engaged in work upon the premises.⁹⁶

In a Colorado case, a statute provided that any person employing a child under fourteen in a mill or factory should be guilty of a misdemeanor. It did not appear by whom the hiring was done in the case being prosecuted, but both the general superintendent and the assistant superintendent had authority to hire employees. Referring to the liability of the assistant, the court said that it appeared that "by reason of his relationship to the company, and the performance of his duties, he either knew, or, by the exercise of due diligence upon his part, should have known, that a minor under the prohibited age was in the employ of the company. For this reason he must be held as having violated the statute, for it was within his power, by virtue of the relationship he bore to the company, to have prevented the employment."⁹⁷ This case goes to the extreme limit, to say the least.

§ 2726. Embezzlement. A corporate officer, where he conspires with other officers to convert corporate funds to their own use, is guilty of embezzlement although they called the moneys so taken "salary," merely as a cover for their defalcations.⁹⁸ So officers of corporations are criminally liable for embezzling state funds in their hands as such officers, independently of any statute expressly mentioning such officers.⁹⁹ However, the president of a corporation cannot be held for embezzlement by a clerk where he had no knowledge thereof and derived no personal benefit therefrom.¹ Special statutes sometimes fix the liability of corporate officers.²

general manager of a corporation, who knows that agents of the company are peddling its goods without a license, may himself be convicted of peddling without a license. *Crall v. Com.*, 103 Va. 862, 49 S. E. 1038.

⁹⁴ *Rex v. Hays*, 14 Ont. L. Rep. 201, 8 Ann. Cas. 380.

⁹⁵ *State v. Carmean*, 126 Iowa 291, 106 Am. St. Rep. 352, 102 N. W. 97.

⁹⁶ *People v. Detroit White Lead Works*, 82 Mich. 471, 9 L. R. A. 722, 46 N. W. 735.

⁹⁷ *Overland Cotton Mill Co. v. People*, 32 Colo. 263, 105 Am. St. Rep. 74, 75 Pac. 924.

⁹⁸ *People v. Lay*, 193 Mich. 476, 160 N. W. 467.

⁹⁹ *State v. Ross*, 55 Ore. 450, 42 L. R. A. (N. S.) 601, 613, 106 Pac. 1022, 104 Pac. 596.

¹ *State v. Carmean*, 126 Iowa 291, 106 Am. St. Rep. 352, 102 N. W. 97.

² See *Com. v. Cain*, 77 Ky. 525; *Coats v. People*, 22 N. Y. 245.

§ 2727. Engaging in business without a license. A corporate agent may be prosecuted for engaging as an agent in a business for which the corporation has not taken out a license.³ And it is held that the vice president, who is general manager, may be convicted of peddling without a license where servants of the company have peddled without a license.⁴

§ 2728. False pretenses. The president of a company who is also its largest stockholder may be convicted for obtaining credit by false pretenses, where the company gets goods on credit through false representations in a report made by him as president.⁵

§ 2729. Libel. Independently of statute, officers of a newspaper company, where not actively engaged in the management of the paper, cannot be held for criminal libel where no criminal intent is shown.⁶

§ 2730. Negligence. Criminal liability for mere neglect to act has been held not to exist,⁷ although the contrary has been held.⁸ Statutes in some states now make such officers liable for negligence.

§ 2731. Nuisance. It is held that the officers of a corporation are properly convicted for the maintenance of a nuisance—the business itself of a company mixing lead, oils and colors—on the theory that they “are jointly responsible for the business.”⁹

§ 2732. Liability as created by statutes applicable only to corporate officers. Statutes in most of the states enumerate at con-

³ Williams v. City of Talladega, 164 Ala. 633, 51 So. 330; Nashville, C. & St. L. R. Co. v. Attalla, 118 Ala. 362, 24 So. 450; Hays v. Com., 107 Ky. 655, 21 Ky. L. Rep. 1418, 55 S. W.⁴ 425. See also Wyandotte v. Corrigan, 35 Kan. 21.

⁴ Crall v. Com., 103 Va. 862, 49 S. E. 1038.

⁵ Rex v. Campbell, 5 Dom. L. R. (Can.) 370.

⁶ People v. Warden of City Prison, 118 N. Y. Supp. 487. As to civil liability, see § 2556, supra.

⁷ People v. Clark, 8 N. Y. Cr. 179; Queen v. Pocock, 17 Q. B. 34; Rex

v. Hays, 14 Ont. L. Rep. 201, 207, 8 Ann. Cas. 380.

It is not a crime, at common law, for directors or other officers to neglect their duties. People v. Knapp, 206 N. Y. 373, Ann. Cas. 1914 B 243, 99 N. E. 841.

⁸ State v. Young (N. J. L.), 56 Atl. 471, liability of directors for neglect to take precautions at the crossing of a trolley line and a railroad.

⁹ People v. Detroit White Lead Works, 82 Mich. 471, 9 L. E. A. 722, 46 N. W. 735. See also Cincinnati R. Co. v. Com., 80 Ky. 137.

siderable length acts of corporate officers which are deemed misdemeanors, and in some cases the punishment thereof is expressly fixed. In perhaps every state there are statutes expressly making certain acts of directors or other corporate officers either a misdemeanor or a felony, especially in case of banking corporations.¹⁰ Among the acts for which criminal liability is often imposed upon corporate officers are the following: fraudulent misappropriation or conversion of the corporate property;¹¹ unlawfully declaring a dividend;¹² the division, withdrawal or paying over to stockholders of any part of the capital stock of the corporation;¹³ making a false entry in any book of the corporation with intent to defraud;¹⁴ wilfully failing or refusing to make reports;¹⁵ publication by corporate officers of false reports as to financial condition of the corporation;¹⁶ making or circulating any false statement in writing with intent to defraud any shareholder or creditor of the company;¹⁷ excessive loans by banking officers, or loans of more than

¹⁰ Thus, in 3 Rul. Cas. Law §§ 117-144, under the head of Banks, there are some twenty-five pages devoted to the criminal liability of bank officers for receiving deposit when insolvent, for false entries in the books of the bank, for false reports to public officials, and for misapplication of funds of the bank.

¹¹ *Com. v. Dow*, 217 Mass. 473, 105 N. E. 995, where construction of statute and evidence admissible thereunder is considered at length.

¹² *Mangham v. State*, 11 Ga. App. 440, 75 S. E. 508.

¹³ *Cooper v. Utah Light & Railroad Co.*, 35 Utah 570, 136 Am. St. Rep. 1075, 102 Pac. 202.

¹⁴ *Qualey v. Territory*, 8 Ariz. 45, 68 Pac. 546; *People v. Leonard*, 103 Cal. 200, 37 Pac. 222; *Com. v. Dewhirst*, 190 Mass. 293, 76 N. E. 1052.

Statute in California was held to apply not only to books of account but also to entries in the minute books as to meetings of directors. *Ex parte McKenney*, 10 Cal. App. 357, 101 Pac. 927.

The indictment need not allege that

the officer proceeded against had any duties in regard to the books nor that he had access or right of access to the books, where the crime is charged in the language of the statute. *Com. v. Dewhirst*, 190 Mass. 293, 76 N. E. 1052.

¹⁵ *State v. Cox*, 88 Ind. 254; *State v. Hanna*, 84 Ind. 183; *Baker v. State*, 57 Ind. 255; *Suburban Elec. Co. v. Com.*, 21 Ky. L. Rep. 1556, 55 S. W. 684.

¹⁶ *People v. Youtz*, 26 Cal. App. 440, 147 Pac. 222; *State v. Paulsen*, 21 Idaho 686, 123 Pac. 588, construing statutes as making the concurring in a false report a lesser crime than the making of a false report.

¹⁷ It is not necessary to show that the false statement was intended to influence a particular person. *State v. Ware*, 71 N. J. L. 53, 58 Atl. 595.

In Idaho, the statute is to the same effect. *State v. Paulsen*, 21 Idaho 686, 123 Pac. 588.

In Iowa, there is a like statute which, however, was held not applicable to an officer of a fraternal beneficiary association which is wholly

a certain per cent. to stockholders or officers;¹⁸ false statements to bank examiners with intent to deceive them.¹⁹ Under a statute providing for punishing directors for violation of their statutory duties, a duty does not become a statutory one merely because the director has taken the oath of office prescribed by statute to the effect that he will not knowingly violate any law relating to corporate affairs.²⁰

§ 2733. Penalties. Statutes sometimes fix a certain sum, as liquidated damages, for acts or omissions of corporate officers.²¹ Thus, statutes in some jurisdictions provide a fixed penalty for refusal to exhibit to a stockholder the stockbook,²² or its records generally.²³ Under such a statute, it is held that the penalty attaches only to a wilful neglect or refusal.²⁴

In New York, under another statute, the treasurer or chief fiscal officer of the corporation is made liable to a fixed penalty for re-

without capital stock or stockholders. *Balz v. Coquilllette*, 173 Iowa 432, 155 N. W. 801.

Statute in California applied to publication of false prospectus of oil company. *People v. Merritt*, 18 Cal. App. 58, 122 Pac. 839, 844.

Washington statute, see *State v. Merchant*, 48 Wash. 69, 92 Pac. 890.

¹⁸ *People v. Knapp*, 206 N. Y. 373, Ann. Cas. 1914 B 243, 99 N. E. 841.

¹⁹ *People v. Nash*, 15 Cal. App. 320, 114 Pac. 784.

²⁰ *People v. Knapp*, 206 N. Y. 373, Ann. Cas. 1914 B 243, 99 N. E. 841, aff'g 147 N. Y. App. Div. 436, 132 N. Y. Supp. 747.

²¹ *Anderson v. Byrnes*, 122 Cal. 272, 54 Pac. 821; *Schenck v. Bandmann*, 81 Cal. 231, 22 Pac. 654, both of which relate to failure of directors of mining company to post each month an account of all disbursements and receipts during the preceding month.

²² *Cox v. Paul*, 175 N. Y. 328, 67 N. E. 586; *Buker v. Steele*, 43 N. Y. Supp. 346; *Brown v. Kildea*, 58 Wash. 184, 108 Pac. 452, 1135, where sufficiency of demand of leave to inspect considered.

If a foreign corporation, the statute applies only to a stock corporation, and not a moneyed or railroad corporation. *Hollister v. DeForest Wireless Tel. Co.*, 47 N. Y. Misc. 674, 94 N. Y. Supp. 504.

If book not kept by the corporation, or if the book is not in the possession of the officer upon whom the penalty is sought to be imposed, he is not liable. *Gould v. Olympic Min. Co.*, 49 N. Y. Misc. 612, 96 N. Y. Supp. 455; *Billingham v. E. P. Gleason Mfg. Co.*, 43 N. Y. Misc. 681, 88 N. Y. Supp. 398.

Corporation is not a necessary party to the action. *Gunst v. Goldstein*, 30 N. Y. Misc. 44, 61 N. Y. Supp. 707.

Sufficiency of complaint, see *Gunst v. Goldstein*, 30 N. Y. Misc. 44, 61 N. Y. Supp. 707.

²³ *Lewis v. Brainerd*, 53 Vt. 519.

²⁴ *Lozier v. Saratoga Gas, Elec. Light & Power Co.*, 59 N. Y. App. Div. 390, 69 N. Y. Supp. 247, 9 N. Y. Ann. Cas. 485, 69 N. Y. Supp. 247; *Kirkman v. Carlstadt Chemical Co.*, 36 N. Y. Misc. 822, 74 N. Y. Supp. 865.

fusal to furnish a statement of corporate assets and liabilities on demand of stockholders owning five per cent. of the stock.²⁵

²⁵ In New York, section 69 of the Stock Corporation Law provides as follows: "Stockholders owning five per centum of the capital stock of any corporation other than a moneyed corporation, not exceeding one hundred thousand dollars, or three per centum where it exceeds one hundred thousand dollars, may make a written request to the treasurer or chief fiscal officer thereof, for a statement of its affairs, under oath, embracing a particular account of all its assets and liabilities, and the treasurer shall make such statement and deliver it to the person presenting the request within thirty days thereafter, and keep on file for twelve months thereafter a copy of such statement, which shall at all times during business hours be exhibited to any stockholder demanding an examination thereof; but the treasurer or such chief fiscal officer shall not be required to deliver more than one such statement in any one year. The Supreme Court, or any justice thereof, may upon application, for good cause shown, extend the time for making and delivering such certificate. For every neglect or refusal of the treasurer or other chief fiscal officer thereof to comply with the provisions of this section he shall forfeit and pay to the person making such request the sum of fifty dollars, and the further sum of ten dollars for every twenty-four hours thereafter until such statement shall be furnished."

Construction in general, see *McCrea v. Bedell*, 9 N. Y. Misc. 372, 29 N. Y. Supp. 705.

Complaint must allege that defendant has not furnished any statement during the year. *Troughton v. Grace*, 151 N. Y. App. Div. 655, 136 N. Y. Supp. 200.

Statute does not apply where corporation dissolved either in law or in fact. *Osborn v. Gilliams*, 65 N. Y. App. Div. 614, 74 N. Y. Supp. 623, aff'g 33 N. Y. Misc. 312, 68 N. Y. Supp. 470.

Resignation after demand made is no excuse. *Osborn v. Gilliams*, 65 N. Y. App. Div. 614, 74 N. Y. Supp. 623, aff'g 33 N. Y. Misc. 312, 68 N. Y. Supp. 470.

Sufficiency of demand, see *Troughton v. Grace*, 84 N. Y. Misc. 577, 147 N. Y. Supp. 993.

"Another vital objection to a recovery in this action is the fact that the plaintiff was not shown to be a stockholder of either the James F. Lavery Company or the James F. Lavery Printing Company at the time when he made the demand upon defendant. On February 11, 1916, plaintiff served upon the defendant a written demand for a statement of the affairs of the James F. Lavery Printing Company. At the end of the instrument were these words: 'I hold certificate No. 10 for 75 shares in the name of Frank W. Marsh. [Signed] Edward A. Tighe.' The statement in the plaintiff's demand that: 'I, the undersigned, a stockholder of the above corporation owning more than 5% of the capital stock, etc.'—is negatived by the later declaration that his so-called ownership was merely holding a certificate of shares issued in the name of Frank W. Marsh. Whether plaintiff was the pledgee or absolute owner of the stock was not made apparent by this instrument. Almost an identical case is that of *Pray v. Todd*, 71 App. Div. 391, 75 N. Y. Supp. 947. It was there held that a stockholder who wishes to enforce the penalty prescribed by section 52 of the Stock Corporation Law

The most important question under such statutes is whether the penalties are cumulative, i. e., whether there can be a separate recovery for each failure. Generally, it is held that they are not cumulative.²⁶ However, of course, a statute may provide a penalty of a certain sum for each day the default continues.²⁷

(now section 69) must see to it that he is a stockholder at the time he makes his demand. The court there said: 'But this statute is highly penal. * * * In order to enforce the penalty against the treasurer they must bring themselves within the terms of the statute. We are of the opinion that the stock book of the corporation which contains the names of the stockholders and in which all transfers of stock are required to be entered, is ordinarily, at least, the treasurer's guide and authority in furnishing statements pursuant to the provision of section 52 of the Stock Corporation Law. If the stockholder wishes to enforce the penalty, he must see to it that he is a stockholder of record at the time of making the demand upon the treasurer for a statement of the affairs of the corporation.' Again, there was absolutely no proof that a financial statement of the affairs of the corporation had not been given within one year. This question came up in the case of *Troughton v. Grace*, 151 App. Div. 655, 136 N. Y. Supp. 200, and it was there held that a complaint in a similar action, which failed to state that

such a statement had not been furnished within one year, was essential, as it 'constitutes a material part of the description of the acts which constitute the violation of the statute.' The court, however, in that case declined to pass upon the question whether the complaint would have been sufficient if it had 'alleged that such a statement had not been furnished to him within a year, but failed to allege that no such statement had been furnished to any stockholder.' *Tighe v. Lavery*, 98 N. Y. Misc. 245, 162 N. Y. Supp. 1005.

²⁶ *Loveland v. Garner*, 71 Cal. 541, 12 Pac. 616; *Cox v. Paul*, 175 N. Y. 328, 67 N. E. 586, holding that fixed penalty cannot be recovered for each and every refusal; *Walcott v. Little*, 46 N. Y. Misc. 96, 91 N. Y. Supp. 411. See also *State Sav. Bank of Butte City v. Johnson*, 18 Mont. 440, 33 L. R. A. 552, 56 Am. St. Rep. 591, 45 Pac. 662; *Morgan v. Hedstrom*, 164 N. Y. 224, 58 N. E. 26; *Trinity Church v. Vanderbilt*, 98 N. Y. 170; *Losee v. Bullard*, 79 N. Y. 404.

²⁷ *St. John v. Eberlin*, 23 N. Y. Misc. 585, 51 N. Y. Supp. 998; *Lewis v. Brainerd*, 53 Vt. 519.

CHAPTER 43

COMPENSATION OF OFFICERS

- § 2734. Compensation of directors in the absence of contract—General rule.
- § 2735. —Basis of the rule.
- § 2736. Compensation of officers other than directors in absence of contract.
- § 2737. Compensation of directors who are officers in absence of contract.
- § 2738. Implied contracts to pay for services—In general.
- § 2739. —Special, unusual or extraordinary services rendered by officers or directors—General rule.
- § 2740. —Illustrations of extra services by directors.
- § 2741. —Illustrations of extra services by other officers.
- § 2742. —Services of directors prior to incorporation.
- § 2743. Express contracts for compensation in general.
- § 2744. Power to fix compensation—In general.
- § 2745. —By-laws, charter provisions and statutes as to compensation.
- § 2746. —Power of courts to fix compensation.
- § 2747. —Power of stockholders.
- § 2748. —Power of directors—As to salaries of directors.
- § 2749. —Compensation of directors filling other offices.
- § 2750. —Compensation of officers other than directors.
- § 2751. —Power of officers.
- § 2752. —Effect of votes or presence of interested directors or officers.
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- § 2756. Amount of compensation or salary—In general.
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- § 2758. Compensation of officers holding over.
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- § 2760. Changes, increases or reductions of compensation.
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- § 2767. —Temporary suspension of work; lessening of duties; discharge of officers; resignation.
- § 2768. —Receivership, bankruptcy, dissolution, etc.
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- § 2771. Actions by officers to recover salaries or compensation—In general.
- § 2772. — Limitation of actions.
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- § 2775. — Evidence.
- § 2776. — Trial; instructions.
- § 2777. — Findings and questions of fact.
- § 2778. — Interest on amount recovered.
- § 2779. Actions to recover salaries or compensation received by officers—Suit by corporation or minority stockholders.
- § 2780. — Evidence; presumptions and burden of proof.
- § 2781. — Amount of recovery.

§ 2734. Compensation of directors in the absence of contract—

General rule. As a general rule, directors or trustees of a corporation are not entitled to recover any compensation or salary for performing the usual and ordinary duties pertaining to their office, unless compensation for such services is provided for in the charter or authorized by a by-law or resolution of the board of directors before the services are rendered. Regardless of the value of such services, the law will not imply a promise on the part of the corporation to pay, and it is immaterial that the services were performed with the expectation of compensation, or with the general understanding among the directors themselves that they should receive compensation.¹ This is the broad, general rule as it is usually stated in the

1 United States. *Corinne Mill, Canal & Stock Co. v. Toponce*, 152 U. S. 405, 38 L. Ed. 493; *Pacific Improvement Co. v. Chattanooga Southern R. Co.*, 189 Fed. 161; *Hayes v. Canada, A. & P. S. S. Co.*, 181 Fed. 289; *Steam Dredge No. 1*, 87 Fed. 760.

California. *Wickersham v. Crittenden*, 106 Cal. 327, 39 Pac. 602, 93 Cal. 17, 28 Pac. 788.

Colorado. *Steele v. Gold Fissure Gold Min. Co.*, 42 Colo. 529, 126 Am. St. Rep. 177, 95 Pac. 349; *Brown v. Republican Mountain Silver Mines*, 17 Colo. 421, 16 L. R. A. 426, 30 Pac. 66.

Connecticut. *New York & N. H. R. Co. v. Ketchum*, 27 Conn. 170.

Georgia. *Home Mixture Guano Co., v. Tillman*, 125 Ga. 172, 53 S. E. 1019; *Burns v. Betk*, 83 Ga. 471, 10 S. E. 121.

Illinois. *Rosehill Cemetery Co. v. Dempster*, 223 Ill. 567, 79 N. E. 276; *Chicago Macaroni Mfg. Co. v. Boggi-ano*, 202 Ill. 312, 67 N. E. 17; *St. Louis, A. & S. R. Co. v. O'Hara*, 177 Ill. 525, 53 N. E. 118, 52 N. E. 734, *aff'd* 75 Ill. App. 496; *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530; *Illinois Linen Co. v. Hough*, 91 Ill. 63; *Gridley v. Lafayette, B. & M. R. Co.*, 71 Ill. 200; *Holder v. Lafayette, B. & M. R. Co.*, 71 Ill. 106, 22 Am. Rep. 89; *Cheaney v. Lafayette, B. & M. R. Co.*, 68 Ill. 570, 18 Am. Rep. 584; *Rockford, R. I. & St. L. R. Co. v. Sage*, 65 Ill. 328, 16 Am. Rep. 587; *Merrick v. Peru Coal Co.*, 61 Ill. 472; *American Cent. R. Co. v. Miles*, 52 Ill. 174; *Jones v. Vance Shoe Co.*, 92 Ill. App. 158; *St. Louis, A. & S. R. Co. v. Crews*, 75 Ill. App. 496, *aff'd* 177 Ill. 525, 53

reported cases, and the later decisions and the textbooks frequently prefix to such statement of the rule, words such as, "It is held by the overwhelming weight of authority that," or, "It is well settled that," etc. In the cases cited as supporting the general rule, it will be found upon examination that the director was usually seeking to recover salary or compensation for services as director, committeeman, manager, officer, or for other like services, nearly or remotely incident to his duties as a director, when no compensation had been provided therefor by formal action of the board, and under the rule a

N. E. 118; *Barry v. Coffeen Coal & Copper Co.*, 52 Ill. App. 183; *Chicago Porter Home Inv. Co. v. Biddison*, 46 Ill. App. 423.

Indiana. *Blue v. Capital Nat. Bank*, 145 Ind. 518, 43 N. E. 655; *Maux Ferry Gravel Road Co. v. Branegan*, 40 Ind. 361; *Smock v. Henderson*, 1 Wilson 241; *Green v. Felton*, 42 Ind. App. 675, 84 N. E. 166.

Iowa. *Citizens' Nat. Bank v. Elliott*, 55 Iowa 104, 39 Am. Rep. 167, 7 N. W. 470.

Kansas. *Winfield Mortgage & Trust Co. v. Robinson*, 89 Kan. 842, Ann. Cas. 1915 A 451, 132 Pac. 979.

Kentucky. *Paine v. Kentucky Refining Co.*, 159 Ky. 270, Ann. Cas. 1915 D 389, 167 S. W. 375; *Huffaker v. Krieger's Assignee*, 107 Ky. 200, 46 L. E. A. 384, 53 S. W. 288; *Newport & M. R. Co. v. Hay*, 8 Ky. L. Rep. 115. Compare *Huffaker v. Krieger's Assignee*, 21 Ky. L. Rep. 887, 46 L. R. A. 384, 53 S. W. 288.

Louisiana. *Levisse v. Shreveport City R. Co.*, 27 La. Ann. 641.

Maine. *McAvity v. Lincoln Pulp & Paper Co.*, 82 Me. 504, 20 Atl. 84; *Holland v. Lewiston Falls Bank*, 52 Me. 564.

Maryland. *Santa Clara Min. Ass'n v. Meredith*, 49 Md. 389, 33 Am. Rep. 264.

Massachusetts. *Apsey v. Chattel Loan Co.*, 216 Mass. 364, 103 N. E. 899; *Von Arnim v. American Tube Works*, 188 Mass. 515, 74 N. E. 680;

Henry Wood's Sons Co. v. Schaefer, 173 Mass. 443, 73 Am. St. Rep. 305, 53 N. E. 887; *Pew v. First Nat. Bank*, 130 Mass. 391; *Sawyer v. Pawnners' Bank*, 6 Allen 207.

Michigan. *Notley v. First State Bank of Vicksburg*, 154 Mich. 676, 118 N. W. 486; *Eakins v. American White Bronze Co.*, 75 Mich. 568, 42 N. W. 982. See also *Ten Eyck v. Pontiac, O. & P. A. R. Co.*, 74 Mich. 226, 3 L. R. A. 378, 16 Am. St. Rep. 633, 41 N. W. 905.

Minnesota. See *Rogers v. Hastings & D. R. Co.*, 22 Minn. 25.

Mississippi. See *Schaekelford v. New Orleans, J. & G. N. R. Co.*, 37 Miss. 202.

Missouri. *Trimble v. Guardian Trust Co.*, 244 Mo. 228, 148 S. W. 934; *Taussig v. St. Louis & K. E. Co.*, 166 Mo. 28, 89 Am. St. Rep. 674, 65 S. W. 969; *St. Louis Sanitary Co. v. Reed*, 179 Mo. App. 164, 161 S. W. 315; *O'Brien v. John O'Brien Boiler Works Co.*, 154 Mo. App. 183, 133 S. W. 347; *Adlets v. Progressive Shoe Co.*, 84 Mo. App. 288; *Remmers v. Seky*, 70 Mo. App. 364; *Rose v. Eclipse Carbonating Co.*, 60 Mo. App. 28; *Pfeiffer v. Lansberg Brake Co.*, 44 Mo. App. 59.

Montana. See *Severson v. Bi-Metallic Extension Mining & Milling Co.*, 18 Mont. 13, 44 Pac. 79.

New Hampshire. *Smith v. Putnam*, 61 N. H. 632.

New Jersey. *Evans v. Trenton*, 24

recovery was denied, and thus a director of a bank cannot claim a reward offered by the bank for the apprehension of a person who has stolen from it, because it is his duty as director to communicate any information that he may receive to the bank.²

Applying the general rule, it is held furthermore that compensation cannot be recovered from the corporation by a person employed by a director to do what the director should have done, as such, without compensation.³

N. J. L. 764; *Chandler v. Bank of Monmouth*, 13 N. J. L. 255; *Baily v. Burgess*, 48 N. J. Eq. 411; *Lawton v. Bidell* (N. J. Ch.), 71 Atl. 490.

New York. *Gaul v. Kiel & Arthe Co.*, 199 N. Y. 472, 92 N. E. 1069, modifying 133 N. Y. App. Div. 621, 118 N. Y. Supp. 225; *Mather v. Eureka Mower Co.*, 118 N. Y. 629, 23 N. E. 993; *Butts v. Wood*, 37 N. Y. 317; *Starbuck v. Housatonic R. Co.*, 83 Hun 534, 32 N. Y. Supp. 87, aff'd 152 N. Y. 251, 46 N. E. 504; *Gill v. New York Cab Co.*, 48 Hun 524, 1 N. Y. Supp. 202; *Jackson v. New York C. R. Co.*, 2 Thomps. & C. 653. Compare *Reed v. Hayt*, 109 N. Y. 659, 17 N. E. 418.

North Carolina. *Chiles v. United States Furniture Mfg. Co.*, 167 N. C. 574, 83 S. E. 812; *Caho v. Norfolk & S. R. Co.*, 147 N. C. 20, 60 S. E. 640.

Oregon. *Wood v. Lost Lake Mfg. Co.*, 23 Ore. 20, 37 Am. St. Rep. 651, 23 Pac. 848.

Pennsylvania. *McKean v. Ritter-Conley Mfg. Co.*, 230 Pa. 319, 79 Atl. 561; *Althouse v. Cobaugh Colliery Co.*, 227 Pa. 580, 136 Am. St. Rep. 908, 76 Atl. 316; *Brophy v. American Brewing Co.*, 211 Pa. 596, 61 Atl. 123; *Grafner v. Pittsburg, N. I. & C. St. R. Co.*, 207 Pa. 217, 56 Atl. 426; *Martindale v. Wilson-Cass Co.*, 134 Pa. St. 348, 19 Am. St. Rep. 706, 19 Atl. 680; *Kilpatrick v. Penrose Ferry Bridge Co.*, 49 Pa. St. 118, 88 Am. Dec. 497; *Accommodation Loan & Savings Fund Ass'n v. Stonemetz*, 29 Pa. St. 534; *Bair & Gazzam Mfg. Co. v. Vander-saal*, 36 Pa. Super. Ct. 615.

Texas. *Austin City R. Co. v. Swisher*, 1 White & W. Civ. Cas. Ct. App. § 76.

Utah. *Toponce v. Corinne Mill Canal & Stock Co.*, 6 Utah 439, 24 Pac. 534.

Vermont. *Hodges v. Rutland & B. R. Co.*, 29 Vt. 220; *Hall v. Vermont & M. R. Co.*, 28 Vt. 401; *Henry v. Rutland & B. R. Co.*, 27 Vt. 435.

Washington. *Blom v. Blom Codfish Co.*, 71 Wash. 41, 127 Pac. 596; *Dial v. Inland Logging Co.*, 52 Wash. 81, 100 Pac. 157; *Burns v. Commencement Bay Light & Improvement Co.*, 4 Wash. 558, 30 Pac. 668, 709.

West Virginia. *Goodin v. Dixie Portland Cement Co.*, 90 S. E. 544; *Ravenswood, S. & G. R. Co. v. Woodyard*, 46 W. Va. 558, 33 S. E. 285; *Crumlish's Adm'r v. Central Improvement Co.*, 38 W. Va. 390, 23 L. R. A. 120, 45 Am. St. Rep. 872, 18 S. E. 456.

Wisconsin. *Lowe v. Ring*, 123 Wis. 370, 3 Ann. Cas. 731, 101 N. W. 698.

Wyoming. *Hjorth Oil Co. v. Curtis*, 163 Pac. 362.

England. *Dunston v. Imperial Gas Light & Coke Co.*, 3 B. & Ad. 125; *In re George Newman & Co.*, [1895] 1 Ch. 674.

² *Stacy v. State Bank of Illinois*, 5 Ill. 91.

³ *Brown v. Valley View Min. Co.*, 127 Cal. 630, 60 Pac. 424. See also *Winfield Mortgage & Trust Co. v. Robinson*, 89 Kan. 842, Ann. Cas. 1915 A 451, 132 Pac. 979; *West Point Telephone & Telegraph Co. v. Rose*, 76 Miss. 61, 23 So. 629.

§ 2735. — Basis of the rule. The principle underlying the rule forbidding compensation, unless expressly provided for, is that the directors are trustees for the stockholders and the corporation, and the law does not imply any promise to pay trustees for performing their duties as such, or allow them to take compensation out of the funds in their hands, in the absence of an express provision or agreement for compensation.⁴

In an Illinois decision it was said, "The doctrine is well settled in this court that the law will not imply a promise on the part of a private corporation to pay its officers for the performance of their usual duties. In order that such officers may legally demand and recover for such services, * * * it must appear that a by-law or resolution had been adopted authorizing and fixing such allowance before the services were rendered. * * * The rule is analogous to that governing trustees generally, who, at common law, were not entitled to compensation, except as there was warrant therefor in the contract or statute under which they acted."⁵

§ 2736. Compensation of officers other than directors in absence of contract. The cases cited to the general proposition that directors and trustees are not entitled to compensation, unless expressly agreed upon before the services are rendered include cases where the directors have sought recovery for services performed as officers, and in a number of cases the same rule which applies to directors is repeated with the word "officers" substituted for the word "directors." Thus, it is held frequently that officers of a corporation are

⁴ **Illinois.** *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530; *Holder v. Lafayette, B. & M. R. Co.*, 71 Ill. 106, 22 Am. Rep. 89; *Cheaney v. Lafayette, B. & M. R. Co.*, 68 Ill. 570, 18 Am. Rep. 584.

Kansas. *Winfield Mortgage & Trust Co. v. Robinson*, 89 Kan. 842, Ann. Cas. 1915 A 451, 132 Pac. 979.

Kentucky. *Poutch v. National Foundry & Machine Co.*, 147 Ky. 242, 143 S. W. 1003.

Missouri. *St. Louis Sanitary Co. v. Reed*, 179 Mo. App. 164, 161 S. W. 315.

New York. *Butts v. Wood*, 37 N. Y. 317; *Carr v. Kimball*, 153 App. Div. 825, 139 N. Y. Supp. 253; *Robbins v.*

Hill, 81 Misc. 441, 142 N. Y. Supp. 637.

Pennsylvania. *Accommodation Loan & Savings Fund Ass'n v. Stonemetz*, 29 Pa. St. 534.

West Virginia. *Goodin v. Dixie Portland Cement Co.*, 90 S. E. 544; *Crumlish's Adm'r v. Central Improvement Co.*, 38 W. Va. 390, 23 L. R. A. 120, 45 Am. St. Rep. 872, 18 S. E. 456.

Wyoming. *Hjorth Oil Co. v. Curtis*, 163 Pac. 362.

As to officers being trustees or fiduciaries, see § 2261 et seq., *supra*.

⁵ *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530.

not entitled to any compensation or salary unless express provision is made therefor before the services are rendered, either by charter provision, by-law or resolution.⁶ In some cases, the distinction is not of much importance, as where the cases involve directors who in the capacity of officers, such as president, treasurer, etc., seek to recover compensation for their services. But cases may readily be imagined where the distinction becomes very important, as where mere ministerial officers are involved. The reason for the doctrine that directors are not entitled to compensation unless expressly agreed upon does not apply to ministerial officers and employees who are not directors, such as managers, superintendents, treasurers, secretaries, cashiers and the like. Such officers have no control over the property and funds of the corporation, even though they may be stockholders. Accordingly it is held that if such officers or employees are elected or appointed to perform valuable services for the corporation, under circumstances indicating an intention and expectation of payment, a promise on the part of the corporation

⁶ **United States.** Title Insurance & Trust Co. v. Home Tel. Co., 200 Fed. 263 (a president); Metropolitan Rubber Co. v. Place, 147 Fed. 90.

Colorado. Steele v. Gold Fissure Gold Min. Co., 42 Colo. 529, 126 Am. St. Rep. 177, 95 Pac. 349.

Georgia. Home Mixture Guano Co. v. Tillman, 125 Ga. 172, 53 S. E. 1019 (a president).

Illinois. Rosehill Cemetery Co. v. Dempster, 223 Ill. 567, 79 N. E. 276; Spruhan v. Searchlight Gas Co., 185 Ill. App. 380 (a treasurer).

Iowa. Citizens' Nat. Bank v. Elliott, 55 Iowa 104, 39 Am. Rep. 167, 7 N. W. 470.

Kansas. Winfield Mortgage & Trust Co. v. Robinson, 89 Kan. 842, Ann. Cas. 1915 A 451, 132 Pac. 979.

Maryland. McGowan v. Finola Mfg. Co., 120 Md. 335, 87 Atl. 694.

Missouri. Trimble v. Guardian Trust Co., 244 Mo. 228, 148 S. W. 934; O'Brien v. John O'Brien Boiler Works Co., 154 Mo. App. 183, 133 S. W. 347.

New York. Gaul v. Kiel & Arthe Co., 199 N. Y. 472, 92 N. E. 1069,

modifying 133 App. Div. 621, 118 N. Y. Supp. 225.

North Carolina. Chiles v. United States Furniture Mfg. Co., 167 N. C. 574, 83 S. E. 812.

Oregon. Barrenstecher v. The Hof Brau, 67 Ore. 194, 135 Pac. 518.

Pennsylvania. McKean v. Riter-Conley Mfg. Co., 230 Pa. 319, 79 Atl. 561; Althouse v. Cobough Colliery Co., 227 Pa. 580, 136 Am. St. Rep. 908, 76 Atl. 316; Brophy v. American Brewing Co., 211 Pa. 596, 61 Atl. 123; Bair & Gazzam Mfg. Co. v. Vandersaal, 36 Pa. Super. Ct. 615.

"Corporate offices are usually filled by the chief promoters of the corporation, whose interest in the stock or in other incidental advantages is supposed to be a motive for executing the duties of the office without compensation, and this presumption prevails until overcome by an express pre-arrangement for salary. * * * And the rule is just as applicable to presidents and treasurers or other officers as to directors." Kilpatrick v. Penrose Ferry Bridge Co., 49 Pa. St. 118, 88 Am. Dec. 497.

to pay reasonable compensation may be implied, even though there is no express contract.⁷ As was said in an Illinois decision, "A person, not a director and having no control over the funds and property of the corporation, rendering services, does not occupy the relation of trustee to the company and does not fall within the rule, and may recover a reasonable compensation for services rendered."⁸ And the same court in another case said, "We are not disposed to adopt the rule in its entire length and breadth, but to limit it to officers who have the management and control of the property and affairs of the company. Where the office of treasurer, secretary or attorney, etc., is held by a mere stockholder, or other person not connected with the directory, the rule should not apply, as they are wholly disconnected from the management and disposal of the property, and are not tempted to misapply the funds."⁹ A fortiori, the rule in regard to the compensation of directors and other managing officers does not apply to mere clerks, or other ministerial officers who are neither directors nor stockholders. If no compensation was intended there can be no recovery in such cases, but if the circumstances indicate an implied contract, reasonable compensation may be recovered.¹⁰

⁷ **California.** *Bee v. San Francisco & H. B. R. Co.*, 46 Cal. 248.

Dakota. See *Edwards v. Fargo & S. Ry. Co.*, 4 Dak. 549, 33 N. W. 100.

Illinois. *Holder v. Lafayette, B. & M. R. Co.*, 71 Ill. 106, 22 Am. Rep. 89; *Cheaney v. Lafayette, B. & M. R. Co.*, 68 Ill. 570, 18 Am. Rep. 584.

Kansas. *First Nat. Bank v. Drake*, 29 Kan. 311, 44 Am. Rep. 646.

Montana. *Kleinschmidt v. American Min. Co.*, 49 Mont. 7, 139 Pac. 785. See also *Felton v. West Iron Mountain Min. Co.*, 16 Mont. 81, 40 Pac. 70.

New York. *Smith v. Long Island R. Co.*, 102 N. Y. 190, 6 N. E. 397.

West Virginia. *Goodin v. Dixie Portland Cement Co.*, 90 S. E. 544.

Thus where a person was elected secretary by the board of directors of a corporation of which he was neither a stockholder nor director, and he acted as such, it was held that there was a prima facie obligation on the part of the company to pay com-

penation for his services, and that, in order to rebut the implication of a contract, there should be clear evidence that the services were intended to be gratuitous. And it was also held that the implication was not rebutted by the fact that he omitted to present his claim for five years, and until he was superseded. *Smith v. Long Island R. Co.*, 102 N. Y. 190, 6 N. E. 397.

⁸ *Cheaney v. Lafayette, B. & M. R. Co.*, 68 Ill. 570, 18 Am. Rep. 584.

⁹ *Holder v. Lafayette, B. & M. R. Co.*, 71 Ill. 106, 22 Am. Rep. 89.

¹⁰ *Newport & M. R. Co. v. Hay*, 8 Ky. L. Rep. 115; *Waller v. Bank of Kentucky*, 3 J. J. Marsh (Ky.) 201; *Kryger v. Railway Track Cleaner Mfg. Co.*, 46 Minn. 500, 49 N. W. 255; *Smith v. Long Island R. Co.*, 102 N. Y. 190, 6 N. E. 397.

A corporation which makes a proposition to its creditors for the selection by them of a committee to super-

On the other hand, there are authorities which take the view that an officer who is a stockholder cannot recover for his services on an implied contract,¹¹ and that such services are presumed to have been rendered gratuitously.¹² Of course, the circumstances may be such as to negative an implied contract to pay such an officer.¹³

§ 2737. Compensation of directors who are officers in absence of contract. By the weight of authority, the rule preventing the payment of compensation to directors, in the absence of an express agreement or provision allowing such compensation, applies when the directors fill other offices. Thus it is held that there can be no recovery of compensation, unless expressly provided for, when a director serves as president or vice president,¹⁴ as secretary and

vice its business is liable to the members of the committee for the services rendered by them. *Dallas v. Columbia Iron & Steel Co.*, 158 Pa. St. 444, 27 Atl. 1055.

¹¹ *Lowe v. Ring*, 123 Wis. 370, 3 Ann. Cas. 731, 101 N. W. 698.

¹² *Metropolitan Rubber Co. v. Place*, 147 Fed. 90.

When a stockholder, not a director, assumes the duties of an office or performs them without some provision for compensation, the presumption may arise that he performs the services gratuitously. *Gaul v. Kiel & Arthe Co.*, 199 N. Y. 472, 92 N. E. 1069, modifying 133 N. Y. App. Div. 621, 118 N. Y. Supp. 225.

¹³ A ministerial officer, such as assistant secretary of a corporation, when elected and serving under circumstances and conditions which negative any implied contract to pay him for the services pertaining to his office, and of a character that a stockholder would ordinarily be expected to perform without compensation, will not, in the absence of a special contract, be permitted to recover compensation therefor, as upon an implied contract. *Goodin v. Dixie-Portland Cement Co.*, — W. Va. —, 90 S. E. 544.

¹⁴ *United States. Pacific Improve-*

ment Co. v. Chattanooga Southern R. Co., 189 Fed. 161; *Hayes v. Canada, A. & P. S. S. Co.*, 181 Fed. 289.

Arkansas. Red Bud Realty Co. v. South, 96 Ark. 281, 131 S. W. 340.

Illinois. St. Louis, A. & S. R. Co. v. O'Hara, 177 Ill. 525, 53 N. E. 118, 52 N. E. 734, aff'g 75 Ill. App. 496; *Cheaney v. Lafayette, B. & M. R. Co.*, 68 Ill. 570, 18 Am. Rep. 584.

Iowa. Citizens' Nat. Bank v. Elliott, 55 Iowa 104, 39 Am. Rep. 167, 7 N. W. 470.

Maine. McAvity v. Lincoln Pulp & Paper Co., 82 Me. 504, 20 Atl. 84.

Maryland. Santa Clara Min. Ass'n v. Meredith, 49 Md. 389, 33 Am. Rep. 264.

Massachusetts. Busell Trimmer Co. v. Coburn, 188 Mass. 254, 69 L. R. A. 821, 74 N. E. 334.

Missouri. Adlets v. Progressive Shoe Co., 84 Mo. App. 288.

Montana. McConnell v. Combination Mining & Milling Co., 31 Mont. 563, 79 Pac. 248, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194.

Oregon. Wood v. Lost Lake Mfg. Co., 23 Ore. 20, 37 Am. St. Rep. 651, 23 Pac. 848.

Pennsylvania. Althouse v. Cobaugh Colliery Co., 227 Pa. 580, 136 Am. St. Rep. 908, 76 Atl. 316; *Martindale v. Wilson-Cass Co.*, 134 Pa. St. 348, 19

treasurer,¹⁵ as secretary,¹⁶ as treasurer or cashier,¹⁷ as a member of an executive committee¹⁸ or similar offices. As was said in one case, that, "From the employment of an ordinary servant, the law implies a contract to pay him. From the service of a director, the implication is that he serves gratuitously. The latter presumption prevails, in the absence of an understanding or agreement to the contrary, when directors are discharging the duties of other offices of the corporation to which they are chosen by the directory, such as those of president, secretary and treasurer."¹⁹ And when services of this character are performed for a number of years without claiming compensation, it will be presumed that the services were in a directorial capacity.²⁰

Under the contrary doctrine it has been held that where directors, comprising all the stockholders, permit a president to exercise all of their functions and manage the business and they receive all

Am. St. Rep. 706, 19 Atl. 680; Kilpatrick v. Penrose Ferry Bridge Co., 49 Pa. St. 118, 88 Am. Dec. 497.

West Virginia. Ravenswood, S. & G. Ry. Co. v. Woodyard, 46 W. Va. 558, 33 S. E. 285; Crumlish's Adm'r v. Central Improvement Co., 38 W. Va. 390, 23 L. R. A. 120, 45 Am. St. Rep. 872, 18 S. E. 456.

Wisconsin. Lowe v. Ring, 123 Wis. 370, 3 Ann. Cas. 731, 101 N. W. 698.

Compare Reed v. Hayt, 109 N. Y. 659, 17 N. E. 418.

An amended intervening petition of a president, stating the services performed by him at the request of other officers, as president, held not to show a right to compensation because of exceptions to the general rule providing that a president is not entitled to salary. Pacific Improvement Co. v. Chattanooga Southern R. Co., 189 Fed. 161.

¹⁵ Crumlish's Adm'r v. Central Improvement Co., 38 W. Va. 390, 23 L. R. A. 120, 45 Am. St. Rep. 872, 18 S. E. 456.

¹⁶ Silverton Min. Co. v. Haughwout, 44 Colo. 173, 96 Pac. 975; Kleinschmidt v. American Min. Co., 49 Mont. 7, 139 Pac. 785.

¹⁷ **Illinois.** Holder v. Lafayette, B. & M. R. Co., 71 Ill. 106, 22 Am. Rep. 89.

Massachusetts. Parker v. Nickerson, 137 Mass. 487.

Montana. Kleinschmidt v. American Min. Co., 49 Mont. 7, 139 Pac. 785.

New York. Butts v. Wood, 38 Barb. 181, aff'd 37 N. Y. 317.

Pennsylvania. Kilpatrick v. Penrose Ferry Bridge Co., 49 Pa. St. 118, 88 Am. Dec. 497.

West Virginia. Crumlish's Adm'r v. Central Improvement Co., 38 W. Va. 390, 23 L. R. A. 120, 45 Am. St. Rep. 872, 18 S. E. 456.

Compare, however, First Nat. Bank v. Drake, 29 Kan. 311, 44 Am. Rep. 646; Dalton v. Brush Elec. Light Co., 7 Ohio Cir. Dec. 141.

¹⁸ Cheeney v. Lafayette, B. & M. R. Co., 68 Ill. 570, 18 Am. Rep. 584; Hodges v. Rutland & B. R. Co., 29 Vt. 220.

¹⁹ National Loan & Investment Co. v. Rockland, 94 Fed. 335.

²⁰ Kleinschmidt v. American Min. Co., 49 Mont. 7, 139 Pac. 785 (a director acting as secretary).

of the benefits of such officer's services, they are as much bound as if they had formally contracted for the services.²¹

§ 2738. Implied contracts to pay for services—In general. In a Massachusetts case, Justice Morton, later Chief Justice, has stated the rule as follows, "A bank or other corporation may be bound by an implied contract in the same manner as an individual may. But in any case, the mere fact that valuable services are rendered for the benefit of a party does not make him liable upon an implied promise to pay for them. It often happens that persons render services for others which all parties understand to be gratuitous. Thus directors of banks and of many other corporations usually receive no compensation. In such cases, however valuable the services may be, the law does not raise an implied contract to pay by the party who receives the benefit of them. To render such a party liable as a debtor under an implied promise, it must be shown not only that the services were valuable, but also that they were rendered under such circumstances as to raise the fair presumption that the parties intended and understood that they were to be paid for; or, at least, that the circumstances were such that a reasonable man in the same situation with the person who receives and is benefited by them, would and ought to understand that compensation was to be paid for them."²² This statement was quoted with approval by Chief Justice Fuller of the Supreme Court of the United States,²³ and the statement has been quoted by other courts, federal and state, as stating the correct rule.²⁴ The rule is sometimes stated

²¹ *Ruttle v. What Cheer Coal Min. Co.*, 153 Mich. 300, 117 N. W. 168.

²² *Pew v. First Nat. Bank*, 130 Mass. 391.

²³ *Fitzgerald & M. Const. Co. v. Fitzgerald*, 137 U. S. 98, 84 L. Ed. 608.

²⁴ *United States. Montana Tonopah Min. Co. v. Dunlap*, 196 Fed. 612, aff'g 192 Fed. 714. See *In re McCarthy Portable Elevator Co.*, 196 Fed. 247, aff'd 201 Fed. 923.

Massachusetts. See *Apsey v. Chatel Loan Co.*, 216 Mass. 364, 103 N. E. 899; *Marcy v. Shelburne Falls & C. St. R. Co.*, 210 Mass. 197, 96 N. E. 130.

Michigan. *Notley v. First State*

Bank of Vicksburg, 154 Mich. 676, 118 N. W. 486.

Oregon. *Barrenstecher v. The Hof Brau*, 67 Ore. 194, 135 Pac. 518.

Texas. *Southwestern Portland Cement Co. v. Latta & Happer*, — Tex. Civ. App. —, 193 S. W. 1115.

"A thoughtful and deliberate consideration of this entire question, and an extended consideration of the authorities upon it, has led to the conclusion that this is the true rule: Officers of a corporation, who are also directors, and who, without any agreement, express or implied, with the corporation or its owners or their representatives, have voluntarily rendered their services, can recover no

in a different form, in speaking of the presumptions which arise when recovery is sought on an implied contract. Thus it is held that no presumption of an agreement to pay arises from the mere rendition of the services, no matter how valuable they may be,²⁵ and in the absence of an express agreement, it is presumed that services rendered by an officer are performed gratuitously.²⁶ In accordance with this rule, in order to admit of recovery on an implied contract, it must be shown that the services were valuable and performed under circumstances raising a presumption that they were to be paid for.²⁷ Accordingly it has been held that where a director of a corporation is appointed by the governor under a statute which makes it an express duty of the corporation to pay compensation not only for the services rendered but also for attendance at

back pay or compensation therefor; and it is beyond the powers of the board of directors, after such services are rendered, to pay for them out of the funds of the corporation, or to create a debt of the corporation on account of them. * * * But such officers who have rendered their services under an agreement, either express or implied, with the corporation, its owners or representatives, that they shall receive reasonable, but indefinite compensation therefor, may recover as much as their services are worth; and it is not beyond the powers of the board of directors to fix and pay reasonable salaries to them after they have discharged the duties of their officers." *National Loan & Investment Co. v. Rockland Co.*, 94 Fed. 335, quoted in *Montana Tonopah Min. Co. v. Dunlap*, 196 Fed. 612, in which case the evidence was held sufficient to support a finding that there was an implied contract, in the circumstances, to pay one who was an officer and a director for services rendered by him. See also *McCarthy v. Mt. Tecarte Land & Water Co.*, 111 Cal. 328, 43 Pac. 956.

Under West Virginia Code 1913, c. 53, § 53 (§ 2885), which provides that no compensation shall be allowed for services rendered by the president or

any director as such, unless it be allowed or authorized by the stockholders, an officer of a corporation who is also a director is not entitled to recover compensation for services rendered in the discharge of his official duties as upon an implied contract, except under some special or extraordinary circumstances, or when there is a special contract duly authorized by a by-law of the stockholders or with proper action of the directors. *Goodin v. Dixie-Portland Cement Co.*, — W. Va. —, 90 S. E. 544.

²⁵ *Notley v. First State Bank of Vicksburg*, 154 Mich. 676, 118 N. W. 486.

²⁶ *Gaul v. Kiel & Arthe Co.*, 133 N. Y. App. Div. 621, 118 N. Y. Supp. 225, modified 199 N. Y. 472, 92 N. E. 1069.

²⁷ *New York & N. H. R. Co. v. Ketchum*, 27 Conn. 170; *Apsey v. Chattel Loan Co.*, 216 Mass. 364, 103 N. E. 899; *Notley v. First State Bank of Vicksburg*, 154 Mich. 676, 118 N. W. 486; *St. Louis Sanitary Co. v. Reed*, 179 Mo. App. 164, 161 S. W. 315.

Evidence held insufficient to establish an implied contract to pay a president for his services. *Notley v. First State Bank of Vicksburg*, 154 Mich. 676, 118 N. W. 486.

meetings of the directors, and such director receives compensation for his services for a considerable period of time, and there is evidence that other directors understand that he is to be paid for his services, a contract will be implied that the director is to be paid.²⁸

This rule denying officers of corporations compensation is not varied by the fact that they own nearly all of the stock of the corporation.²⁹ There is, however, a set of cases which, while fully sustaining the proposition that directors are trustees incapable of contracting with themselves, nevertheless recognize a tendency in modern times towards the formation of small business corporations, and, realizing that those most interested and holding practically all of the stock will in all probability become the directors and officers thereof, take the view that the corporation which has benefited by the work done by the officers should be compelled to pay for it, and accordingly permit a recovery on a quantum meruit. The officer has the burden, however, of showing the fair and reasonable value of the services rendered.³⁰ The right to compensation in these classes of cases depends upon the circumstances, and the evidence may be such as to preclude the finding of an implied contract.³¹

The rule permitting a recovery by a director on a quantum meruit in a proper case applies to a de facto director as well as to one holding office de jure.³²

Stockholders who are not directors or officers and who render services to the corporation upon proper request do so under an implied agreement that they are to be paid the reasonable value of such services, unless the circumstances negative such an implication, as by showing that the services were to be gratuitous.³³

²⁸ *Apsey v. Chattel Loan Co.*, 216 Mass. 364, 103 N. E. 899.

²⁹ *Gaul v. Kiel & Arthe Co.*, 133 N. Y. App. Div. 621, 118 N. Y. Supp. 225, modified 199 N. Y. 472, 92 N. E. 1069.

³⁰ *Carr v. Kimball*, 153 N. Y. App. Div. 825, 139 N. Y. Supp. 253, citing *Fitthett v. Murphy*, 46 N. Y. App. Div. 181, 61 N. Y. Supp. 182; *McNaughton v. Osgood*, 41 Hun (N. Y.) 109.

³¹ See *Red Bud Realty Co. v. South*, 96 Ark. 281, 131 S. W. 340, referring to extra services.

³² See *Shively v. Eureka Tellurium Gold Min. Co.*, 5 Cal. App. 236, 89 Pac.

1073, allowing a recovery for services and money advanced, where the directors were illegally elected, and were de facto officers.

³³ *Gaul v. Kiel & Arthe Co.*, 199 N. Y. 472, 92 N. E. 1069, modifying 133 N. Y. App. Div. 621, 118 N. Y. Supp. 225; *Goodin v. Dixie-Portland Cement Co.*, — W. Va. —, 90 S. E. 544; *Hjorth Oil Co. v. Curtis*, — Wyo. —, 163 Pac. 362.

The right of a broker to recover the reasonable value of services in effecting the sale of a leasehold is not prevented by the fact that he is a stockholder of the corporation, that the services were performed under an

§ 2739. — **Special, unusual or extraordinary services rendered by officers or directors—General rule.** Some of the cases which adhere to the rule that directors and other managing officers of a corporation are not entitled to compensation, in the absence of express agreement or provision therefor, admit that the rule does not apply where such officers render unusual or extraordinary services, or perform duties not within the line of their duty in the particular office that they occupy. The earlier cases speak of this as the "liberal" rule. This exception, if it may be called such, is now so well established as to be a rule of similar dignity with the general doctrine stated at the beginning of this chapter, and, according to the great weight of authority, if a director or other officer renders services clearly outside of his duty as such, at the request of the corporation or board of directors, with the understanding that they are to be paid for, the law will imply a promise to pay what they are reasonably worth, and in such cases it is not necessary that there be a special agreement to pay, or precedent resolutions, charter provisions, and the like, providing for compensation.³⁴

appointment as member of a committee, or by the fact that such broker was the assistant secretary of the company when the negotiations were commenced and the original appointment made. *Hjorth Oil Co. v. Curtis*, — Wyo. —, 163 Pac. 362.

As to the right of stockholders to compensation where they are officers but not directors, see § 2736, *supra*.

³⁴ **United States.** *Corinne Mill, Canal & Stock Co. v. Toponce*, 152 U. S. 405, 38 L. Ed. 493; *Fitzgerald & Mallory Const. Co. v. Fitzgerald*, 137 U. S. 98, 34 L. Ed. 608; *Title Insurance & Trust Co. v. Home Tel. Co.*, 200 Fed. 263; *Montana Tonopah Min. Co. v. Dunlap*, 196 Fed. 612; *In re Gouverneur Pub. Co.*, 168 Fed. 113.

Arkansas. *Red Bud Realty Co. v. South*, 96 Ark. 281, 131 S. W. 340 (a president); *Mount Nebo Anthracite Coal Co. v. Martin*, 86 Ark. 608, 112 S. W. 882, 111 S. W. 1002.

California. *Bassett v. Fairchild*, 132 Cal. 637, 52 L. R. A. 611, 64 Pac. 1082, 61 Pac. 791. See also *Graves v. Mono*

Lake Hydraulic Min. Co., 81 Cal. 303, 22 Pac. 665.

Colorado. *Ruby Chief Mining & Milling Co. v. Prentice*, 25 Colo. 4, 52 Pac. 210; *Brown v. Republican Mountain Silver Mines*, 17 Colo. 421, 16 L. R. A. 426, 30 Pac. 66.

Dakota. *Edwards v. Fargo & S. Ry. Co.*, 4 Dak. 549, 33 N. W. 100.

Illinois. *Rosehill Cemetery Co. v. Dempster*, 223 Ill. 567, 79 N. E. 276; *Chicago Macaroni Mfg. Co. v. Boggiano*, 202 Ill. 312, 67 N. E. 17; *Lafayette, B. & M. R. Co. v. Cheeney*, 87 Ill. 446; *Gridley v. Lafayette, B. & M. R. Co.*, 71 Ill. 200; *Cheeney v. Lafayette, B. & M. R. Co.*, 68 Ill. 570, 18 Am. Rep. 584; *Rockford, R. I. & St. L. R. Co. v. Sage*, 65 Ill. 328, 16 Am. Rep. 587.

Indiana. *Greensboro & N. C. J. Turnpike Co. v. Stratton*, 120 Ind. 294, 22 N. E. 247.

Iowa. *Brown v. Creston Ice Co.*, 113 Iowa 615, 85 N. W. 750.

Kentucky. *Paine v. Kentucky Refining Co.*, 159 Ky. 270, Ann. Cas.

The circumstances must be such as to give rise to an implied promise in accordance with the principles governing the law of implied contracts. A promise will not be implied from the mere fact that the services were rendered, and that they were valuable, but it must also appear that "they were rendered under such circum-

1915 D 389, 167 S. W. 375; *Huffaker v. Krieger's Assignee*, 21 Ky. L. Rep. 887, 46 L. R. A. 384, 53 S. W. 288.

Louisiana. *New Orleans, B. R. & B. S. Packet Co. v. Brown*, 36 La. Ann. 138, 51 Am. Rep. 5.

Maryland. *McGowan v. Finola Mfg. Co.*, 120 Md. 335, 87 Atl. 694; *Santa Clara Min. Ass'n v. Meredith*, 49 Md. 389, 33 Am. Rep. 264.

Massachusetts. *Apsey v. Chattel Loan Co.*, 216 Mass. 364, 103 N. E. 899; *Marcy v. Shelburne Falls & C. St. R. Co.*, 210 Mass. 197, 96 N. E. 130; *Bartlett v. Mystic River Corporation*, 151 Mass. 433, 24 N. E. 780.

Michigan. *Ruttle v. What Oheer Coal Min. Co.*, 153 Mich. 300, 117 N. W. 168; *Henry v. Michigan Sanitarium & Benevolent Ass'n*, 147 Mich. 142, 110 N. W. 523; *Ten Eyck v. Pontiac, O. & P. A. R. Co.*, 74 Mich. 226, 3 L. R. A. 378, 16 Am. St. Rep. 633, 41 N. W. 905.

Minnesota. *Kryger v. Railway Track Cleaner Mfg. Co.*, 46 Minn. 500, 49 N. W. 255; *Deane v. Hodge*, 85 Minn. 146, 59 Am. Rep. 321, 27 N. W. 917; *Rogers v. Hastings & D. R. Co.*, 22 Minn. 25.

Mississippi. *Shackelford v. New Orleans, J. & G. N. R. Co.*, 37 Miss. 202.

Missouri. *Bell v. Peper Tobacco Warehouse Co.*, 205 Mo. 475, 103 S. W. 1014; *Taussig v. St. Louis & K. R. Co.*, 166 Mo. 28, 89 Am. St. Rep. 674, 65 S. W. 969; *O'Brien v. John O'Brien Boiler Works Co.*, 154 Mo. App. 183, 133 S. W. 347.

Montana. *Severson v. Bi-Metallic Extension Mining & Milling Co.*, 18 Mont. 13, 44 Pac. 79; *Felton v. West*

Iron Mountain Min. Co., 16 Mont. 81, 40 Pac. 70.

New Jersey. *Chandler v. Bank of Monmouth*, 13 N. J. L. 255; *Porch v. Agnew Co.*, 70 N. J. Eq. 328, 61 Atl. 721.

New York. *Gaul v. Kiel & Arthe Co.*, 199 N. Y. 472, 92 N. E. 1069, modifying 133 App. Div. 621, 118 N. Y. Supp. 225; *Bogart v. New York & L. I. R. Co.*, 191 N. Y. 550, 85 N. E. 1106, aff'g 118 App. Div. 50, 102 N. Y. Supp. 1093; *Bogart v. New York & L. I. R. Co.*, 118 App. Div. 50, 102 N. Y. Supp. 1093, aff'd 191 N. Y. 550, 85 N. E. 1106; *Bagley v. Carthage, W. & S. H. R. Co.*, 25 App. Div. 475, 49 N. Y. Supp. 718; *Outerson v. Fonda Lake Paper Co.*, 66 Hun 629, 20 N. Y. Supp. 980; *McDowall v. Sheehan*, 59 Hun 618, 13 N. Y. Supp. 386; *Sargent v. Sargent Granite Co.*, 3 Misc. 325, 23 N. Y. Supp. 886; *Rider v. Union India Rubber Co.*, 5 B. O. S. W. 85, aff'd 28 N. Y. 379.

North Carolina. *Chiles v. United States Furniture Mfg. Co.*, 167 N. C. 574, 83 S. E. 812.

Oregon. *Barrenstecher v. The Hof Brau*, 67 Ore. 194, 135 Pac. 518; *Wood v. Lost Lake Mfg. Co.*, 23 Ore. 20, 37 Am. St. Rep. 651, 23 Pac. 848.

Rhode Island. *Flynn v. Columbus Club*, 21 B. I. 534, 45 Atl. 551.

Tennessee. *Reeve v. Harris*, 50 S. W. 658.

Utah. *Toponce v. Corinne Mill, Canal & Stock Co.*, 6 Utah 439, 24 Pac. 534.

Washington. *Blom v. Blom Codfish Co.*, 71 Wash. 41, 127 Pac. 596; *Dial v. Inland Logging Co.*, 52 Wash. 81, 100 Pac. 157.

stances as to raise the fair presumption that the parties intended and understood that they were to be paid for; or, at least, that the circumstances were such that a reasonable man in the same situation with the person who receives and is benefited by them would and ought to understand that compensation was to be paid for them."³⁵ Of course there can be no recovery of compensation if the circumstances are such as to show that no compensation was expected or intended,³⁶ or if a custom is proved showing that no compensation was charged for the services such as the director or officer performed.³⁷ A fortiori, the recovery of compensation is precluded where an express agreement that compensation should not

West Virginia. *Watts v. West Virginia Southern Ry. Co.*, 48 W. Va. 262, 37 S. E. 700.

Wyoming. *Hjorth Oil Co. v. Curtis*, 163 Pac. 362.

England. *Eales v. Cumberland Black Lead Mine Co.*, 6 H. & N. 481.

In *Santa Clara Min. Ass'n v. Meredith*, 49 Md. 389, 33 Am. Rep. 264, the court stated the rule to be that, "If a president or director of a corporation renders services which are not within the scope of, and are not required of him by, his duties as president, or director, but are such as are properly to be performed by an agent, broker or attorney, he may recover compensation for such services upon an implied promise." In *Greensboro & N. C. J. Turnpike Co. v. Stratton*, 120 Ind. 294, 22 N. E. 247, the court quoted the foregoing statement and said, "This, we think, the true rule, as supported by the great weight of authority."

³⁵ *Pew v. First Nat. Bank*, 130 Mass. 391. See also *Marcy v. Shelburne Falls & C. St. R. Co.*, 210 Mass. 197, 96 N. E. 130; *Dodge v. Lansing & S. Traction Co.*, 152 Mich. 100, 115 N. W. 1004; *Henry v. Michigan Sanitarium & Benevolent Ass'n*, 147 Mich. 142, 110 N. W. 523.

³⁶ **United States.** *Lindsey v. Pasco Power & Water Co.*, 203 Fed. 251; *McMullen v. Ritchie*, 64 Fed. 253.

California. *Fraylor v. Sonora Min. Co.*, 17 Cal. 594.

Colorado. *Brown v. Republican Mountain Silver Mines*, 17 Colo. 421, 16 L. R. A. 426, 30 Pac. 66.

Kentucky. *Louisville Bldg. Ass'n v. Hegan*, 20 Ky. L. Rep. 1629, 49 S. W. 796.

Louisiana. *Fowler v. Great Southern Telephone & Telegraph Co.*, 104 La. 751, 29 So. 271; *Levissee v. Shreveport City R. Co.*, 27 La. Ann. 641.

Massachusetts. *Henry Wood's Sons Co. v. Schaefer*, 173 Mass. 443, 73 Am. St. Rep. 305, 53 N. E. 881; *Parker v. Nickerson*, 137 Mass. 487; *Pew v. First Nat. Bank*, 130 Mass. 391; *Sawyer v. Pawnors' Bank*, 6 Allen 207. Compare *Bartlett v. Mystic River Corporation*, 151 Mass. 433, 24 N. E. 780.

Michigan. *Eakins v. American White Bronze Co.*, 75 Mich. 568, 42 N. W. 982.

Mississippi. *West Point Telephone & Telegraph Co. v. Rose*, 76 Miss. 61, 23 So. 629.

New York. *Pendleton v. Empire Stone Dressing Co.*, 19 N. Y. 13; *Gill v. New York Cab Co.*, 48 Hun 524, 1 N. Y. Supp. 202; *Mather v. Eureka Mower Co.*, 44 Hun 333, aff'd 118 N. Y. 629, 23 N. E. 993; *Utica Ins. Co. v. Bloodgood*, 4 Wend. 652.

³⁷ *Fraylor v. Sonora Min. Co.*, 17 Cal. 594.

be claimed or paid, is shown,³⁸ and provisions in the charter, by-laws or resolutions of the directors expressly prohibiting the payment of compensation will operate to prevent recovery.³⁹ In some states, statutory provisions have been enacted providing that trustees are precluded from receiving compensation for services simply acquiesced in, however strong the inference might be that compensation was expected; and the effect of such a statute is obvious although it does not operate to bar a director from performing extra services.⁴⁰

Some decisions have laid down the contrary doctrine that an express contract is necessary to insure recovery whether the services are performed in the line of the officer's duty or whether they are extraofficial services.⁴¹ In at least one jurisdiction, this rule is well established. The policy on which it rests has been stated as follows, viz., "Corporate officers have ample opportunities to adjust and fix their compensation before they render their services, and no great mischief is likely to result from compelling them to do so, but if, on the other hand, actions are to be maintained by corporate officers for services, which, however faithful and valuable, were not rendered on the foot of an express contract, there would be no limitation to corporate liabilities, and stockholders would be devoured by officers."⁴² In the case from which this statement was taken, recovery was sought for services within the scope of the officer's duty, but in a later case it was pointed out that no substantial difference existed with respect to the rule or the policy, where the services were extraofficial.⁴³

³⁸ First Nat. Bank v. Drake, 29 Kan. 311, 44 Am. Rep. 646.

³⁹ See Olney v. Chadsey, 7 R. I. 224; Hodges v. Rutland & B. R. Co., 29 Vt. 220. See also Steam Dredge No. 1, 87 Fed. 760. Compare, however, Bartlett v. Mystic River Corporation, 151 Mass. 433, 24 N. E. 780; Chandler v. Bank of Monmouth, 13 N. J. L. 255.

If the charter of a corporation expressly provides that the president shall not be paid for official services, he can claim no compensation for any services, unless from their nature or from the evidence it appears that they were rendered outside the duties of his office. Olney v. Chadsey, 7 R. I. 224.

⁴⁰ Henry v. Michigan Sanitarium & Benevolent Ass'n, 147 Mich. 142, 110 N. W. 523.

⁴¹ Beach v. Stouffer, 84 Mo. App. 395; Rose v. Eclipse Carbonating Co., 60 Mo. App. 28 (compare, however, the later Missouri cases cited under the majority rule, supra, this section): Althouse v. Cobaugh Colliery Co., 227 Pa. 580, 136 Am. St. Rep. 908, 76 Atl 316; Kilpatrick v. Penrose Ferry Bridge Co., 49 Pa. St. 118, 88 Am. Dec. 497; Field v. Union Box Co., 2 Wkly. Notes Cas. (Pa.) 426.

⁴² Woodward, C. J., in Kilpatrick v. Penrose Ferry Bridge Co., 49 Pa. St. 118, 88 Am. Dec. 497.

⁴³ Althouse v. Cobaugh Colliery Co., 227 Pa. 580, 136 Am. St. Rep. 908, 76

§ 2740. — **Illustrations of extra services by directors.** In accordance with the rule permitting recovery of compensation for extraordinary services, it has been held that a director who performs the duties of a manager, or acts in any other capacity outside of his duties as a director, is entitled to compensation.⁴⁴ Recovery may be had where a director who is also an attorney performs professional services for the corporation,⁴⁵ where the director acts as counsel for the corporation in a suit to which it is a party,⁴⁶ or where the director acts as general counsel for the corporation.⁴⁷ Similarly, a director who is an expert bookkeeper and auditor, and who acts as arbitrator in settling a dispute to which the corporation is a party, is entitled to compensation. This rule was applied in a case where the director as arbitrator helped to settle a dispute between the corporation and a manager as to commissions due such manager under an arbitration agreement which did not provide for fees and the payment of incidental expenses, and the arbitrators were entitled to a reasonable compensation.⁴⁸ It has also been held that a director, president or other officer of a mining company may recover for services as agent, broker or attorney in procuring patents for land, obtaining loans, etc.;⁴⁹ that a director of a railroad company may recover for expenses and services performed on request, as agent and attorney of the company in securing the right of way for its road, securing subscriptions to stock, obtaining aid notes, raising money, securing loans, and making contracts for the construction of its road, etc., if such services are not, under the charter or by-laws, included in his duties as director;⁵⁰ that a director may recover commissions

Atl. 316. See also *Brophy v. American Brewing Co.*, 211 Pa. 596, 61 Atl. 123.

⁴⁴ *Mount Nebo Anthracite Coal Co. v. Martin*, 86 Ark. 608, 112 S. W. 882, 111 S. W. 1002; *Ruttle v. What Cheer Coal Min. Co.*, 153 Mich. 300, 117 N. W. 168.

Where a secretary and director performed services for a corporation in a general way as assistant manager, being requested to do so by the owner of the corporation, an instruction that no contract to pay for such services could be implied under the rule that they would be presumed gratuitous, would have been improper under the evidence. *Ruttle v. What Cheer Coal*

Min. Co., 153 Mich. 300, 117 N. W. 168. Contra *Brophy v. American Brewing Co.*, 211 Pa. 596, 61 Atl. 123.

⁴⁵ *Taussig v. St. Louis & K. R. Co.*, 166 Mo. 28, 89 Am. St. Rep. 674, 65 S. W. 969.

⁴⁶ *Jackson v. New York Cent. R. Co.*, 2 Thomps. & C. (N. Y.) 653, aff'd 58 N. Y. 623.

⁴⁷ *Watts v. West Virginia Southern R. Co.*, 48 W. Va. 262, 37 S. E. 700.

⁴⁸ *Paine v. Kentucky Refining Co.*, 159 Ky. 270, Ann. Cas. 1915 D 389, 167 S. W. 375.

⁴⁹ *Santa Clara Min. Ass'n v. Meredith*, 49 Md. 389, 33 Am. Rep. 264.

⁵⁰ *Cheaney v. Lafayette, B. & M. R. Co.*, 68 Ill. 570, 18 Am. Rep. 584; *Ten*

and compensation for services as a buyer and seller of goods;⁵¹ and that a director and manager of a steamboat company may recover for his services as captain of one of its boats.⁵²

The payment of compensation for extra services will be denied where it appears from the evidence that it was not expected. Under this rule salary was denied in one case where a director had charge of the construction of irrigating works;⁵³ and in another case it was held that the mere appointment of a director as a member of a building committee was not sufficient to show a special employment from which both parties expected that the trustee was to be compensated.⁵⁴

§ 2741. — Illustrations of extra services by other officers. A president may recover compensation for extra services rendered if it appears that the representatives of the corporation understood or ought, as reasonable men, to have understood, that the services performed were outside of those due from the officer, and were to be paid for.⁵⁵ Under this rule it has been held that a president was

Eyck v. Pontiac, O. & P. A. R. Co., 74 Mich. 226, 3 L. R. A. 378, 16 Am. St. Rep. 633, 41 N. W. 905.

⁵¹ See *Loewer v. Tonoke Rice Mill Co.*, 111 Ark. 62, 161 S. W. 1042.

⁵² *New Orleans, B. R. & B. S. Packet Co. v. Brown*, 36 La. Ann. 138, 51 Am. Rep. 5.

⁵³ *Lindsey v. Pasco Power & Water Co.*, 203 Fed. 251.

⁵⁴ *Henry v. Michigan Sanitarium & Benevolent Ass'n*, 147 Mich. 142, 110 N. W. 523.

⁵⁵ *Red Bud Realty Co. v. South*, 96 Ark. 281, 131 S. W. 340; *Marcy v. Shelburne Falls & C. St. R. Co.*, 210 Mass. 197, 96 N. E. 130; *Barrenstecher v. The Hof Bran*, 67 Ore. 194, 135 Pac. 518.

In considering whether or not a contract to pay a president for special services rendered has been proved, the nature of the corporation and its business, the nature and extent of the services rendered, the comparative amount and value of the services of other officers and all other circumstances of the case must be considered and weighed. *Red Bud Realty Co. v.*

South, 96 Ark. 281, 131 S. W. 340.

Where a plaintiff who was director and president seeks the recovery of compensation for special services rendered, the same implied obligation to pay for services performed do not arise in favor of such officer to the extent that it does in favor of a third person. *Marcy v. Shelburne Falls & C. St. R. Co.*, 210 Mass. 197, 96 N. E. 130.

Where an instruction stated that there could be a recovery of the reasonable value of special services rendered by a plaintiff as president, if rendered with expectation of pay and accepted under conditions that the officers of the defendant as reasonable men ought to have understood that they were to be paid for, it was not error to state that the jury had no right to find in favor of the plaintiff "as a matter of equity and fairness between him * * * and the corporation," such portion of the charge being given in connection with a statement that the plaintiff could not recover if he had no intention when the services were rendered to claim

entitled to recover for services rendered as a manager,⁵⁶ or as a manager and salesman. Recovery has been allowed for such extra services even where the by-laws required all salaries to be fixed by the directors.⁵⁷ Recovery has also been permitted for services of a president as an expert railroad man.⁵⁸ But if a president performs services as a superintendent as required by the by-laws, and performs no services outside of his duties, he is not entitled to recover extra compensation;⁵⁹ and recovery has been denied in one case where the president prepared certain contracts, it appearing that the work was such as he was required to perform in his capacity as manager.⁶⁰

Under the strict rule precluding compensation unless an express contract is entered into, it has been held that there could be no recovery for services of a president in surveying, procuring rights of way and building bridges, etc.;⁶¹ and a recovery of commissions on sales of stock and material has been denied.⁶²

In an action by a treasurer of a corporation to recover compensation for his services, evidence that the plaintiff is a stockholder in the corporation and a member of a firm which does the banking business of the corporation and that he performed his duties as treasurer without an express understanding that he should have compensation, the salaries of other officers being fixed by the by-laws, justifies a finding that the plaintiff accepted the office without expecting compensation and performed the services gratuitously.⁶³ The right of

compensation. *Marcy v. Shelburne Falls & C. St. R. Co.*, 210 Mass. 197, 96 N. E. 130.

In the case of a corporation having only a few members, all of whom are officers and rendering some services to promote the business of the company, and the testimony and circumstances tend to show that no officer expected to charge or to receive compensation for his services, and the president is paid on a commission basis for expenses in selling lots, in accordance with the understanding of the officers that there would be no extra compensation paid for such services, a finding that there was no implied contract to pay for such services will be sustained. *Red Bud Realty Co. v. South*, 96 Ark. 281, 131 S. W. 340.

⁵⁶ *Barrenstecher v. The Hof Brau*, 67 Ore. 194, 135 Pac. 518.

⁵⁷ *Georgetown Mercantile Co. v. First Nat. Bank of Georgetown*, — Tex. Civ. App. —, 165 S. W. 73.

⁵⁸ *Law v. New Mexico Cent. R. Co.*, 19 N. M. 242, 142 Pac. 145.

⁵⁹ *Ebner v. Alaska Mildred Gold Min. Co.*, 167 Fed. 456.

⁶⁰ *Tanner v. Sinaloa Land & Fruit Co.*, 43 Utah 14, Ann. Cas. 1916 C 100, 134 Pac. 586.

⁶¹ *Althouse v. Cobaugh Colliery Co.*, 227 Pa. 580, 136 Am. St. Rep. 908, 76 Atl. 316.

⁶² *In re Dr. Voorhees Awning Hood Co.*, 187 Fed. 611, rev'd 188 Fed. 425.

⁶³ *Mather v. Eureka Mower Co.*, 44 Hun (N. Y.) 333, aff'd 118 N. Y. 629, 23 N. E. 993.

salaries officers to recover expenses and extra compensation is treated in subsequent sections.⁶⁴

§ 2742. — **Services of directors prior to incorporation.** It has been held that a director, who is also an attorney, may recover upon an implied promise for the reasonable value of services in preparing articles of incorporation, and for similar services performed before incorporation, unless the understanding is that the services are gratuitous.⁶⁵ But there is also authority to the contrary on this proposition, and it seems that the better authority is to the effect that an express promise or agreement is necessary to render a corporation liable for such services. It has been held that a corporation is not liable for services of a director rendered as secretary of the promoters of the corporation, although there was an understanding that the corporation would pay for such services.⁶⁶

§ 2743. **Express contracts for compensation in general.** In the absence of any limitation imposed in the corporate charter or in the general law, it is within the power of a corporation to enter into an express contract to pay a salary or other compensation to its directors or other officers for their services, whether rendered in the line of their duty or outside of such line of duty. When such a contract is entered into, the right to compensation depends on the terms of the contract entered into.⁶⁷ Usually the corporation cannot avoid the effect of such contracts when properly entered into.⁶⁸

⁶⁴ See § 2763, *infra*.

⁶⁵ *Taussig v. St. Louis & K. R. Co.*, 166 Mo. 28, 89 Am. St. Rep. 674, 65 S. W. 969.

As to liability of the corporation for the services and expenses of the promoters, see § 164.

⁶⁶ *West Point Telephone & Telegraph Co. v. Rose*, 76 Miss. 61, 23 S. 629.

⁶⁷ *Green v. Felton*, 42 Ind. App. 675, 84 N. E. 166; *Ft. Payne Rolling Mill v. Hill*, 174 Mass. 224, 54 N. E. 532.

A director who is also a general manager is entitled to a salary where an agreement so providing is entered into. *Bevier Black Diamond Coal Co. v. Watson*, 107 Mo. App. 451, 80 S. W. 287.

⁶⁸ Where a corporation entered into an agreement to pay an assistant

manager the same salary as a general manager as long as he retained stock in the company, and such assistant performed services pursuant to such agreement, the corporation was bound to make the payments of compensation in accordance with the contract, and it would be estopped from setting up the plea of *ultra vires*. *Darknell v. Cœur D'Alene & St. J. Transp. Co.*, 18 Idaho 61, 108 Pac. 536.

Where a marine superintendent of a company accepted the action of an executive committee in employing him, the corporation could not avoid the effect of the action by setting up an agreement of a syndicate in control of the company, limiting the salaries to be paid. *Young v. Canada, A. & P. S. S. Co.*, 211 Mass. 453, 97 N. E. 1098.

It has been held that the fact that a prospectus is issued prior to incorporation stating that no salaries will be paid to officers does not operate to limit the power to pay salaries. When the corporation is duly created, the directors may pay salaries if the circumstances warrant it, as business conditions may arise whereby it is for the best interest for all concerned that the officers receive salaries.⁶⁹

An agreement entered into prior to incorporation providing for salaries of certain officers does not bind the corporation when not incorporated into the articles of incorporation.⁷⁰ In some cases where corporations have succeeded partnerships, binding contracts entered into have operated to prevent the payment of compensation for a certain period of time.⁷¹

An executor of a deceased stockholder is not disqualified to receive a salary as president. Even the fact that such executor and a co-executor control the majority of the stock of the corporation will not prevent such a contract being entered into, it appearing that there is no fraud, and that the directors who elect such person as president are not controlled by him.⁷²

In one case a corporation acting under a trust had assumed the duty of finding an advantageous purchaser of the property of its cestui que trust, and an attempt was made to pay a director for services rendered in finding such a purchaser. It was held that the duty of finding the purchaser necessarily belonged to the board of directors and each member of such board, by means of which the corporation acted, and the right to pay a director out of the funds of the cestui que trust could not be sustained, although the corporation might be entitled to compensation for affecting the sale.⁷³

§ 2744. Power to fix compensation—In general. As a general rule, the power to fix the compensation of an officer is an incident to the

⁶⁹ *Metzger v. Knox*, 77 N. Y. Misc. 271, 136 N. Y. Supp. 681.

⁷⁰ *Mills v. Hendershot*, 70 N. J. Eq. 258, 62 Atl. 542.

⁷¹ *In re Nixon's Estate*, 239 Pa. 270, 86 Atl. 849.

⁷² *Hirsch v. Jones*, 115 N. Y. App. Div. 156, 100 N. Y. Supp. 687.

⁷³ *Purchase v. Atlantic Safe Deposit & Trust Co.*, 81 N. J. Eq. 344, 87 Atl. 444, *aff'd* 83 N. J. Eq. 353, 91

Atl. 1070, holding that where, in such a case, the corporation paid one of its directors for disclosing a purchaser of the trust property compensation out of the funds of the cestui que trust, and it later developed that the purchaser was a director of the same corporation, both the director and the corporation were liable to the cestui que trust for the compensation paid, the director being primarily liable.

power of appointing him, when it is not vested elsewhere or expressly taken away from the appointing power.⁷⁴

§ 2745. — By-laws, charter provisions and statutes as to compensation. Express provisions, in the corporate charter or in the by-laws or in statutes, prohibiting the payment of any salaries or other compensation, or allowing compensation to certain officers only, are, of course, controlling.⁷⁵ Accordingly, a charter provision fixing the salaries of certain officers may operate to prevent a change of such salaries.⁷⁶ Where the articles of incorporation provide that the directors shall be entitled to receive a certain sum "by way of remuneration in each year," no remuneration can be claimed except for a complete year of service.⁷⁷

In the same way statutory provisions may limit the amount of compensation⁷⁸ or require the salaries of certain officers to be allowed by the stockholders.⁷⁹

The usual provisions of the by-laws are to the effect that the directors shall fix the salaries of officers,⁸⁰ but in some cases, by-laws exist fixing the amount. It has been held that a payment in excess of that authorized by the by-laws is voidable at the suit of a dissenting stockholder, even though authorized by the majority stockholders.⁸¹ It has also been held that a by-law thus fixing the salary of an officer may be modified by usage and acquiescence.⁸²

As a general rule, the existence of a by-law or charter provision merely giving the directors or stockholders the power to fix salaries, to be exercised or not, as they deem best, does not of itself give any right to compensation, and in fact, if it appears that no salary has been fixed, such fact will negative the idea that any compensation was intended.⁸³ Some authorities hold, however, that the existence of

⁷⁴ *Waite v. Windham County Min. Co.*, 37 Vt. 608.

⁷⁵ *Eagle & P. Mfg. Co. v. Browne*, 58 Ga. 240; *Olney v. Chadsey*, 7 R. I. 224.

⁷⁶ See § 2760, *infra*.

⁷⁷ *Salton v. New Beeston Cycle Co.*, [1899] 1 Ch. 775, 68 L. J. Ch. 371.

⁷⁸ See § 2756, *infra*.

⁷⁹ See § 2747, *infra*.

⁸⁰ See § 2747, *infra*.

The directors must act in good faith in carrying out such provisions. See § 2755, *infra*.

⁸¹ *Brown v. De Young*, 167 Ill. 549, 47 N. E. 863, *aff'g* 66 Ill. App. 212.

⁸² *Bowler v. American Box Strap Co.*, 22 N. Y. Misc. 335, 49 N. Y. Supp. 153.

⁸³ *United States*. See *Steam Dredge No. 1*, 87 Fed. 760.

Illinois. *Illinois Linen Co. v. Hough*, 91 Ill. 63.

Maine. *McAvity v. Lincoln Pulp & Paper Co.*, 82 Me. 504, 20 Atl. 84.

Missouri. *Remmers v. Seky*, 70 Mo. App. 364.

Oregon. *Wood v. Lost Lake Mfg.*

such a by-law or charter provision authorizing the fixing of compensation operates to show an intention that compensation shall be paid and is ground for implying a promise to pay reasonable compensation if the amount due is not fixed.⁸⁴ The right to compensation would seem to depend, however, upon the wording of the by-law involved. Thus it has been held that a by-law providing for a yearly salary to be fixed after the expiration of the year's service operates to rebut any presumption that the officer was to serve without compensation.⁸⁵

A by-law forbidding the incurring of a debt "unless there are funds in the treasury to meet the same," has been held not to apply to the payment of salaries of officers.⁸⁶

§ 2746. — Power of courts to fix compensation. The courts have no power to interfere with the action of stockholders or directors in fixing compensation unless there is injustice, oppression or circumstances amounting to fraud.⁸⁷ A case of fraud is presented where directors increase their collective salaries so as to use up nearly the entire earnings of a company;⁸⁸ where directors or officers appropriate the income so as to deprive stockholders of reasonable dividends, or perhaps so reduce the assets as to threaten the corporation with insolvency;⁸⁹ or where majority stockholders or trustees, with

Co., 23 Ore. 20, 37 Am. St. Rep. 651, 23 Pac. 848.

West Virginia. *Crumlish's Adm'r v. Central Improvement Co.*, 38 W. Va. 390, 23 L. R. A. 120, 45 Am. St. Rep. 872, 18 S. E. 456.

Canada. *In re Bolt & Iron Co.*, 14 Ont. 211.

A by-law providing that no salary shall be paid to the officers until actual profits are made, "except to the secretary," does not in itself provide by implication for compensation to the secretary, but merely authorizes the board of directors to provide for such compensation if they see fit. *Pfeiffer v. Lansberg Brake Co.*, 44 Mo. App. 59.

⁸⁴ *Missouri River R. Co. v. Richards*, 8 Kan. 101; *Grundy v. Pine Hill Coal Co.*, 10 Ky. L. Rep. 833, 9 S. W. 414; *Rogers v. Hastings & D. R. Co.*, 22 Minn. 25. See also *Eagle & P. Mfg. Co. v. Browne*, 58 Ga. 240.

⁸⁵ *Metropolitan Rubber Co. v. Place*, 147 Fed. 90.

⁸⁶ *McCracken v. Halsey Fire-Engine Co.*, 57 Mich. 361, 24 N. W. 104.

⁸⁷ *Green v. Felton*, 42 Ind. App. 675, 84 N. E. 166; *Matthews v. Headley Chocolate Co.*, — Md. —, 100 Atl. 645.

A charge of conspiracy on the part of directors in the management of a corporation and of fraud in voting excessive salaries to themselves is not sustained where it appears that the salaries voted were just, fair, and reasonable and in proportion to the services rendered, that the action was taken without attempt at concealment and that there was no attempt to defraud minority stockholders. *Robbins v. Hill*, 81 N. Y. Misc. 441, 142 N. Y. Supp. 637.

⁸⁸ *Dauids v. Davids*, 135 N. Y. App. Div. 206, 120 N. Y. Supp. 350.

⁸⁹ *Green v. Felton*, 42 Ind. App. 675, 84 N. E. 166.

the aid of persons subservient to their wishes, arbitrarily authorize large salaries.⁹⁰ In such cases, the salaries so fixed are not final as against dissenting stockholders, but are voidable, and the courts may interfere.⁹¹ Minority stockholders may question such illegal acts, even though ratified by the majority of the stockholders;⁹² and the fact that a by-law exists requiring salaries or compensation to be fixed by the directors will not prevent an investigation by a court of equity.⁹³ In such cases, if the court finds that the salaries are exorbitant, it may determine the value of the services rendered and restrain the corporation from paying compensation in excess thereof.⁹⁴ Usually the court will deal only with the facts presented to it, and thus determine the reasonable compensation actually earned. But exceptional cases may arise where, contemplating a continuance of an ascertained state of facts and guarding the decree accordingly, the

⁹⁰ *Davis v. Memphis City Ry. Co.*, 22 Fed. 883.

Where a trustee, who was president, treasurer and general manager of a corporation, permitted an annual meeting of stockholders to be adjourned and then called a meeting of hold-over trustees including himself and two trustees subservient to his wishes, to make a contract raising his salary, the action was arbitrary and illegal. *Boothe v. Summit Coal Min. Co.*, 55 Wash. 167, 19 Ann. Cas. 1255, 104 Pac. 207.

Where a president and a managing director voted to themselves, at a meeting of an executive committee, when they alone were present, a certain sum, and such sum was a pure gratuity and the result of an illegal and fraudulent combination between the officers named, such sum would not be recoverable. *Gale v. Canada A. & P. S. S. Co.*, 187 Fed. 598.

So, too, where a majority of stockholders decided to discontinue the business of a corporation, and the directors voted to pay a certain sum to a stockholder for his services in liquidating the company, such payment was a fraud upon the corporation and upon the dissenting stock-

holders. *Godley v. Crandall & Godley Co.*, 212 N. Y. 121, 105 N. E. 818.

A contract between a trustee who represented one-half of the stock of the corporation with a person to whom he transferred one share so that he might act as director; that such trustee should hold office for a term of years at an agreed compensation is not against public policy, where it appears that all of the stock was controlled by two families. *People v. Lehme*, 193 Ill. App. 341.

⁹¹ *Green v. Felton*, 42 Ind. App. 675, 84 N. E. 166; *Lillard v. Oil, Paint & Drug Co.*, 70 N. J. Eq. 197, 58 Atl. 188, 56 Atl. 254; *Sotter v. Coatsville Boiler Works*, — Pa. —, 101 Atl. 744.

The payment of excessive salaries to directors who are also officers of a corporation, is not void, but only voidable. *Matthews v. Headley Chocolate Co.*, — Md. —, 100 Atl. 645.

⁹² *Sotter v. Coatsville Boiler Works*, — Pa. —, 101 Atl. 744. See § 2761, *infra*.

⁹³ *Carr v. Kimball*, 153 N. Y. App. Div. 825, 139 N. Y. Supp. 253.

⁹⁴ *Sotter v. Coatsville Boiler Works*, — Pa. —, 101 Atl. 744. See § 2779, *infra*.

court may determine the compensation to be paid in the future.⁹⁵ It has been held, however, that the court has no power to fix a gross sum to be divided as salaries among the directors and officers.⁹⁶

The power of the courts to fix compensation of corporate officers is limited in the absence of fraud. It has been held that where a corporation was organized to conduct the business of a deceased person, the action of the court in fixing the salary of a business manager and ordering such salary paid was not only in violation of the common law, but was a violation of a statute declaring that the business of a corporation shall be managed by a president and board of directors.⁹⁷

§ 2747. — Power of stockholders. In fixing salaries or other compensation of officers, the stockholders are bound by provisions in the by-laws limiting the amount, if any such exist,⁹⁸ as well as by statutory provisions.⁹⁹ In some states, statutory provisions have been enacted providing that there shall be no compensation for services rendered by a president or director, unless it be allowed by the stockholders. Such a statute has been held to be mandatory, and the payment of such compensation by virtue of a resolution of the directors to be illegal, unless authorized or ratified by the stockholders.¹ Such a statute will also prevent the payment of compensation to a president for services rendered in closing the business of the corporation unless so allowed.²

The regulation of the salaries of officers of private corporations is a proper subject of the by-laws,³ and the stockholders may fix the salaries of directors by such provisions. They may also delegate such authority to the directors themselves,⁴ or to an executive committee of the board.⁵

Where an increase of salaries is effected at a stockholders' meet-

⁹⁵ *Sotter v. Coatsville Boiler Works*, — Pa. —, 101 Atl. 744.

⁹⁶ *Fitchett v. Murphy*, 46 N. Y. App. Div. 181, 61 N. Y. Supp. 182, rev'g 26 N. Y. Misc. 544, 56 N. Y. Supp. 322.

⁹⁷ *In re Goetz's Estate*, 236 Pa. 630, 85 Atl. 65.

⁹⁸ See § 2745, *supra*.

⁹⁹ See § 2756.

¹ *Shickel v. Berryville Land & Improvement Co.*, 99 Va. 88, 37 S. E. 813.

² *Triplett v. Fauver*, 103 Va. 123, 48 S. E. 875.

³ *Green v. Felton*, 42 Ind. App. 675, 84 N. E. 166. See also § 2745, *supra*.

⁴ *Green v. Felton*, 42 Ind. App. 675, 84 N. E. 166.

⁵ *Hayes v. Canada, Atlantic & Plant S. S. Co.*, 181 Fed. 289.

A resolution of the board of directors, authorizing the executive committee to award to the president a participation in the net profits as compensation for services in addition to his regular salary, which was subsequently ratified by the stockholders, authorized such committee to provide

ing and the same persons are both stockholders and directors, it is not necessary that a separate meeting be held by the directors to vote on the increase, even though it appears that the by-laws commit authority over salaries to the directors.⁷

§ 2748. — Power of directors—As to salaries of directors. The salaries or other compensation of the directors or trustees of a corporation must be fixed by the stockholders by vote, resolution or by-laws, unless there is some provision to the contrary in the by-laws or in the corporate charter. While the stockholders may delegate this power of fixing compensation, as has been noted in the previous subdivision of this section, it is well recognized that the directors cannot fix their own salaries or compensation unless expressly authorized by the charter or by the stockholders to do so.⁸ This re-

for the payment to the president of a definite percentage of such profits as additional compensation for future services, and did not merely empower it to make him gifts from time to time for past services performed for a stated salary. *Young v. United States Mortgage & Trust Co.*, 108 N. E. 418, 214 N. Y. 279, rev'g 156 N. Y. App. Div. 515, 141 N. Y. Supp. 364, modifying 131 N. Y. Supp. 33.

As to delegation to officers, see *Powers v. Butland R. Co.*, 88 Vt. 376, 92 Atl. 463.

⁷ *Murray v. Smith*, 166 N. Y. App. Div. 528, 152 N. Y. Supp. 102.

⁸ *United States. Monmouth Inv. Co. v. Means*, 151 Fed. 159.

Alabama. *Branch Bank v. Collins*, 7 Ala. 95.

Arizona. *Martin v. Santa Cruz Water Storage Co.*, 4 Ariz. 171, 36 Pac. 36.

California. *Strouse v. Sylvester*, 134 Cal. XX, 66 Pac. 660.

Connecticut. *Butler v. Cornwall Iron Co.*, 22 Conn. 335.

Georgia. *Burns v. Beck*, 83 Ga. 471, 10 S. E. 121.

Illinois. *Vorhees v. Mason*, 245 Ill. 256, 91 N. E. 1056; *Holder v. Lafayette, B. & M. R. Co.*, 71 Ill. 106, 22 Am. Rep. 89.

Indiana. *Green v. Felton*, 42 Ind. App. 675, 84 N. E. 166.

Iowa. *Schoening v. Schwenk*, 112 Iowa 733, 84 N. W. 916.

Kentucky. *Louisville Bldg. Ass'n v. Hegan*, 20 Ky. L. Rep. 1629, 49 S. W. 796.

Maine. *Pride v. Pride Lumber Co.*, 109 Me. 452, 84 Atl. 989; *Chabot & Richard Co. v. Chabot*, 109 Me. 403, 84 Atl. 892; *Camden Land Co. v. Lewis*, 101 Me. 78, 63 Atl. 523.

Michigan. *Miner v. Belle Isle Ice Co.*, 93 Mich. 97, 17 L. R. A. 412, 53 N. W. 218. See *Eakins v. American White Bronze Co.*, 75 Mich. 568, 42 N. W. 982.

Minnesota. *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854.

Montana. *Kleinschmidt v. American Min. Co.*, 49 Mont. 7, 139 Pac. 785; *McConnell v. Combination Mining & Milling Co.*, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194.

New Jersey. *Gardner v. Butler*, 30 N. J. Eq. 702.

New York. *Godley v. Crandall & Godley Co.*, 212 N. Y. 121, 105 N. E. 818; *Metropolitan El. R. Co. v. Kneeland*, 120 N. Y. 134, 8 L. R. A. 253, 17 Am. St. Rep. 619, 24 N. E. 381; *Mather v. Eureka Mower Co.*, 118 N. Y. 629, 23 N. E. 993; *Davids v.*

sults from the fiduciary relation which the directors sustain towards the corporation, preventing them from contracting with the corporation when the corporation's interest conflict with the private interests of the directors.⁹ And even when the power is delegated to the directors, they must act fairly and honestly in fixing the compensation.¹⁰

When a director knows of the existence of a by-law requiring salaries to be fixed by the board of directors, he cannot recover a salary which is neither fixed nor ratified by such board.¹¹

§ 2749. — Compensation of directors filling other offices. The power of directors to fix their own compensation or to fix the compensation of other officers who are directors is somewhat involved by the rules applicable as to the manner of fixing such compensation.¹² It is usually held that directors have a right to serve as officers or employees of the corporation, and to receive compensation for such services, if legally employed by the company;¹³ and it is

Dauids, 135 App. Div. 206, 120 N. Y. Supp. 350; **Copeland v. Johnson Mfg. Co.,** 47 Hun 235; **Kelsey v. Sargent,** 40 Hun 150; **Tilton v. Gans,** 90 Misc. 84, 152 N. Y. Supp. 981; **Miller v. Crown Perfumery Co.,** 57 Misc. 383, 109 N. Y. Supp. 760; **Blatchford v. Ross,** 37 How. Pr. 110.

Pennsylvania. **Russell v. Henry C. Patterson Co.,** 232 Pa. 113, 36 L. R. A. (N. S.) 199, 81 Atl. 136.

Rhode Island. **Eaton v. Robinson,** 19 R. I. 146, 29 L. R. A. 100, 32 Atl. 339, 31 Atl. 1058.

Tennessee. **Harris v. Lemming-Harris Agricultural Works** (Tenn. Ch. App.), 43 S. W. 869.

Washington. **Burns v. Commencement Bay Light & Improvement Co.,** 4 Wash. 558, 30 Pac. 668, 709.

West Virginia. **Ravenswood, S. & G. Ry. Co. v. Woodyard,** 46 W. Va. 558, 33 S. E. 285.

England. In re **George Newman & Co.,** [1895] 1 Ch. 674.

Canada. **Gardner v. Canadian Manufacturer Pub. Co.,** 31 Ont. 488.

Compare, however, **Hedges v. Paquett,** 3 Ore. 77.

⁹ **Haas v. Universal Phonograph & Record Co.,** 75 N. Y. Misc. 119, 132 N. Y. Supp. 767; **Russell v. Henry C. Patterson Co.,** 232 Pa. 113, 36 L. R. A. (N. S.) 199, 81 Atl. 136.

¹⁰ See § 2755, *infra*.

¹¹ **Sloan v. Hanson Mfg. Co.,** 150 Ill. App. 544.

¹² See § 2752, *infra*.

¹³ **Sotter v. Coatsville Boiler Works,** — Pa. —, 101 Atl. 744.

Directors may contract with agents or employees who are likewise directors. **Sotter v. Coatsville Boiler Works,** — Pa. —, 101 Atl. 744.

A stockholder and director may deal with the corporation if his acts are open and fair and known to the other directors and stockholders. **Reynick v. Allington & Curtis Mfg. Co.,** 179 Mich. 630, 146 N. W. 252.

A director may enter into a binding contract with the corporation when fair and equitable and when the corporation is represented by a majority of its directors, each of whom is acting as a free agent and under no controlling influence or restraint. **Crocker v. Cumberland Mining & Milling Co.,** 31 S. D. 137, 139 N. W. 783.

within the power of a board of directors to fix the salaries of officers employed by them, although from their own number, unless there is some provision in existence limiting or prohibiting the exercise of such power. In the same manner, a board of directors may fix the compensation to be paid for extra services which they engage or authorize.¹⁴ A director who occupies an official position, such as general manager, is bound to know the provisions in the by-laws declaring that the board of directors is to have authority to fix salaries.¹⁵ Such contracts are subject to close scrutiny and are voidable for fraud or overreaching.¹⁶ If a resolution fixing the salaries of such officers is regularly adopted in pursuance of the by-laws and is not for the purpose of disposing of the profits, the only question to be determined is whether the salary fixed was reasonable.¹⁷

A statute requiring salaries of officers of a corporation to be fixed by the board of directors operates to recognize the right of an officer to contract with the corporation in his individual capacity. It has been held that such a statute is not broad enough to prevent a director from receiving payment for services while a director, without the payment being authorized by the board of directors. The right to compensation of such a director, while acting as an officer, was held to depend upon the nature of the relation established by the undertaking.¹⁸

§ 2750. — Compensation of officers other than directors. It is well established that directors may appoint and fix the compensation of mere ministerial officers;¹⁹ but officers have no power to fix their

¹⁴ *Hax v. R. T. Davis Mill Co.*, 39 Mo. App. 453; *Outterson v. Fonda Lake Paper Co.*, 66 Hun (N. Y.) 629, 20 N. Y. Supp. 980; *Bagaley v. Pittsburgh & L. S. Iron Co.*, 146 Pa. St. 478, 23 Atl. 837; *Waite v. Windham County Min. Co.*, 37 Vt. 608. Compare *Branch Bank v. Collins*, 7 Ala. 95.

The action of a board of directors in providing that the salary of the president, whom they had elected, shall be fixed by him and another director who owns nearly all of the stock, is such an exercise of the board's authority to fix salaries as to constitute a contract on which the president can recover. *Bagaley v. Pittsburgh & L. S. Iron Co.*, 146 Pa. St. 478, 23 Atl. 837.

¹⁵ *McKean v. Riter-Conley Mfg. Co.*, 230 Pa. 319, 79 Atl. 561.

¹⁶ See § 2755, *infra*.

¹⁷ *Tilton v. Gans*, 90 N. Y. Misc. 84, 152 N. Y. Supp. 981.

¹⁸ *Powers v. Rutland R. Co.*, 88 Vt. 376, 92 Atl. 463.

¹⁹ *Godley v. Crandall & Godley Co.*, 212 N. Y. 121, 105 N. E. 818; *Tilton v. Gans*, 90 N. Y. Misc. 84, 152 N. Y. Supp. 981.

Under Massachusetts Pub. St. 1882, c. 106, § 23, directors have the power to establish a reasonable salary for a treasurer, where no vote of the stockholders or by-law limiting their authority is shown. *Fillebrown v. Hayward*, 190 Mass. 472, 77 N. E. 45.

own salaries in the absence of an authority to do so expressly conferred.²⁰

If a corporation refuses to fix the amount of a manager's salary, the question being left to future determination, such officer has no power to fix his own salary and pay it.²¹

A statute requiring the salaries of officers to be fixed by the board of directors has been held to apply to officers who have the control and management of the corporation and its funds, and not to mere employees.²²

§ 2751. — Power of officers. Officers of a corporation other than the board of directors cannot bind the corporation by a promise to pay another officer a salary or other compensation unless they are expressly authorized to make such a promise.²³

²⁰ *Wayne Pike Co. v. Hammons*, 129 Ind. 368, 27 N. E. 487; *Church v. Church Cement Co.*, 75 Minn. 85, 77 N. W. 548; *Kelsey v. Sargent*, 40 Hun (N. Y.) 150.

An officer of a corporation, either as president, treasurer, manager or director, has no authority to fix his own salary or increase it. *Chabot & Richard Co. v. Chabot*, 109 Me. 403, 84 Atl. 892.

The testimony of a plaintiff to the effect that he had authority to raise his own salary as manager establishes his prima facie right to do so in the absence of any showing to the contrary. *Waldorf v. Phillips*, 42 Mont. 80, 111 Pac. 546.

Where funds of a trustee and those of a corporation were commingled with the consent of all concerned, the manager of the trust, who was also manager of the corporation, had the right to pay himself salaries in both capacities out of the commingled fund. *Rocky Mountain Oil Co. v. Phillips*, 29 Colo. 268, 68 Pac. 269.

²¹ *Smith v. Courant Co.*, 23 N. D. 297, 136 N. W. 781.

²² *Powers v. Rutland R. Co.*, 88 Vt. 376, 92 Atl. 463.

Where the duties and authority of a general counsel of a corporation are

prescribed by a by-law, and include general control of legal matters, etc., and the by-law includes other employees such as the purchasing agent, superintendent of motive power and general freight agent, it must be held that such general counsel is not an officer within the meaning of a statute (Pub. St. 4262) requiring salaries to be fixed by the board of directors. *Powers v. Rutland R. Co.*, 88 Vt. 376, 92 Atl. 463.

Vermont Acts 1902, No. 187 amending the charter of a corporation, and authorizing the board of directors to appoint a clerk, treasurer and other needed officers, was intended to refer to officers in the corporate sense, and does not apply to a general counsel. *Powers v. Rutland R. Co.*, 88 Vt. 376, 92 Atl. 463.

²³ *Louisville Bldg. Ass'n v. Hegan*, 20 Ky. L. Rep. 1629, 49 S. W. 796; *Henry Wood's Sons Co. v. Schaefer*, 173 Mass. 443, 73 Am. St. Rep. 305, 53 N. E. 881; *Bailey v. Buffalo Cross-town Ry. Co.*, 14 Hun (N. Y.) 483.

A corporation is not bound by a promise made by its treasurer, who is also a director, to a third person that the latter should be president at a stated salary, where the promise was never communicated to the other di-

But if the president or other officer makes a contract with a subordinate officer for a certain salary, the board of directors may ratify the agreement. And such ratification may arise from the continuance of services under the agreement with the knowledge or acquiescence of the directors.²⁴ The usual rules as to ratification apply, and it must appear that the directors had knowledge of the contract entered into.²⁵ The ratification of the appointment of a subordinate officer does not necessarily operate as the ratification of a contract of a manager, for instance, with such subordinate officer fixing his salary. The question was involved in one case where the plaintiff sought to apply a statute providing that the ratification of a part of an individual transaction is a ratification of the whole. It was held that the statute did not apply.²⁶

§ 2752. — Effect of votes or presence of interested directors or officers. A director cannot vote on a resolution fixing his own salary or compensation as the incumbent of another office or for services to be performed by him outside of the ordinary duties of his office.²⁷

rectors and the by-laws do not provide a salary for the president. *Henry Wood's Sons Co. v. Schaefer*, 173 Mass. 443, 73 Am. St. Rep. 305, 53 N. E. 881.

A treasurer of a corporation has no implied authority to make an agreement with a person to issue treasury stock as a commission on a purchase by a third party of the company's treasury stock, as such an agreement clearly required a vote of the board of directors to warrant it. *Hill v. Troegerlith Tile Co.*, 168 N. Y. App. Div. 639, 154 N. Y. Supp. 535.

As to extra compensation, see § 2764, *infra*.

²⁴ *Mobile, J. & K. C. R. Co. v. Owen*, 121 Ala. 505, 25 So. 612.

Where a president appointed a person as general counsel of a company for five years at a salary of \$10,000 per year, and the executive committee voted a salary of \$6,000 and tendered payment accordingly, which the attorney accepted when the president stated that the full amount would be paid, there was a continuing contract

in process of performance, and the payment of salary at the reduced rate did not operate as a breach of the original contract, and even if so considered, the modified contract was acted upon and binding, operating as a substituted contract. *Powers v. Rutland R. Co.*, 88 Vt. 376, 92 Atl. 463.

²⁵ *Powers v. Rutland R. Co.*, 88 Vt. 376, 92 Atl. 463.

²⁶ *Colpe v. Jubilee Min. Co.*, 2 Cal. App. 393, 84 Pac. 324.

²⁷ *California*. *Zellerbach v. Allenberg*, 99 Cal. 57, 33 Pac. 786; *Wickersham v. Crittenden*, 106 Cal. 327, 39 Pac. 602, 93 Cal. 17, 28 Pac. 788; *Shattuck v. Oakland Smelting & Refining Co.*, 58 Cal. 550.

Colorado. *Steele v. Gold Fissure Gold Min. Co.*, 42 Colo. 529, 126 Am. St. Rep. 177, 95 Pac. 349.

Kentucky. *Beha v. Martin*, 161 Ky. 838, 171 S. W. 393; *Poutch v. National Foundry & Machine Co.*, 147 Ky. 242, 143 S. W. 1003.

Maine. *Connors v. Connors Bros. Co.*, 110 Me. 428, 86 Atl. 843.

This is the general rule, and in some jurisdictions it is held that the trust relation between a director and his corporation render such contracts void as against public policy.²⁸ The theory upon which this view is supported is that the law will not allow a trustee for his own private advantage to do that which may place him in a position in which his interest is antagonistic to that of the beneficiaries of his trust.²⁹ Under the rule that such contracts are void, there can be no ratification by the stockholders of the resolution fixing a salary.³⁰

Missouri. Ward v. Davidson, 89 Mo. 445, 1 S. W. 846; Davis Mill Co. v. Bennett, 39 Mo. App. 460.

Montana. McConnell v. Combination Mining & Milling Co., 31 Mont. 563, 79 Pac. 248, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194.

New York. Marshall v. Industrial Federation of America, 84 N. Y. Supp. 866.

Pennsylvania. Schaffhauser v. Arnholt & Schaefer Brewing Co., 218 Pa. 298, 11 Ann. Cas. 772, 67 Atl. 417.

South Dakota. Under South Dakota Rev. Code, § 1619, providing that neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he or any one for whom he acts as agent has an interest, a director and his wife are disqualified from acting and voting in favor of a resolution increasing such director's salary. Ritchie v. People's Tel. Co., 22 S. D. 598, 119 N. W. 990.

Tennessee. Harris v. Lemming-Harris Agricultural Works (Tenn. Ch. App.), 43 S. W. 869.

²⁸ **United States.** Hardee v. Sunset Oil Co., 56 Fed. 51.

Arizona. Martin v. Santa Cruz Water Storage Co., 4 Ariz. 171, 36 Pac. 36.

California. Bassett v. Fairchild, 132 Cal. 637, 52 L. R. A. 611, 64 Pac. 1082, (Cal.), 61 Pac. 791; In re McCarthy Portable Elevator Co., 196 Fed. 247, aff'd 201 Fed. 923. See also Graves v. Mono Lake Hydraulic Min. Co., 81 Cal. 303, 22 Pac. 665.

Illinois. Luthy v. Ream, 270 Ill. 170, 110 N. E. 373; Voorhees v. Mason, 245 Ill. 256, 91 N. E. 1056; McNulta v. Corn Belt Bank, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954; Ross v. R. J. Ross Mfg. Co., 183 Ill. App. 180.

Michigan. Miner v. Belle Isle Ice Co., 93 Mich. 97, 17 L. R. A. 412, 53 N. W. 218.

Montana. McConnell v. Combination Mining & Milling Co., 31 Mont. 563, 79 Pac. 248, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194.

South Dakota. Crocker v. Cumberland Mining & Milling Co., 31 S. D. 137, 139 N. W. 783.

Texas. Greathouse v. Martin (Tex. Civ. App.), 91 S. W. 385, aff'd 100 Tex. 99, 94 S. W. 322.

West Virginia. Ravenswood, S. & G. Ry. Co. v. Woodyard, 46 W. Va. 558, 33 S. E. 285.

A resolution fixing the compensation of directors for selling stock which is void as to the corporation for the reason that it is carried by the vote of the directors benefited will nevertheless operate as an estoppel in that the directors named cannot demand more for their services than the sum fixed in the resolution as the reasonable value of their services. Voorhees v. Mason, 245 Ill. 256, 91 N. E. 1056.

²⁹ See Purchase v. Atlantic Safe Deposit & Trust Co., 81 N. J. Eq. 344, 87 Atl. 444, aff'd 83 N. J. Eq. 353, 91 Atl. 1070.

³⁰ Bassett v. Fairchild, 132 Cal. 637, 52 L. R. A. 611, 64 Pac. 1082, 61 Pac.

In other jurisdictions, the view is taken that such contracts are not absolutely void, but are voidable at the option of the corporation or its representative, provided such option is exercised within a time which is reasonable under all the circumstances of the case.³¹ In its essentials, this rule is substantially the same as that which holds such contracts absolutely void, the exception being that the power of ratification is reserved to the stockholders. If the option of the corporation is exercised within a reasonable time, the contracts involved are given no contractual force, however open, fair and honest they may be.³² In such circumstances, the courts also hold, in accordance with the theory rendering such contracts void, that directors, as trustees, voting salaries to themselves are in a position of dealing with themselves to their own advantage, and the

791, holding that a resolution of the directors fixing the salary of one of their number was void because the interested director's presence was necessary to constitute a quorum, and that the resolution could not be ratified by the stockholders.

31 Louisiana. Crichton v. Webb Press Co., 113 La. 167, 67 L. R. A. 76, 104 Am. St. Rep. 500, 36 So. 926.

Maryland. Francis v. Brigham-Hopkins Co., 108 Md. 233, 70 Atl. 95.

Minnesota. Jones v. Morrison, 31 Minn. 140, 16 N. W. 854.

New Jersey. Stewart v. Lehigh Valley R. Co., 38 N. J. L. 505; Purchase v. Atlantic Safe Deposit & Trust Co., 81 N. J. Eq. 344, 87 Atl. 444, aff'd 83 N. J. Eq. 353, 91 Atl. 1070; Lillard v. Oil, Paint & Drug Co., 70 N. J. Eq. 197, 58 Atl. 188, 56 Atl. 254; Gardner v. Butler, 30 N. J. Eq. 702.

New York. Godley v. Crandall & Godley Co., 212 N. Y. 121, 105 N. E. 818; Butts v. Wood, 37 N. Y. 317; Murray v. Smith, 166 App. Div. 528, 152 N. Y. Supp. 102; Copeland v. Johnson Mfg. Co., 47 Hun 235; Haas v. Universal Phonograph & Record Co., 75 Misc. 119, 132 N. Y. Supp. 767; Miller v. Crown Perfumery Co., 57 Misc. 383, 109 N. Y. Supp. 760.

Where a vice president sues upon an express promise, made solely by

officers who attempted to contract with themselves, there being no proof of the value of the services, and they being accepted by the corporation through the same officers, the plaintiff cannot recover either under an express or an implied contract. *Haas v. Universal Phonograph & Record Co.*, 75 N. Y. Misc. 119, 132 N. Y. Supp. 767.

The fixing of a salary by the sole vote of a majority stockholder is subject to review by the court of equity, and will not be allowed if fraudulent or oppressive. *Lillard v. Oil, Paint & Drug Co.*, 70 N. J. Eq. 197, 58 Atl. 188, 56 Atl. 254.

32 See *Purchase v. Atlantic Safe Deposit & Trust Co.*, 81 N. J. Eq. 344, 87 Atl. 444, aff'd 83 N. J. Eq. 353, 91 Atl. 1070.

Where three of five directors voted one of themselves a salary and at the same time voted a bond issue, and the stockholders afterwards ratified the action as to the bond issue but did not take any action as to the salary, it was held that the fact that the minutes of the directors' meeting were before the stockholders' meeting and contained the resolution as to the salary did not show a ratification thereof. *Martin v. Santa Cruz Water Storage Co.*, 4 Ariz. 171, 36 Pac. 36.

presumption is that they act in their own interest.³³ The officer cannot act both for himself and for his principal, without the full knowledge and assent of the principal.³⁴

Pursuant to the general rules as to voting, it is also held in most cases that the vote of an interested director cannot be counted for the purpose of ascertaining if a quorum is present,³⁵ although there are decisions to the contrary. Thus it has been held that a resolution was valid where the interested director did not vote, although his presence was necessary to constitute a quorum, the resolution being passed not only by a majority of the quorum, but by a majority of the entire board.³⁶ A resolution passed at a meeting where an interested director presided has been held invalid, although he testified that he did not vote and the records did not show that he voted.³⁷ But a resolution of the board of directors fixing the salary of a director as the incumbent of another office is not invalid merely because such other director voted, if there were enough votes without him to constitute a majority of the board,³⁸ or if the board, without his participation, has subsequently ratified the resolution by a majority vote.³⁹ And it has been held that the mere fact that a director is present when his salary as another officer is fixed does not render the resolution invalid, it appearing that he did not vote.⁴⁰ There is also authority to the effect that directors may vote to fix or increase salaries to themselves as officers where each one refrains

³³ *Francis v. Bringham-Hopkins Co.*, 108 Md. 233, 70 Atl. 95; *Davids v. Davids*, 135 N. Y. App. Div. 206, 120 N. Y. Supp. 350.

³⁴ *Burton v. Lithie Mfg. Co.*, 73 Ore. 605, 144 Pac. 1149.

³⁵ *California*. *Bassett v. Fairchild*, 132 Cal. 637, 52 L. R. A. 611, 64 Pac. 1082, (Cal.), 61 Pac. 791.

Colorado. *Steele v. Gold Fissure Gold Min. Co.*, 42 Colo. 529, 126 Am. St. Rep. 177, 95 Pac. 349.

Kentucky. *Beha v. Martin*, 161 Ky. 838, 171 S. W. 393.

Montana. *McConnell v. Combination Mining & Milling Co.*, 31 Mont. 563, 79 Pac. 248, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194.

South Dakota. *Crocker v. Cumberland Mining & Milling Co.*, 31 S. D. 137, 139 N. W. 783.

³⁶ *Gumaer v. Cripple Creek Tunnel*,

Transportation & Mining Co., 40 Colo. 1, 122 Am. St. Rep. 1024, 13 Ann. Cas. 781, 90 Pac. 81.

³⁷ *Beers v. New York Life Ins. Co.*, 66 Hun (N. Y.) 75, 20 N. Y. Supp. 788; *Ashley v. Kinnan*, 18 N. Y. St. Rep. 791, 2 N. Y. Supp. 574.

³⁸ *Bassett v. Fairchild*, 132 Cal. 637, 52 L. R. A. 611, 64 Pac. 1082, 61 Pac. 791; *Wickersham v. Crittenden*, 110 Cal. 332, 28 Pac. 788; *Clark v. American Coal Co.*, 86 Iowa 436, 17 L. R. A. 557, 53 N. W. 291; *McNab v. McNab & Harlin Mfg. Co.*, 62 Hun (N. Y.) 18, 16 N. Y. Supp. 448, 133 N. Y. 687, 31 N. E. 627; *Keans v. New York & College Point Ferry Co.*, 17 N. Y. Misc. 272, 40 N. Y. Supp. 366.

³⁹ *Wickersham v. Crittenden*, 110 Cal. 332, 28 Pac. 788.

⁴⁰ *Hax v. R. T. Davis Mill Co.*, 39 Mo. App. 453.

from voting when the resolution affecting himself is voted on.⁴¹ Such decisions are opposed to the weight of authority,⁴² and the courts will not separate a resolution into parts and hold it valid on the ground that each part was carried by a majority of the vote of the other directors not interested in that particular portion.⁴³ In the same way, a resolution passed by the vote of an interested officer will not be sustained by applying the presumption that he was authorized to vote as the representative of another director;⁴⁴ and the interested director cannot recover on the ground that the corporation is precluded from questioning the validity of an executed contract when such facts arise.⁴⁵ But if a resolution fixing compensation is ratified by the stockholders and partly executed, it cannot be questioned.⁴⁶

If the passage of a resolution fixing compensation of an interested director is effected by the votes of persons subservient to his wishes,

⁴¹ Where three directors of a corporation by a unanimous vote fixed the salary of one of their number as president and of another as secretary, the resolution was valid, as to the salary of each officer, as it was supported by two disinterested votes. *Funsten v. Funsten Commission Co.*, 67 Mo. App. 599.

A clause in a resolution of a board of directors fixing the salary of one officer is not rendered invalid by the invalidity of another clause fixing the salary of another officer. *Funsten v. Funsten Commission Co.*, 67 Mo. App. 559.

⁴² *Beha v. Martin*, 161 Ky. 838, 171 S. W. 393. See also *Fitchett v. Murphy*, 26 N. Y. Misc. 544, 56 N. Y. Supp. 322, rev'd on other grounds 46 N. Y. App. Div. 181, 61 N. Y. Supp. 182.

The fact that a resolution increasing salaries is voted on in parts, so that no director votes on the proposition to increase his own salary, does not justify the increase, the effect being merely to give a semblance of legality to a wrongful act. *Davids v. Davids*, 135 N. Y. App. Div. 206, 120 N. Y. Supp. 350.

⁴³ *Beha v. Martin*, 161 Ky. 838, 171 S. W. 393.

⁴⁴ *Steele v. Gold Fissure Gold Min. Co.*, 42 Colo. 529, 126 Am. St. Rep. 177, 95 Pac. 349.

⁴⁵ *Steele v. Gold Fissure Gold Min. Co.*, 42 Colo. 529, 126 Am. St. Rep. 177, 95 Pac. 349.

⁴⁶ Where a by-law of a corporation provides for the fixing of compensation of officers by the directors or by the executive committee, and a resolution fixing compensation of the president on the basis of a percentage of the net profits is ratified by the stockholders and payments are made pursuant to such resolution, no question can arise as to the propriety, under the by-law, of fixing compensation in the manner indicated. *Young v. United States Mortgage & Trust Co.*, 214 N. Y. 279, 108 N. E. 418.

A contract for the compensation of a director is merely voidable and may be ratified by the majority vote of stockholders, and the interested director may vote as a stockholder at such meeting. *Lillard v. Oil, Paint & Drug Co.*, 70 N. J. Eq. 197, 58 Atl. 188, 56 Atl. 254.

the corporation is not bound,⁴⁷ such acts being considered fraudulent and subject to attack by minority stockholders.⁴⁸

§ 2753. Time of fixing compensation. The amount of salary or other compensation of an officer need not be fixed. If it is agreed or understood that he shall be compensated, the amount of his compensation may be afterwards fixed, or he may recover a reasonable compensation if no amount is fixed.⁴⁹ It has been held that a by-law requiring the board of directors to fix salaries of officers before their election is merely directory, and action taken

⁴⁷ *Crocker v. Cumberland Mining & Milling Co.*, 31 S. D. 137, 139 N. W. 783; *Greathouse v. Martin* (Tex. Civ. App.), 91 S. W. 385, *aff'd* 100 Tex. 99, 94 S. W. 322.

Where two directors constituting the majority of a board vote salaries to themselves as officers for the purpose of absorbing all the profits of the company, the plaintiff having refused to sell them his stock in the company, the action of such majority directors is void and they will be required to return the money received. *Miller v. Crown Perfumery Co.*, 57 N. Y. Misc. 383, 109 N. Y. Supp. 760.

Where the salary of a president was increased by vote of the board of directors, and three of the four directors at that time had contracted to sell all of their stock except one share to the president, taking notes for a portion of the selling price, they were interested in the payment of such notes, but such interests were not incompatible or necessarily in conflict with their interests for the success of the corporation, and there being no satisfactory evidence of fraud or corrupt or false motives, it could not be held that the increase of salary was fraudulent. *Cowell v. McMillin*, 177 Fed. 25.

⁴⁸ See § 2755, *infra*.

⁴⁹ *Stewart v. St. Louis, Ft. S. & W. R. Co.*, 41 Fed. 736; *Rosborough v. Shasta River Canal Co.*, 22 Cal. 556; *Robson v. C. E. Fennimore Co.*, 83 N.

J. L. 453, 85 Atl. 356; *Bagley v. Carthage, W. & S. H. R. Co.*, 25 N. Y. App. Div. 475, 49 N. Y. Supp. 718, 165 N. Y. 179, 58 N. E. 895.

Where a director was appointed consulting engineer, his salary to be determined subsequently, and such salary was never determined, he could recover on a quantum meruit, the services being outside of his duties as director and secretary, especially where it appeared that the company had paid such director another bill for similar services while holding such position. *Bogart v. New York & L. I. R. Co.*, 118 N. Y. App. Div. 50, 102 N. Y. Supp. 1093, *aff'd* 191 N. Y. 550, 83 N. E. 1106.

The fact that the amount of the salary is determined after the officer's election to the office instead of before, is immaterial where there is no claim that it is excessive. *Robson v. C. E. Fennimore Co.*, 83 N. J. L. 453, 85 Atl. 356.

Where, by a resolution of the directors, the salary of an officer is fixed for a year, and shortly after the commencement of the year a person is elected to the office with the understanding that the resolution fixes his salary, no formal confirmation of the resolution is necessary to entitle him to the benefit of it, and the directors cannot afterward rescind the resolution. *Kimball v. New England Roller Grate Co.*, 168 Mass. 32, 46 N. E. 432.

after the election is not invalid.⁵⁰ Also, when it is customary to fix salaries in the month of January for officers previously elected, the failure of the directors to act does not terminate their power. Such directors may act at any time during their term of office.⁵¹ But if a by-law requires the board of directors to agree annually as to the salaries to be paid officers, such board has no power to fix the salary of a secretary for a longer period than one year. Especially is this true, where such secretary is also a director and presumed to know the by-laws.⁵²

A failure to act does not operate to give the officer affected any right to fix his own compensation.⁵³ If no salary is fixed or claimed for a number of years, the officer may be deprived of his compensation even when the by-laws require his salary to be fixed.⁵⁴ In such cases, the matter comes within the rules forbidding compensation for past services.⁵⁵ It has even been held that salaries cannot be left for adjustment until after the services are performed, where the charter requires the directors to elect officers and fix their compensation.⁵⁶

An application for the fixing of salary and its refusal are usually necessary before an officer can sue upon a contract for compensation.⁵⁷

§ 2754. Manner of fixing compensation. As a general rule, directors must act as a board in fixing compensation;⁵⁸ and it has been said that a formal resolution, passed before the services are rendered, is necessary, a mere understanding or agreement among themselves being insufficient. This is undoubtedly the rule where the salary or compensation of directors is involved;⁵⁹ but in the case of officers

⁵⁰ *Francis v. Brigham-Hopkins Co.*, 108 Md. 233, 70 Atl. 95.

⁵¹ *In re Knox Automobile Co.*, 229 Fed. 241.

⁵² *Hurricane Gold Min. Co. v. Bright*, 193 Fed. 46.

⁵³ See § 2750, *supra*.

⁵⁴ Where the by-laws of a corporation required the salaries of officers, including the superintendent, to be fixed by the trustees, but the trustees failed to act as to the salary of the superintendent, and he performed services for eight years without claiming compensation, a claim made after the lapse of such period of time would be considered as an afterthought and

deserving of very little consideration. *McLean v. Hayden Creek Mining & Milling Co.*, 25 Idaho 416, 138 Pac. 331.

As to limitation of actions, see § 2772, *infra*.

⁵⁵ See § 2762, *infra*.

⁵⁶ *Caho v. Norfolk & S. R. Co.*, 147 N. C. 20, 60 S. E. 640.

⁵⁷ *McLean v. Hayden Creek Mining & Milling Co.*, 25 Idaho 416, 138 Pac. 331.

⁵⁸ *Chabot & Richard Co. v. Chabot*, 109 Me. 403, 84 Atl. 892.

⁵⁹ *Butler v. Cornwall Iron Co.*, 22 Conn. 335; *Rockford, R. I. & St. L. R. Co. v. Sage*, 65 Ill. 328, 16 Am. Rep.

appointed or employed by the directors, or where extra services are required, an understanding that compensation shall be paid will be held binding on the corporation. The passage of a resolution or a formal vote and the recording of such acts are not necessary; and if no compensation is fixed, the corporation will be held liable for reasonable compensation.⁶⁰

A resolution providing for the employment of an officer and for his compensation is evidence of such facts.⁶¹ An officer's right to compensation is not affected because the resolution states that he is "elected" instead of "appointed" even though the by-laws provide for the appointment of such officer.⁶²

If a resolution is passed and acted upon, a formal contract is not

587; *Besch v. Western Carriage Mfg. Co.*, 36 Mo. App. 333. See also *Eakins v. American White Bronze Co.*, 75 Mich. 568, 42 N. W. 982.

⁶⁰ *United States*. *National Loan & Investment Co. v. Rockland Co.*, 94 Fed. 335; *Stewart v. St. Louis, Ft. S. & W. R. Co.*, 41 Fed. 736.

Kansas. *St. Louis, Ft. S. & W. R. Co. v. Tiernan*, 37 Kan. 606, 15 Pac. 544.

Kentucky. *Huffaker v. Krieger's Assignee*, 21 Ky. L. Rep. 887, 46 L. R. A. 384, 53 S. W. 288.

Maine. *Chabot & Richard Co. v. Chabot*, 109 Me. 403, 84 Atl. 892.

Michigan. *Dodge v. Lansing & S. Traction Co.*, 152 Mich. 100, 115 N. W. 1004. See also *Reynick v. Allington & Curtis Mfg. Co.*, 179 Mich. 630, 146 N. W. 252.

New York. *Young v. United States Mortgage & Trust Co.*, 214 N. Y. 279, 108 N. E. 418; *Bagley v. Carthage, W. & S. H. R. Co.*, 25 App. Div. 475, 49 N. Y. Supp. 718, *aff'd* 165 N. Y. 179, 58 N. E. 895; *Outterson v. Fonda Lake Paper Co.*, 66 Hun 629, 20 N. Y. Supp. 980.

An arrangement whereby a plaintiff was to manage a corporation's business on a certain basis will be held conclusive when it appears that such arrangement was knowingly ac-

quiesced in by the corporation's officers. *Luin v. Chicago Grill Co.*, 138 Iowa 268, 115 N. W. 1024.

If an officer of a corporation is called before the board of directors or a duly authorized committee and informed by one of their number that they have decided to make a stated increase in his salary to induce him to continue in the service of the company and he assents to the proposition and acts upon it, it is not essential that the agreement be reduced to writing or embodied in a formal resolution. *Young v. United States Mortgage & Trust Co.*, 214 N. Y. 279, 108 N. E. 418.

A conversation between two of the incorporators of a company prior to incorporation, wherein one of them told the other, who later became president of the corporation, that he always deducted wages before computing profits, did not form a sufficiently definite basis upon which to found a claim of express contract to pay the president a salary for his official services. *Dial v. Inland Logging Co.*, 52 Wash. 81, 100 Pac. 157.

⁶¹ *Fraker v. A. G. Hyde & Sons*, 127 N. Y. App. Div. 620, 111 N. Y. Supp. 757.

⁶² *Dodge v. Lansing & S. Traction Co.*, 152 Mich. 100, 115 N. W. 1004.

necessary.⁶³ Where a general manager is appointed to render services for ten years by a resolution which is adopted, entered in the records and signed by the president, the statute of frauds is complied with, the corporation being the party to be charged.⁶⁴ Where a stockholder and director is employed for a year's service and the contract is renewed from year to year, it is not within the statute.⁶⁵

§ 2755. **Necessity of good faith in fixing compensation.** Stockholders or directors cannot take advantage of their ownership of a controlling interest in the corporation to vote to themselves excessive salaries or to cause excessive salaries to be voted to them by persons under their control. Both the stockholders and directors in fixing compensation of officers must act in good faith and reasonably.⁶⁶

⁶³ *Sotter v. Coatsville Boiler Works*, — Pa. —, 101 Atl. 744.

⁶⁴ *Maune v. Unity Press*, 143 N. Y. App. Div. 94, 127 N. Y. Supp. 1002.

⁶⁵ *Reynick v. Allington & Curtis Mfg. Co.*, 179 Mich. 630, 146 N. W. 252. See § 2743, *supra*.

⁶⁶ *United States*. *Gale v. Canada, A. & P. S. S. Co.*, 187 Fed. 598; *Davis v. Memphis City Ry. Co.*, 22 Fed. 883; *Hubbard v. New York, N. E. & W. Inv. Co.*, 14 Fed. 675; *Sellers v. Phoenix Iron Co.*, 13 Fed. 20.

Alabama. *Decatur Mineral Land Co. v. Palm*, 113 Ala. 531, 59 Am. St. Rep. 140, 21 So. 315.

Georgia. *Burns v. Beck*, 83 Ga. 471, 10 S. E. 121.

Indiana. *Green v. Felton*, 42 Ind. App. 675, 84 N. E. 166.

Iowa. *Schoening v. Schwenk*, 112 Iowa 733, 84 N. W. 916.

Michigan. *Miner v. Belle Isle Ice Co.*, 93 Mich. 97, 17 L. R. A. 412, 53 N. W. 218.

Minnesota. *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854.

New York. *Davids v. Davids*, 135 App. Div. 206, 120 N. Y. Supp. 350; *Copeland v. Johnson Mfg. Co.*, 47 Hun 235; *Butts v. Wood*, 38 Barb. 181, *aff'd* 37 N. Y. 317.

Pennsylvania. *Schaffhauser v. Arnold & Schaefer Brewing Co.*, 218 Pa.

298, 11 Ann. Cas. 772, 67 Atl. 417.

Tennessee. *Harris v. Lemming-Harris Agr. Works* (Tenn. Ch. App.), 43 S. W. 869.

Washington. *Boothe v. Summit Coal Min. Co.*, 55 Wash. 167, 19 Ann. Cas. 1255, 104 Pac. 207.

The fact that directors own a majority of stock, enabling them to elect themselves as directors, gives them no right to vote themselves salaries, as in so doing they are not occupying the impartial position the law requires. *Davids v. Davids*, 135 N. Y. App. Div. 206, 120 N. Y. Supp. 350.

An attempt by directors in control of a corporation to contract for such corporation with themselves individually, to their benefit and to the detriment of the corporation, is presumptively fraudulent and in bad faith. *Kreitner v. Burgweger*, 174 N. Y. App. Div. 48, 160 N. Y. Supp. 256.

The rule that majority stockholders cannot deal with the assets of a corporation so as to divide them between themselves to the exclusion of the minority does not require that directors who are active officers shall donate their services to the corporation. *Beha v. Martin*, 161 Ky. 838, 171 S. W. 393.

If the by-laws provide that officers shall be entitled to salaries, and require such salaries to be fixed by the board of directors, such directors must act fairly and honestly, not only towards the corporation and the stockholders, but also towards the officers who are affected.⁶⁷

§ 2756. Amount of compensation or salary—In general. The amount of an officer's salary or compensation may be limited by charter provisions, or by the by-laws.⁶⁸ When the directors are authorized to fix salaries, their power is confined to fixing a recompense or reward for the services performed, considering the value of the services, the results accomplished, and similar circumstances.⁶⁹ The fixing of salary at a certain sum per month has been held not to operate as a fixing at that rate for the year.⁷⁰ Where the term of office and the salary of an officer are annual and co-extensive, an incumbent who serves in the office during the full term is entitled to the full salary.⁷¹ A corporation has the right to pay employees for services by a percentage of the business obtained.⁷² A resolution providing for the payment of certain salaries with the express stipulation that they are to be paid out of the net proceeds of the business, has only one possible interpretation. Under such a resolution the salaried officers are not entitled to draw their salaries all the time, regardless of the profits of the corporation.⁷³ But a resolution providing for the payment of salaries from the proceeds of bonds sold has been held to operate merely as an appropriation of such fund for such purpose.⁷⁴

A resolution fixing salaries of directors at an exorbitant and grossly excessive figure has been held effective to rebut the presumption that the services rendered were gratuitous, and the directors were entitled to reasonable compensation.⁷⁵

⁶⁷ Where a by-law provided that the directors should fix all salaries and a president was elected and subsequently his salary was reduced from \$25,000 to \$10,500 a year, the changes in the salaries of other officers being slight, it was held that the reduction was not a fair and honest execution of the by-law, and that he was not prevented thereby from recovering what his services were worth. *Banigan v. United States Rubber Co.*, 22 R. I. 452, 45 Atl. 739.

⁶⁸ See § 2745, *supra*.

⁶⁹ *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E.

954; *Mathews v. Headley Chocolate Co.*, — Md. —, 100 Atl. 645.

⁷⁰ *Bennett v. St. Louis Car Roofing Co.*, 23 Mo. App. 587.

⁷¹ *Robson v. C. E. Fenniman Co.*, 83 N. J. L. 453, 85 Atl. 356.

⁷² *Rollins v. Co-operative Bldg. Bank*, 98 N. Y. App. Div. 606, 90 N. Y. Supp. 631.

⁷³ *Mutual Adjustment Co. v. Ouellette*, 70 Wash. 693, 127 Pac. 301.

⁷⁴ *Indianapolis, E. River & S. W. R. Co. v. Hyde*, 122 Ind. 188, 23 N. E. 706.

⁷⁵ *Miller v. Doyle*, 211 Pa. 59, 60 Atl. 496.

The directors have no power to vote compensation for the performance of acts in violation of the charter of the corporation or beyond the powers conferred on the corporation. It has also been held that the power to compensate officers does not include the power to give a bonus in addition to salary. By a bonus is meant a sum paid to an officer, in addition to a stated salary, for his acceptance of such office and the performance of acts outside of the duties of such office.⁷⁶ The payment of such bonuses has been sustained in some cases, however, in connection with increases of salaries and as extra compensation.⁷⁷

As will be noted in another section, the amount due under a contract is not always determined prior to the rendition of the services,⁷⁸ and some interesting cases have arisen as to the amount due when the amount is not fixed at all but where the officer under his contract was entitled to compensation or where his predecessor was paid. It has been held that an officer whose salary is not otherwise fixed is entitled prima facie to the same salary that was paid to his predecessor.⁷⁹ This cannot be considered as an absolute rule however. There is a mere presumption that such was the intention, and it may be rebutted by evidence showing a contrary understanding and intention.⁸⁰ In one case, where a treasurer and his brother owned a corporation, the treasurer, who had been receiving a salary of \$12,000 yearly, retired from the business, and another person was appointed to fill his place without any action being taken with respect to the salary of the new incumbent. It was held that the incoming treasurer was entitled to receive only what his services were reasonably worth, as an agreement to pay more than that would have to be entered into by the corporation before it would be binding.⁸¹ In a somewhat similar case, a secretary resigned after three years' service, and the successor who was appointed did not know of the amount of his predecessor's salary. There being no express contract fixing the compensation, it was held that the secretary could only recover the reasonable value of his services.⁸² On the other hand, when the salary of the president of a corporation is fixed by the

⁷⁶ *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954.

⁷⁷ See § 2764, *infra*.

⁷⁸ See § 2753, *infra*.

⁷⁹ *South & N. A. R. Co. v. Falkner*, 49 Ala. 115; *Commonwealth Ins. Co. v. Crane*, 6 Metc. (Mass.) 64; *Starbuck v. Housatonic R. Co.*, 83 Hun

(N. Y.) 534, 32 N. Y. Supp. 87, *aff'd* 152 N. Y. 251, 46 N. E. 504.

⁸⁰ *Commonwealth Ins. Co. v. Crane*, 6 Metc. (Mass.) 64.

⁸¹ *Smith v. Bedell Bros.*, 84 N. J. Eq. 268, 509, 96 Atl. 898.

⁸² *Carver v. San Joaquin Cigar Co.*, 16 Cal. App. 572, 118 Pac. 91.

charter or by-laws, and a by-law provides that, in case of his death or inability, his duties shall devolve upon the vice president, the latter on succeeding to the duties of the president on his death or inability to act is entitled to the salary of the president.⁸³ But in the absence of a provision to such effect, the vice president is not entitled to the salary of the president for performing his duties during temporary absence.⁸⁴ The fact that no compensation was paid to an officer's predecessor does not bar the right of such officer to recover compensation.⁸⁵

§ 2757. — **Statutory provisions limiting compensation.** In some states statutes have been enacted limiting the compensation of officers of corporations. The payment of grossly excessive salaries to officers of certain kinds of corporations where a large number of persons or stockholders are interested has given rise to this kind of legislation. The case of officers of life insurance companies is given as an illustration. The constitutionality of such a statute has been sustained.⁸⁶

§ 2758. **Compensation of officers holding over.** Where an employee hired at a fixed salary continues his employment after his contract expires, it is presumed that the compensation fixed by the contract continues, and in such case the terms of the original contract control and there can be no recovery on a quantum meruit. This general rule of law governing employees has been held to apply to corporate officers.⁸⁷ So it has been held that where a secretary

⁸³ *Funsten v. Funsten Commission Co.*, 67 Mo. App. 559.

⁸⁴ *Brown v. Galveston Wharf Co.*, 92 Tex. 520, 50 S. W. 126, rev'g (Tex. Civ. App.), 48 S. W. 41.

⁸⁵ See *Gem Knitting Mills v. Thurman*, 140 Ga. 15, 78 S. E. 408.

⁸⁶ Under Missouri Laws 1907, p. 315, limiting the compensation of officers of life insurance companies, the license of a company disregarding the statute is not revoked, but the granting of a new license to such companies is prohibited. *State v. Vandiver*, 222 Mo. 206, 121 S. W. 45.

Laws 1907, p. 315, "relating to the salaries and compensation of officers and agents of life insurance companies," does not violate Const. art.

4, § 28 as to the title of legislative enactments, and providing that no bill shall contain more than one subject. *State v. Vandiver*, 222 Mo. 206, 121 S. W. 45.

⁸⁷ *Perry v. J. Noonan Furniture Co.*, 8 Cal. App. 35, 95 Pac. 1128; *Trimble v. Guardian Trust Co.*, 244 Mo. 228, 148 S. W. 934.

While a hiring at so much per year, without more, is an indefinite hiring, the rule gives way when the circumstances show a different intention. *Foltz & Fuller v. Fuller*, 38 App. Cas. (D. C.) 139.

No presumption of an agreement to pay for future services arises from the passage of a resolution providing for the payment of salary for past

and treasurer was re-elected, without any provision being made as to his salary, he was entitled to a salary on the same basis as before.⁸⁸ If there is a continuance of the employment and a change in the circumstances, the question of the amount of the salary may become one of fact.⁸⁹ But if there is an express understanding that the officer will not continue at the same rate of compensation and he is re-elected without any provision being made as to his salary, he may recover the reasonable value of his services.⁹⁰

§ 2759. Form of compensation. In some cases the compensation takes the form of things of value other than money. In one case, the officers of a small manufacturing concern were in the habit of getting their fuel from the corporation, with the knowledge of all concerned, the custom having been acquiesced in for some time. The fuel was accordingly regarded as additional compensation to the salary received.⁹¹

Where an officer is paid for his services in stock, subsequent increases in the value of the stock as well as accruing dividends belong to him.⁹²

years. *Bell v. Peper Tobacco Warehouse Co.*, 205 Mo. 475, 103 S. W. 1014.

⁸⁸ *Eicke v. Wittemann Co.*, 157 N. Y. App. Div. 412, 142 N. Y. Supp. 190.

Where a secretary and treasurer was re-elected to his office for a year and nothing was said as to his salary, but he had been in the habit of receiving fifty dollars per month, and a resolution authorized the president to pay him \$400 at the end of the year if the business warranted it, and such secretary was removed from office at the end of a little over three months, his recovery of salary would be limited to the \$50 payable each month served. *Eicke v. Wittemann Co.*, 157 N. Y. App. Div. 412, 142 N. Y. Supp. 190.

As to when officers may be designated as "hold-over" officers, see § 1808, *supra*.

Where a secretary and treasurer held office until a certain date, when a newly-elected board of directors ap-

pointed two persons to fill the offices in question, and the election of directors was subsequently set aside, invalidating the appointments, but the controversy was adjusted later and a stipulation was signed by all the parties, whereupon the court set aside its order setting aside the election, such latter order operated to annul the proceedings previously brought, and the original secretary-treasurer could not claim compensation as a hold-over officer. *McNeil v. Columbia Engineering Works*, 136 N. Y. Supp. 73.

⁸⁹ *Metropolitan Rubber Co. v. Place*, 147 Fed. 90. And see § 2753, *supra*.

⁹⁰ *Stacy v. Cherokee Foundry & Mach. Works*, 70 S. C. 178, 49 S. E. 223.

See § 2753, *supra*.

⁹¹ *Jorndt v. Reuter Hub & Spoke Co.*, 112 Mo. App. 341, 87 S. W. 29.

⁹² *Rosehill Cemetery Co. v. Dempster*, 223 Ill. 567, 79 N. E. 276.

§ 2760. **Changes, increases or reductions of compensation.** Charter provisions or by-laws governing the fixing of salaries usually apply also to the change of such salaries,⁹³ and directors who occupy other positions are bound to know of the provisions of the by-laws governing the fixing of compensation.⁹⁴ Where a charter contains a provision fixing the salaries of some of the officers, they cannot be changed by the by-laws, even though the charter also provides that the corporation may fix salaries, as such provision applies only to salaries not fixed by the charter.⁹⁵ Nor can salaries fixed by the by-laws be changed by a mere resolution.⁹⁶

In order to be entitled to an increase in salary, an officer must usually show an express contract with the corporation,⁹⁷ but the passage of a resolution is not necessary. A mutual understanding may be sufficient.⁹⁸ The board of directors cannot delegate its power to increase compensation to an individual member.⁹⁹

Increases of salaries are subject to the same rules as those that govern with respect to fixing salaries, concerning the votes of interested directors.¹ Thus an increase effected by interested directors will be held voidable,² and, in case of fraud, the directors may be held liable for the increase received.³ The fact that an officer owns a majority of the stock of a corporation does not authorize him to increase, or effect an increase, of his compensation in disregard of the corporate regulations;⁴ but there is no objection to

⁹³ See §§ 2744, 2745, *supra*.

⁹⁴ *McKean v. Riter-Conley Mfg. Co.*, 230 Pa. 319, 79 Atl. 561.

⁹⁵ *Carr v. St. Louis*, 9 Mo. 191.

⁹⁶ *Hington v. Montgomery*, 121 Mo. App. 451, 97 S. W. 202.

⁹⁷ *McKean v. Riter-Conley Mfg. Co.*, 230 Pa. 319, 79 Atl. 561.

⁹⁸ *Chabot & Richard Co. v. Chabot*, 109 Me. 403, 84 Atl. 892.

See § 2752, *supra*.

⁹⁹ The power to increase salaries of officers is vested in the directors as a board. *Chabot & Richard Co. v. Chabot*, 109 Me. 403, 84 Atl. 892.

Where an executive committee recommended that the board of directors pay a president a portion of the net profits of the company as extra compensation, the board could not delegate its power to an individual member and such member could

not bind the corporation to pay the portion of the profits unless his action was ratified by the board, but the board was bound to act as a board. *Young v. United States Mortgage & Trust Co.*, 156 N. Y. App. Div. 515, 141 N. Y. Supp. 864.

¹ See § 2752, *supra*.

² *Russell v. Henry C. Patterson Co.*, 232 Pa. 113, 36 L. R. A. (N. S.) 199, 81 Atl. 136.

³ *Pontch v. National Foundry & Machine Co.*, 147 Ky. 242, 143 S. W. 1003.

See § 2755, *supra*.

⁴ *McGowan v. Finola Mfg. Co.*, 120 Md. 335, 87 Atl. 694.

An officer whose duties are prescribed by the by-laws and whose salary is fixed by a resolution of the directors cannot have his compensation increased, without any material

an increase of salary of an officer who is not a director.⁵ If the compensation of interested officers is increased and the act is not ratified by the stockholders, there is no room for the application of the doctrine of implied contracts, as in such case the suggestion of an implied promise to pay greater compensation for the performance of the same duties is negatived by the existence of the specific contract.⁶

Added prosperity of a corporation does not justify an increase of compensation, as the officers perform their services to produce such results;⁷ and the value of services is not to be determined by rules of proportion so as to absorb all the profits of a company.⁸ It has been held that officers cannot of themselves increase their compensation without a corresponding increase of duties.⁹

In some cases bonuses are given to induce an officer to retain his position. It has been held that a promise to pay an officer a certain percentage of profits in addition to his salary is supported by sufficient consideration, where the officer abrogates his privilege of annulling his contract of employment.¹⁰

Where a resolution reducing salaries is ambiguous in that it does not state when the resolution is to become effective, and the testimony as to the effect of the resolution is contradictory, a question of fact is presented as to what the agreement was and what occurred at the meeting when the resolution was passed.¹¹ A reduction of salary may be implied.¹²

and apparent increase of service, by a private arrangement with another officer in disregard of the corporate regulations. *McGowan v. Finola Mfg. Co.*, 120 Md. 335, 87 Atl. 694.

⁵ *Carr v. Kimball*, 153 N. Y. App. Div. 825, 139 N. Y. Supp. 253.

⁶ *Kreitner v. Burgweger*, 174 N. Y. App. Div. 48, 160 N. Y. Supp. 256.

⁷ *Kreitner v. Burgweger*, 174 N. Y. App. Div. 48, 160 N. Y. Supp. 256.

⁸ *Jacobson v. Brooklyn Lumber Co.*, 184 N. Y. 152, 76 N. E. 1075.

⁹ *Kreitner v. Burgweger*, 174 N. Y. App. Div. 48, 160 N. Y. Supp. 256.

¹⁰ *Fraker v. A. G. Hyde & Sons*, 127 N. Y. App. Div. 620, 111 N. Y. Supp. 757.

See § 2756, *supra*. And see § 2762, *infra*.

¹¹ *Russell v. Henry C. Patterson Co.*, 48 Pa. Super. Ct. 571.

¹² A corporation cannot avail itself of a mutual agreement among its officers to accept a reduced rate of salary, where the agreement was not communicated to or accepted by it and it was not in any way a party to it. *Richard Thompson Co. v. Brook*, 37 N. Y. St. Rep. 506, 14 N. Y. Supp. 370.

In an action to recover for services as general manager under a written contract, held, under the evidence, that the court should have specifically called the attention of the jury to the conduct of the plaintiff and the undisputed dealings between the parties subsequent to a resolution employing the manager at a reduced

§ 2761. Ratification by stockholders of acts of directors fixing or increasing compensation. As a general rule, any act of the board of directors may be ratified by the stockholders when they could have originally authorized such act.¹³ Under this rule it has been held that the voidable acts of directors in fixing or increasing their own salaries as officers may be ratified by the stockholders, it appearing that the act is not fraudulent or detrimental to the interests of the corporation.¹⁴ In such cases, the fact that interested stockholders vote will not affect the validity of the confirming resolution,¹⁵ it appearing that the salaries paid are reasonable.¹⁶ Other courts hold that it may well be doubted whether the rule permitting ratification of voidable acts, not fraudulent or ultra vires, applies to increases of salaries.¹⁷ Thus it has been held that there can be no ratification of payments to officers for services rendered without any express or implied agreement that they should be paid, such act being a taking of funds from the treasury without authority.¹⁸ And in one

salary. In such case the jury should not have been confined to the mere question whether the officer had expressly agreed to come under such resolution. *Clark v. Onaway-Alpena Tel. Co.*, — Mich. —, 163 N. W. 44.

¹³ *Russell v. Henry C. Patterson Co.*, 232 Pa. 113, 36 L. R. A. (N. S.) 199, 81 Atl. 136.

¹⁴ *Sotter v. Coatsville Boiler Works*, — Pa. —, 101 Atl. 744; *Russell v. Henry C. Patterson Co.*, 232 Pa. 113, 36 L. R. A. (N. S.) 199, 81 Atl. 136.

Where stockholders ratify the action of directors in fixing salaries, the corporation, or a minority stockholder, is estopped from questioning the validity of payments or the right of officers to receive the salaries thus fixed. *Lewis v. Matthews*, 161 N. Y. App. Div. 107, 146 N. Y. Supp. 424.

Where a president and a managing director by certain proceedings allowed a salary of \$5,000 per year to each officer and such salary was paid by the corporation for thirteen months, the corporation would not be heard to attack the validity of the arrangement on account of its ac-

quiescence. *Gale v. Canada, A. & P. S. S. Co.*, 187 Fed. 598.

¹⁵ *Russell v. Henry C. Patterson Co.*, 232 Pa. 113, 36 L. R. A. (N. S.) 199, 81 Atl. 136.

When directors vote as stockholders in a stockholders' meeting they hold no trust relation to the company which deprives them of the right to vote as their interests dictate. *Russell v. Henry C. Patterson Co.*, 232 Pa. 113, 36 L. R. A. (N. S.) 199, 81 Atl. 136.

Where the action of a board of directors is not fraudulent or unfair and may be ratified by the stockholders, the stock of a director who is benefited is to be counted, even though the vote would have failed had his stock not been counted. *Russell v. Henry C. Patterson Co.*, 232 Pa. 113, 36 L. R. A. (N. S.) 199, 81 Atl. 136.

¹⁶ *Russell v. Henry C. Patterson Co.*, 232 Pa. 113, 36 L. R. A. (N. S.) 199, 81 Atl. 136.

¹⁷ *Godley v. Crandall & Godley Co.*, 212 N. Y. 121, 105 N. E. 818.

¹⁸ *Lewis v. Matthews*, 161 N. Y. App. Div. 107, 146 N. Y. Supp. 424.

case where a majority of stockholders received preferential payments under the guise of increased salaries and voted to ratify such payments, it was held that the rule would apply that even the majority could not for selfish purposes act in hostility to the interests of the corporation with the intent of defrauding non-assenting stockholders.¹⁹

§ 2762. Compensation for past services. It is a well-recognized and inflexible rule that directors or managing officers of a corporation cannot legally vote to themselves or other officers compensation for past services, where there is no agreement that such officers should be paid.²⁰ The rule results from the general rule that the

¹⁹ *Godley v. Crandall & Godley Co.*, 212 N. Y. 121, 105 N. E. 818. See also § 2755, *supra*.

²⁰ *United States*. *Montana Tonopah Min. Co. v. Dunlap*, 196 Fed. 612, *aff'g* 192 Fed. 714; *Monmouth Inv. Co. v. Means*, 151 Fed. 159; *National Loan & Investment Co. v. Rockland Co.*, 94 Fed. 335; *Doe v. Northwestern Coal & Transportation Co.*, 78 Fed. 62.

California. See *Bassett v. Fairchild*, 132 Cal. 637, 52 L. R. A. 611, 64 Pac. 1082 (Cal.), 61 Pac. 791.

Connecticut. *New York & N. H. R. Co. v. Ketchum*, 27 Conn. 170.

Illinois. *Klein v. Independent Brewing Ass'n*, 231 Ill. 594, 83 N. E. 434, *rev'g* 135 Ill. App. 234; *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530; *Holder v. Lafayette, B. & M. R. Co.*, 71 Ill. 106, 22 Am. Rep. 89; *Cheeney v. Lafayette, B. & M. R. Co.*, 68 Ill. 576, 18 Am. Rep. 584.

Kansas. *First Nat. Bank v. Drake*, 29 Kan. 311, 44 Am. Rep. 646.

Michigan. See *Utica Fire Alarm Tel. Co. v. Waggoner Watchman Clock Co.*, 166 Mich. 618, 132 N. W. 502.

Minnesota. *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854.

Montana. *Kleinschmidt v. American Min. Co.*, 49 Mont. 7, 139 Pac. 785.

New York. *Godley v. Crandall & Godley Co.*, 212 N. Y. 121, 105 N. E.

818; *Beers v. New York Life Ins. Co.*, 66 Hun 75, 20 N. Y. Supp. 788. Compare *Reed v. Hayt*, 109 N. Y. 659, 17 N. E. 418; *Miller v. Crown Perfumery Co.*, 57 Misc. 383, 109 N. Y. Supp. 760.

Ohio. *State v. People's Mut. Ben. Ass'n*, 42 Ohio St. 579.

Oregon. *Wood v. Lost Lake Mfg. Co.*, 23 Ore. 20, 37 Am. St. Rep. 651, 23 Pac. 848.

Pennsylvania. *Danville, H. & W. R. Co. v. Kase*, 39 Atl. 301; *Martindale v. Wilson-Cass Co.*, 134 Pa. St. 348, 19 Am. St. Rep. 706, 19 Atl. 680; *Accommodation Loan & Savings Fund Ass'n v. Stonemetz*, 29 Pa. St. 534.

Texas. *Southwestern Portland Cement Co. v. Latta & Happer*, — Tex. Civ. App. —, 193 S. W. 1115.

West Virginia. *Ravenswood S. & G. R. Co. v. Woodyard*, 46 W. Va. 558, 33 S. E. 285.

In *National Loan & Investment Co. v. Rockland*, 94 Fed. 335, Sanborn, J., says, "A thoughtful and deliberate consideration of this entire question, and an extended consideration of the authorities upon it, has led to the conclusion that this is the true rule: Officers of a corporation, who are also directors, and who, without any agreement, express or implied, with the corporation or its owners or their representatives, have voluntarily rendered their services, can recover no

officers are not impliedly entitled to compensation for services rendered, and accordingly a payment for services which have been voluntarily rendered is void as without consideration and is also ultra vires as a misapplication of the corporate funds.

Under this rule it has been held that directors cannot vote increases of salary to themselves for services already performed under a contract where a stipulated salary was fixed;²¹ and claims for compensation which are evidently afterthoughts will not be allowed.²² In the case of the sale or transfer of a corporation, it has been held that an officer who failed to assert his claim at the time of the transfer could not assert such claim against the buying company subsequently;²³ and in one case where a sale had been effected, except for the ratification of the contract by the directors, it was held that a situation of trust and confidence arose, and the selling company could not deplete its assets and pay an officer for services in effecting the contract of sale.²⁴

The rule forbidding payment for past services does not apply where there is an understanding that the services are to be paid for, or where the circumstances are such as to raise an implied contract. In such cases the payment of compensation is based on sufficient consideration.²⁵ The payment for services performed by an

back pay or compensation therefor; and it is beyond the power of the board of directors, after such services are rendered, to pay for them out of the funds of the corporation, or to create a debt of the corporation on account of them.”

The court will look with suspicion on dealings between a president or superintendent of a corporation and such corporation, where the object is to pay for services rendered in the past. *McLean v. Hayden Creek Mining & Milling Co.*, 25 Idaho 416, 138 Pac. 331.

²¹ *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854; *Godley v. Crandall & Godley Co.*, 212 N. Y. 121, L. R. A. 1915 D 632, 105 N. E. 818.

²² *Utica Fire Alarm Tel. Co. v. Waggoner Watchman Clock Co.*, 166 Mich. 618, 132 N. W. 502; *Sidway v. Missouri Land & Live Stock Co.*, 187 Mo. 649, 86 S. W. 150.

²³ *Dodge v. Lansing & S. Traction Co.*, 152 Mich. 100, 115 N. W. 1004.

²⁴ *Atlantic Suburban Gas & Fuel Co. v. Johnson*, 81 N. J. Eq. 351, 514, 88 Atl. 163.

²⁵ *National Loan & Investment Co. v. Rockland Co.*, 94 Fed. 335; *Stewart v. St. Louis, Ft. S. & W. R. Co.*, 41 Fed. 736; *St. Louis, Ft. S. & W. R. Co. v. Tiernan*, 37 Kan. 606, 15 Pac. 544; *Huffaker v. Krieger's Assignee*, 21 Ky. L. Rep. 887, 46 L. R. A. 384, 53 S. W. 288.

Where an officer served for two years under an understanding that he was to receive compensation and at the beginning of the third year a resolution was passed fixing his salary at a certain sum per month, it was held that it constituted an agreement to pay for past as well as future services at that rate. *Rosborough v. Shasta River Canal Co.*, 22 Cal. 556.

officer prior to his assumption of the office may be authorized,²⁶ and in some cases, a payment for past services may prove to be, in reality, a payment for the future services of the officer, to induce his continued employment.²⁷

§ 2763. Recovery of expenses and money advanced by officers.

An officer, such as a secretary, is entitled to recover, as on an implied contract, money advanced to pay bills of the company, when the arrangement is known and acquiesced in by the directors.²⁸ And a corporation which claims the benefit of a contract which its vice president has in part executed at his own expense must pay him the reasonable advances thereon.²⁹

Usually there can be no recovery by a president or vice president for expenses in attending stockholders' meetings or in visiting directors,³⁰ but a corporation which authorizes an officer to do certain work is liable for the expenses which he incurs. In one case a bank which had temporarily suspended payment authorized an officer to resume business, and under such authorization the bank was held liable for expenses of the officer in operating his automobile (including necessary repairs) in furtherance of the bank's business.³¹ A corporation which owns all the stock of another company cannot fix a certain amount as expense money for an officer of such other company, it being entitled to its own board of directors.³² The doctrine of implied contracts may permit of a recovery in such a case, there being no engagement to expend the money gratuitously.³³ Sums expended by a president for traveling expenses, dinners and entertainments are not recoverable where they were not authorized or agreed to be paid for and where it is not shown that such expenses

²⁶ *Rosehill Cemetery Co. v. Dempster*, 223 Ill. 567, 79 N. E. 276.

²⁷ Where directors of a corporation, considering the matter of an increase of salary of a treasurer, voted such increase and turned over certain stock of the company to him, the vote referring to past services under the evidence, the stock was not transferred as a bonus or gift, but in consideration of the future support and assistance of the treasurer. In *re Knox Automobile Co.*, 229 Fed. 241. See § 2760, *supra*.

²⁸ In *re Gouverneur Pub. Co.*, 168 Fed. 113.

²⁹ *Krauss Engineering Co. v. McKinnon*, 66 N. Y. Misc. 181, 121 N. Y. Supp. 396.

³⁰ *McConnell v. Combination Mining & Milling Co.*, 31 Mont. 563, 79 Pac. 248, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194.

³¹ *Seadale v. Montgomery*, 113 N. Y. Supp. 600.

³² *Atlantic Suburban Gas & Fuel Co. v. Johnson*, 81 N. J. Eq. 351, 514, 88 Atl. 163.

³³ *Atlantic Suburban Gas & Fuel Co. v. Johnson*, 81 N. J. Eq. 351, 514, 88 Atl. 163.

inured to the benefit of the corporation.³⁴ A claim for living expenses cannot be sustained where other officers of the corporation directly deny such a claim. Recovery for such expenses was sought in one case of a corporation which succeeded a partnership by a partner who became an officer. The court would not permit recovery in view of the evidence, and also in view of the improbability that the other partners would enter into an agreement so elastic.³⁵

§ 2764. Extra compensation to officers. According to the general rule, when the salary of an officer or employee of a corporation is fixed by the charter, by-laws or agreement, he cannot recover additional compensation, in the absence of special agreement, for extra services performed in the course of his office or employment, although they may not have been contemplated at the time of his appointment or employment.³⁶ The rules as to the necessity of express contracts in general apply,³⁷ but such rules do not prevent the stockholders from making a contract with an officer to pay him for extra services, where creditors are not defrauded.³⁸ And usually directors are authorized to fix the salaries or compensation of officers for duties performed by them which are outside and beyond the usual scope of their duties.³⁹ It has been held also that extra compen-

³⁴ *Ebner v. Alaska Mildred Gold Min. Co.*, 167 Fed. 456.

³⁵ *Kwapil v. Bell Tower Co.*, 55 Wash. 583, 104 Pac. 824.

³⁶ *Willard v. Pittsburgh, C., C. & St. L. Ry. Co.*, 162 Ill. App. 427; *Trimble v. Guardian Trust Co.*, 244 Mo. 228, 148 S. W. 934; *Martindale v. Wilson-Cass Co.*, 134 Pa. St. 348, 19 Am. St. Rep. 706, 19 Atl. 680; *Carr v. Chartiers Coal Co.*, 25 Pa. St. 337. See also *Fowler v. Great Southern Telephone & Telegraph Co.*, 104 La. 751, 29 So. 271; *Gill v. New York Cab Co.*, 48 Hun (N. Y.) 524, 1 N. Y. Supp. 202.

Where litigation of a corporation arose in a county in a district which an attorney under his general employment was bound to handle, he was not entitled to extra compensation for taking charge of such litigation, even though the action was afterwards transferred to another county. *Willard v. Pittsburgh, C., C. & St. L. Ry. Co.*, 162 Ill. App. 427.

An officer such as a general counsel, receiving a stated salary, is not entitled to recover extra compensation during such period, when not authorized by his employer. If he is a hold-over officer, and is paid the same salary as in previous years, this is the limit of his compensation. *Trimble v. Guardian Trust Co.*, 244 Mo. 228, 148 S. W. 934. See § 2758, *supra*.

³⁷ See § 2734, *supra*.

³⁸ *Caho v. Norfolk & S. R. Co.*, 147 N. C. 20, 60 S. E. 640.

³⁹ *Williams v. Little Falls Water Power Co.*, 99 Minn. 4, 108 N. W. 289; *Godley v. Crandall & Godley Co.*, 212 N. Y. 121, 105 N. E. 818.

Where the board of directors votes a certain compensation for all special services performed by any director, a director cannot recover higher compensation for any services which could only have been performed by a director. *Hodges v. Rutland & B. R. Co.*, 29 Vt. 220.

sation can be paid to a president for services outside of those imposed upon him by virtue of his official capacity,⁴⁰ and services in saving the company's property from execution sales, in supervising work and disbursements, making contracts and employing men have been held to be outside of the usual duties of a president or director.⁴¹ A president may also be paid for services rendered as a salesman.⁴² An agreement properly entered into to pay for extra services is binding. In one case a president and the majority stockholders agreed to pay certain officers extra compensation for services in effecting a reorganization of the company, and it was held immaterial whether the reorganization scheme originated with such officers, whether the services were within the scope of their usual duties, or whether they were of permanent benefit to the company.⁴³

The rule prohibiting officers from fixing the salaries of subordinates unless authorized operates similarly to prevent an officer from binding the corporation by a promise to pay a subordinate for extra services. Such a promise is not binding on the corporation unless ratified by it.⁴⁴ The payment of compensation for extra services does not operate as a ratification or acquiescence of a continuous payment of such amounts under changed conditions, as where

A vote of the stockholders or directors limiting the amount per diem of pay allowable to a director for special services does not apply to services rendered by a director in an entirely different capacity under employment by the company. *Henry v. Rutland & B. R. Co.*, 27 Vt. 435.

⁴⁰ *Burton v. Lithie Mfg. Co.*, 73 Ore. 605, 144 Pac. 1149.

⁴¹ *Gumaer v. Cripple Creek Tunnel Transportation & Mining Co.*, 40 Colo. 1, 122 Am. St. Rep. 1024, 13 Ann. Cas. 781, 90 Pac. 81.

⁴² Where it was agreed in the presence of other officers that a president was to enter on the duties of salesman at a minimum salary of \$500 per month, and the evidence showed the performance of such duties of value to the company, a judgment of nonsuit was erroneous. *Chiles v. United States Furniture Mfg. Co.*, 167 N. C. 574, 83 S. E. 812.

A stockholder of a corporation who is also vice president, without a sal-

ary, may be employed as a salesman of the corporation at a reasonable salary and is entitled to his salary with the privilege of securing the same like any third person performing the same services. *Friedrichs v. Friedrichs, Young & Taney*, 126 La. 689, 52 So. 996.

⁴³ *Belcher v. Carstens*, 87 Wash. 264, 151 Pac. 802.

⁴⁴ So where a president promised an employee that he would be paid a percentage of bonds and some stock, if he continued in his position, but the promise was not assented to by the board of directors nor the executive committee, and the employee was paid his regular salary until the corporation was sold, when his services ended, such employee could not recover extra compensation on a quantum meruit, his contract not having been rescinded. *Minshull v. New Jersey Terminal R. Co.*, 76 N. J. L. 684, 71 Atl. 663.

See § 2736, *supra*.

the officer ceases his extra work;⁴⁵ and a resolution of an executive committee recommending an award to a president of a portion of the net profits of the company, during the pleasure of the board, does not operate as a binding contract, even though payments are made thereunder for a number of years.⁴⁶

§ 2765. Rights of de facto officers to salaries. A de facto officer is not entitled to the salary attached to an office when another person has the legal title to such office.⁴⁷ But when it appears that a person has been elected or appointed to an office and that the stockholders have acquiesced in his discharge of the duties of the office, he is entitled to recover the compensation therefor, notwithstanding there was a mere irregularity in his appointment or election.⁴⁸

As a general rule, when an officer de facto or a mere intruder has received the salary, fees and emoluments of an office, he is liable therefor to the officer de jure in an action for money had and received,⁴⁹ a rule which is frequently applied when public officers are involved.⁵⁰

When a person who has been illegally elected or appointed to an office is neither a de jure nor a de facto officer, he is clearly not entitled to any salary or other compensation for performing the duties of the office, in the absence of an estoppel against the corporation.⁵¹

⁴⁵ *Burton v. Lithie Mfg. Co.*, 73 Ore. 605, 144 Pac. 1149.

⁴⁶ *Young v. United States Mortgage & Trust Co.*, 156 N. Y. App. Div. 515, 141 N. Y. Supp. 364.

⁴⁷ *Waterman v. Chicago & I. R. Co.*, 139 Ill. 658, 15 L. R. A. 418, 32 Am. St. Rep. 228, 29 N. E. 689. Compare *Salton v. New Beeston Cycle Co.*, [1899] 1 Ch. 775, 68 L. J. Ch. 371, where a director was not qualified.

When a person claiming to be an officer of a corporation brings an action to recover the salary incident to the office, which he has no right to receive unless he has a legal right to the office, his title to the office is necessarily in issue and he must show that he is a de jure officer, or, at the least, that his appointment or election was merely irregular and that the discharge of the duties of the office has been acquiesced in by the stockholders. *Waterman v. Chicago & I.*

R. Co., 139 Ill. 658, 15 L. R. A. 418, 32 Am. St. Rep. 228, 29 N. E. 689; *State v. Tate*, 70 N. C. 161.

⁴⁸ *Waite v. Windham County Min. Co.*, 37 Vt. 608, 36 Vt. 18.

As to recovery of compensation on an implied contract, see § 2738, *supra*.

⁴⁹ *Waterman v. Chicago & I. R. Co.*, 139 Ill. 658, 15 L. R. A. 418, 32 Am. St. Rep. 228, 29 N. E. 689; *Mayfield v. Moore*, 53 Ill. 428, 5 Am. Rep. 52; *State v. Tate*, 70 N. C. 161.

⁵⁰ See *In re Berger's Estate*, 152 Mo. App. 663, 133 S. W. 96; *DeVigil v. Stroup*, 15 N. M. 544, 110 Pac. 830; *Howard v. Town of Port Royal*, 85 S. C. 361, 67 S. E. 449.

⁵¹ *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954; *Waterman v. Chicago & I. R. Co.*, 139 Ill. 658, 15 L. R. A. 418, 32 Am. St. Rep. 228, 29 N. E. 689; *State v. Tate*, 70 N. C. 161. See § 1834, *supra*.

or employee appointed by him desires a vacation,⁶³ or the payment of compensation to the officer after his vacation has commenced may give rise to a presumption that the acts of the managing officer were ratified by the directors.⁶⁴

§ 2767. Temporary suspension of work; lessening of duties; discharge of officers; resignation. The mere lessening of the duties of an officer does not abrogate an agreement to pay him a salary. It is only when there is such a change in the business of the company that the officer has no duties to perform, that the question of abandonment of a contract can arise.⁶⁵

The right of an officer to salary where the work required of him is temporarily suspended, depends upon the contract for his services. Thus it has been held that where the records of a corporation showed that a secretary was paid a salary as officer and not for the performance of extra services, the suspension of work, dispensing with the necessity of the extra services, did not operate to affect the right to recover salary.⁶⁶

Usually an officer cannot be discharged without proper grounds therefor, and the corporation will be liable for a breach of contract in the case of an improper discharge.⁶⁷ The payment of damages for breach of a contract employing an officer is improper where he holds his position at the pleasure of the board of directors.⁶⁸

⁶³ *Missouri, K. & T. Ry. Co. v. Bryant*, — Tex. Civ. App. —, 178 S. W. 685.

⁶⁴ *Birch v. Glasgow Sav. Bank*, 114 Mo. App. 711, 90 S. W. 746.

⁶⁵ *Metropolitan Rubber Co. v. Place*, 147 Fed. 90.

⁶⁶ *Bligh v. People's Packing Co.*, 192 Ill. App. 83, in which case the evidence was held not to show that a secretary agreed to waive his salary during a period when the corporation temporarily suspended business, the books showing a credit of such salary, and such credit being with the knowledge of the president. 192 Ill. App. 83.

⁶⁷ In order to warrant the discharge of a manager of a corporation employed for a fixed time at a fixed price, before the expiration of the time agreed upon, there should exist

grounds of complaint against him of a serious character. If a manager is discharged without the existence of such grounds, the corporation will be liable to him (under La. Civ. Code art. 2749). *Berlin v. P. L. Cusachs*, 114 La. 744, 38 So. 539.

If a corporation is liable to an officer for a breach of contract of employment, the measure of damages would be the difference between the salary and what he could have earned in some other occupation. *Busell Trimmer Co. v. Coburn*, 188 Mass. 254, 69 L. R. A. 821, 74 N. E. 334.

As to the removal of officers, see §§ 1814-1824.

⁶⁸ Where a general manager of a corporation was an agent within the meaning of West Virginia Code, c. 53, § 53, holding his position at the

An officer is not entitled to any salary after he has resigned and his resignation has been accepted, unless the charter, by-laws or a resolution of the stockholders gives him a right thereto, and it can make no difference that in resigning he gives notice that he claims salary for a given time thereafter and asserts that the resolutions of the stockholders give him a right thereto.⁶⁹

§ 2768. — Receivership, bankruptcy, dissolution, etc. The appointment of a receiver to take control of a corporation operates to terminate the right of officers and employees to compensation, whether the corporation is dissolved or not. In such case there is no breach of contract, as the court order operates to prevent the rendition of services by the officers.⁷⁰ An officer may be named by the court, however, to perform services rendered necessary by the receivership, his compensation being limited to the amounts earned in such capacity, and as fixed by the court.⁷¹ The same rules apply in the

pleasure of the board of directors, the board could not bind the corporation to pay a penalty of three months' salary when such officer was dismissed. *Wright v. Warren Bros.*, 204 Fed. 231.

⁶⁹ *Savannah Cotton Mills v. Cunningham*, 100 Ga. 468, 28 S. E. 435.

⁷⁰ *Sullivan Timber Co. v. Black*, 159 Ala. 570, 48 So. 870; *Lenoir v. Linville Improvement Co.*, 126 N. C. 922, 51 L. R. A. 146, 36 S. E. 185; *Law v. Waldron*, 230 Pa. 458, Ann. Cas. 1912 A 467, 79 Atl. 647.

A contract with an insurance corporation whereby a person agrees to act as general agent of the company in a certain territory, which provides for 90 days' notice before it can be discontinued, is terminated when a receiver is appointed for the company, and in such case the provision as to notice does not apply. *Law v. Waldron*, 230 Pa. 458, Ann. Cas. 1912 A 467, 79 Atl. 647.

An officer cannot participate in the distribution of assets of a corporation being administered through an insolvency proceeding by a receiver when his claim is for compensation for the unexpired term of office and a breach

of contract of his employment under the election to the office. *Williamson County Banking & Trust Co. v. Roberts-Buford Dry Goods Co.*, 118 Tenn. 340, 9 L. R. A. (N. S.) 644, 12 Ann. Cas. 579, 101 S. W. 421.

See also *Louchheim v. Clawson Printing & Weighing Co.*, 12 Pa. Super. Ct. 55, where the charter of a corporation was declared void for nonpayment of taxes, and a receiver appointed, and *Eddy v. Co-operative Dress Ass'n*, 3 Civ. Proc. R. (N. Y.) 442, where the receiver discharged the superintendent.

⁷¹ Thus an officer or stockholder of a corporation which has been placed in the hands of a receiver can be named by the court as auctioneer to make a sale of the property, and if so appointed and he makes a sale, he is entitled to his commissions in like manner as any other person rendering that service. *Friedrichs v. Friedrichs, Young & Taney*, 126 La. 689, 52 So. 996.

Where a corporation was dissolved and the president was appointed receiver, he was not entitled to recover salary as president in addition to his compensation as receiver, as the re-

case of bankruptcy in determining the claim of an officer to salary.⁷³

The right of an officer to salary may cease on a transfer of all the property and business of the corporation to another corporation, particularly where he enters into the service of the new company or consents to the transfer.⁷³ And where, with the consent and co-operation of an officer of a corporation, all its property and franchises are sold, so that he has no further duty to perform, any contract which he may have had with the company for salary will be deemed cancelled, although the corporation may not be dissolved.⁷⁴

A statute providing that no compensation shall be allowed a president for services rendered unless allowed by the stockholders, will operate to prevent compensation for services rendered in closing the corporation's business, unless so allowed.⁷⁵ But an allow-

ceivership proceedings operated to terminate the office of the president. *Sullivan Timber Co. v. Black*, 159 Ala. 570, 48 So. 870.

After the appointment of a receiver for an insolvent corporation to close up its business and an injunction against the continuance of business further than to elect officers and do such other acts as are necessary to continue the corporate existence and to lay assessments to pay liabilities, the president and other officers are not entitled to the salary fixed for their officers before, but only to reasonable compensation for the services performed after the appointment and injunction. *Com. v. Eagle Fire Ins. Co.*, 14 Allen (Mass.) 344.

Where a person was appointed receiver in an action and allowed and paid \$500 a month, and among the assets transferred to him were three-fifths of the stock of a corporation of which he was afterwards elected president, it was held that he was not entitled to recover from the corporation the salary fixed for his office by a resolution passed prior to his election, as the services performed by him were performed as receiver, and compensated for in the allowance made to him by the court. *Thompson v. Willamette S. M. L. & Mfg. Co.*, 15 Ore. 604, 16 Pac. 647.

Where the president of an insolvent mortgagor corporation in the discharge of his duty cared for the property pending foreclosure, a receiver having been refused, it was held that he was entitled to compensation from the proceeds of the foreclosure. *Trust & Deposit Co. v. Spartanburg Water Works Co.*, 97 Fed. 409.

⁷³ See *In re Grubbs-Wiley Grocery Co.*, 96 Fed. 183.

⁷³ *Simonson v. New York City Ins. Co.*, 141 N. Y. 12, 35 N. E. 969.

⁷⁴ *Long Island Ferry Co. v. Terbell*, 48 N. Y. 427; *Rodney v. Southern R. Ass'n*, 3 N. Y. St. Rep. 564, 14 Daly (N. Y.) 70.

Where the president of a corporation conducted its business as general manager, and such business was sold to another corporation which assumed all the liabilities of the selling company, there was no liability on the part of the purchasing corporation to continue payment of the president's salary for the balance of his unexpired term, there being nothing to show that the purchasing company agreed to carry on the business purchased or to retain him in his employment. *Busell Trimmer Co. v. Coburn*, 188 Mass. 254, 69 L. R. A. 821, 74 N. E. 334.

⁷⁵ See § 2747, *supra*.

ance by the court to an officer at the same rate as his salary, for services in settling and winding up the affairs of a corporation is not invalid or unjust.⁷⁶

An assignment by a corporation for the benefit of creditors does not defeat the right of its treasurer or other officers to recover salary for the time between the assignment and the reconveyance to the corporation, if they perform the duties of their office during such time.⁷⁷

The fact that a corporation is without funds does not relieve it from liability to its officers for their agreed salaries, so long as it permits them to remain in office and accepts their services.⁷⁸

§ 2769. Lien of officer for compensation. In some cases, an officer who is also a director and stockholder may perform services of such a nature as to entitle him to a lien protecting his claim to compensation. Thus it has been held that a general manager and superintendent who had charge of mining operations, requiring his personal skill and supervision, and who performed manual labor, was within a statute giving him a first and prior lien upon the property involved.⁷⁹

§ 2770. Effect of bankruptcy proceedings. The provisions of the Bankruptcy Act giving priority to the wages due workmen, clerks or "servants," has been held not to include a manager of a corporation who also rendered services as a salesman;⁸⁰ but a foreman of a repair department of a firm selling and buying automobiles, who was also a superintendent, has been held within the statute and entitled to a preference in the payment of his wages.⁸¹

Salaries of officers of corporations are usually held to be current expenses, therefore the act of a company in disposing of property to procure money to pay the salary of its president is not a fraudulent preference of creditors constituting an act of bankruptcy. But if such salaries are allowed to accumulate and become an existing debt, their payment will constitute a preference of a creditor so as to be an act of bankruptcy.⁸²

⁷⁶ *Lindemann v. Rusk*, 125 Wis. 210, 104 N. W. 119.

⁷⁷ *Potts v. Rose Valley Mills*, 167 Pa. St. 310, 31 Atl. 655.

⁷⁸ *Mobile, J. & K. C. R. Co. v. Owen*, 121 Ala. 505, 25 So. 612.

⁷⁹ *Hahn v. Anaconda Gold Min. Co.*, 26 S. D. 218, 128 N. W. 128.

⁸⁰ Section 64b(4) of the Bankruptcy

Act of 1898 as amended in 1906 (Act June 15, 1906, c. 3333, 34 Stat. 267).
Blessing v. Blanchard, 223 Fed. 35, Ann. Cas. 1916 B 341.

⁸¹ *Blessing v. Blanchard*, 223 Fed. 35, Ann. Cas. 1916 B 341.

⁸² *Richmond Standard Steel Spike & Iron Co. v. Allen*, 148 Fed. 657.

Salaries fixed and paid by a board of directors are not presumed wrongful or fraudulent, and a trustee in bankruptcy is not entitled to recover such salaries on behalf of the company unless fraud or wrongdoing is shown.⁸³

The payment of salary or compensation to an officer who performs no services may be sustained where the corporation is profitable, and the payment is duly authorized, but a different rule applies when the corporation becomes insolvent. In the latter case the money paid may be recovered by the trustee in bankruptcy.⁸⁴

§ 2771. Actions by officers to recover salaries or compensation—In general. A discussion of the procedure in actions by officers to recover compensation must necessarily be somewhat limited, in order to avoid a repetition of the principles of substantive law already stated in this chapter and also in order to avoid a statement of the principles usually applicable in contract actions. An endeavor has been made to call attention to only the most important questions and those which usually arise in actions by officers to recover compensation.

An officer who seeks the recovery of compensation under a contract providing that his salary is to be fixed by some person, must

⁸³ *Fillebrown v. Hayward*, 190 Mass. 472, 77 N. E. 45.

Where a treasurer of a company threatened to resign unless his salary was increased and the board of directors of the corporation voted to grant an increase which operated retrospectively and covered services performed several months prior to the time of the resolution fixing the salary and it appeared that there was no fraud in effecting such increase of salary, the company being then solvent and the services being worth the increased amount, creditors of the corporation could not object to the increase of salary some two years later when the company became bankrupt. In *re Knox Automobile Co.*, 229 Fed. 241.

Where a treasurer's salary was increased and stock was turned over to him in consideration of his future support and assistance, a contention that the corporation was coerced into

granting the increase because of the treasurer's attitude in threatening to resign, even if considered, would merely have the effect of making the increase voidable and not void, and objection could not be taken by creditors some two years later when the company was bankrupt. In *re Knox Automobile Co.*, 229 Fed. 241.

⁸⁴ *Williams v. McClave*, 168 N. Y. App. Div. 192, 154 N. Y. Supp. 38.

Where a corporation was merely a convenience for carrying out the purposes of an individual in exploiting a patented device, the directors, officers and associates being merely instruments responsive to the will of the owner, an implied assumpsit to pay such owner for services rendered would not be allowed, as against creditors of the bankrupt corporation. In *re McCarthy Portable Elevator Co.*, 196 Fed. 247, *aff'd* 201 Fed. 923.

show an application to have such salary fixed and its refusal, before the action will lie.⁸⁵

§ 2772. — **Limitation of actions.** In an action by an officer to recover compensation for services, the defense of the statute of limitations is not available when it appears that there was an understanding that the compensation was not to be paid until the corporation was out of debt and the action is seasonably commenced after the happening of that event.⁸⁶

§ 2773. — **Pleadings.** An action of quantum meruit to recover for services will be dismissed, even though there is some evidence of a contract to pay a salary, where there is no separate count based on the express contract involved.⁸⁷ An admission in the pleadings that a resolution was duly adopted operates to preclude the corporation from contending that such resolution was invalid as being adopted by the vote of an interested director.⁸⁸ A set-off claimed by a corporation on account of having furnished office room to a plaintiff when a public officer is not available when not pleaded.⁸⁹

§ 2774. — **Burden of proof and presumptions.** An officer seeking a recovery for special services rendered has the burden of proof,⁹⁰ and in an action for a manager's salary the officer has the burden of overcoming a presumption that the resolution fixing the compensation was entered in the minutes.⁹¹ Similarly, an officer seeking to recover the reasonable value of services has the burden of proving their value.⁹²

§ 2775. — **Evidence.** A resolution fixing the salary of an officer at a certain amount operates as an admission of the directors that

⁸⁵ McLean v. Hayden Creek Mining & Milling Co., 25 Idaho 416, 138 Pac. 331.

⁸⁶ Montana Tonopah Min. Co. v. Dunlap, 196 Fed. 612, aff'g 192 Fed. 714.

⁸⁷ Home Mixture Guano Co. v. Tillman, 125 Ga. 172, 53 S. E. 1019.

⁸⁸ Maune v. Unity Press, 143 N. Y. App. Div. 94, 127 N. Y. Supp. 1002.

That which is "duly" done is in legal parlance done according to law, and this does not relate to form merely, but includes both form and substance. Maune v. Unity Press, 143

N. Y. App. Div. 94, 127 N. Y. Supp. 1002.

⁸⁹ Bell v. Peper Tobacco Warehouse Co., 205 Mo. 475, 103 S. W. 1014.

⁹⁰ Marcy v. Shelburne Falls & Colrain St. R. Co., 210 Mass. 197, 96 N. E. 130.

See § 2734, supra.

⁹¹ Graham v. Coos Bay, R. & E. R. & Nav. Co., 71 Ore. 393, 139 Pac. 337.

⁹² Greathouse v. Martin, 100 Tex. 99, 94 S. W. 322.

As to presumptions as to implied contracts see § 2739, supra.

the salary was so fixed.⁹³ In some cases the resolution passed does not establish a contract, though it may be evidence of it,⁹⁴ and parol evidence is admissible to show the real contract.⁹⁵

Evidence of the payment of a small salary to a person for his work prior to incorporation has been held proper to show an understanding that such salary was to continue after incorporation.⁹⁶ Where an officer sues to recover a fixed salary, it is proper to exclude evidence that no salary was paid to his predecessor.⁹⁷

⁹³ *Smith v. Woodville Consol. Silver Min. Co.*, 66 Cal. 398, 5 Pac. 688.

⁹⁴ Where a president claimed that a corporation had promised to pay him, as additional salary, five per cent. of the net profits of the business, a resolution stating that the executive committee was authorized to award such president a participation in the net profits during the pleasure of the board of directors did not establish the contract, although it was some evidence of it, and the other evidence being insufficient to sustain the verdict of the jury, it would be set aside. *Young v. United States Mortgage & Trust Co.*, 168 N. Y. App. Div. 858, 154 N. Y. Supp. 400.

⁹⁵ Where resolutions do not express the terms of a contract with a president and are not a memorial of such contract, but merely authorize an executive committee to make a contract, evidence tending to show the existence of the contract in question by which the president is to be paid a percentage of the net profits of the company may be considered, and such evidence is not within the rule as to the exclusion of parol testimony varying or contradicting the resolutions. *Young v. United States Mortgage & Trust Co.*, 214 N. Y. 279, 108 N. E. 418.

Where a resolution of a corporation provides that a general manager is to receive \$100 per week compensation during the entire term of ten years that he is employed and that he is to

be paid \$50 in cash and \$50 in stock each week until he has received stock of the par value of \$10,000 and after that time \$100 per week in cash, and such resolution was not ambiguous in its language, the defendant was merely entitled to have it construed in the light of the circumstances surrounding its making, and the agreement could not be changed by the evidence of some directors who thought that the manager was to have only \$50 per week after the \$10,000 was earned. *Maune v. Unity Press*, 143 N. Y. App. Div. 94, 127 N. Y. Supp. 1002.

⁹⁶ *Perry v. J. Noonan Furniture Co.*, 8 Cal. App. 35, 95 Pac. 1128.

In an action by a general manager to recover for his services, where the plaintiff testified that his services were worth \$500 per month, it was proper to cross-examine and show that he performed the same services prior to incorporation for a less salary. *Perry v. J. Noonan Furniture Co.*, 8 Cal. App. 35, 95 Pac. 1128.

The admission of an opinion as to the value of a general manager's services is not an abuse of discretion, though the qualifications of the witness as an expert are meager, the determination of such question of qualification being for the trial judge. *Perry v. J. Noonan Furniture Co.*, 8 Cal. App. 35, 95 Pac. 1128.

⁹⁷ *Gem Knitting Mills v. Thurman*, 140 Ga. 15, 78 S. E. 408.

A by-law may be admissible to show an officer's duties and whether he properly performed his services.⁹⁸

In an officer's action to recover the reasonable value of services, it is not improper to show that such officer was employed by another company,⁹⁹ and it has been held error to exclude evidence of the extent and character of such services, where it is admitted that only the reasonable value of the plaintiff's services may be recovered.¹ Letters may be admissible to show knowledge of services performed by an officer,² and their amount and character.³ The reasonable value of services may be shown by evidence of the amount of work performed, profits, capital, etc.⁴ Evidence of an offer of settlement

⁹⁸ Where officer sues on a quantum meruit and for breach of contract. *Perry v. J. Noonan Furniture Co.*, 8 Cal. App. 35, 95 Pac. 1128.

⁹⁹ *Alabama Securities Co. v. Dewey*, 156 Ala. 530, 47 So. 55, holding that where an officer sued for work and labor performed in building a railroad the measure of his compensation was fixed by the value of the services without regard to salary received in another official position.

In an action for services performed in constructing a railroad, evidence that certain persons held offices in the defendant company, of which the plaintiff was vice president and manager and that they were clerks of the railroad companies was proper as showing that the companies acted in unison and that the officers of the defendant knew the plaintiff was performing the services claimed. *Alabama Securities Co. v. Dewey*, 156 Ala. 530, 47 So. 55.

In an action for work and labor performed by an officer of a corporation, evidence of the plaintiff that a certain person represented another company was not erroneous, as the defendant could have cross-examined the witness to show the facts upon which he based his statement. *Alabama Securities Co. v. Dewey*, 156 Ala. 530, 47 So. 55.

Proof of employment by corporation

is subject to same rules as in case of employment by an individual. *O'Brien v. John O'Brien Boiler Works Co.*, 154 Mo. App. 183, 133 S. W. 347.

¹ *Ruttle v. What Cheer Coal Min. Co.*, 153 Mich. 300, 117 N. W. 168.

² Where an officer sued for work and labor performed in building a railroad, a letter from the president of the defendant company was properly admitted to show that that officer knew that the plaintiff was engaged in the work. *Alabama Securities Co. v. Dewey*, 156 Ala. 530, 47 So. 55.

³ Where a director, appointed as an arbitrator in a dispute between the corporation and one of its officers, brought a suit to recover compensation for the services, a letter of a lawyer tending to support the plaintiff's contention as to the amount and character of the services performed and containing an opinion as to the cost or value of the services was competent evidence, except as to the part placing an estimate on the cost of the service, in which case, if evidence was desired, a deposition of the lawyer should have been taken. *Paine v. Kentucky Refining Co.*, 159 Ky. 270, Ann. Cas. 1915 D 389, 167 S. W. 375.

⁴ *Francis v. Brigham-Hopkins Co.*, 108 Md. 233, 70 Atl. 95.

has been held improperly admitted when it was not shown that the person making the proposition was an officer of the defendant.⁵ In another case it was held error to exclude an accord and satisfaction because not signed, there being evidence that it was accepted and acted upon.⁶ Evidence of amounts paid another person for similar work has been held improper as furnishing no criterion of what the plaintiff was entitled to.⁷

Where an officer seeks to recover for special services rendered, the opinion of directors as to whether such services were special and were to be paid for is not material, although their knowledge and expectation, in connection with other circumstances, might show employment.⁸ In such a case, evidence of the improved condition of the corporation may be admissible on the question of the value of the services.⁹

Evidence of the salary paid a general manager at time of trial is improperly received on the question of the reasonable value of a plaintiff's services, where there is no evidence of the duties of such general manager. *O'Brien v. John O'Brien Boiler Works Co.*, 154 Mo. App. 183, 133 S. W. 347.

Where a plaintiff stated that his services were worth \$5,000 and detailed such services in a general way, they being of such a character that it would be impossible to place a value on some of the items, and such plaintiff was fully cross-examined, it could not be said as a matter of law that there was no competent evidence on the subject. *Ruttle v. What Cheer Coal Min. Co.*, 153 Mich. 300, 117 N. W. 168.

⁵ *Alabama Securities Co. v. Dewey*, 156 Ala. 530, 47 So. 55.

⁶ *Gem Knitting Mills v. Thurman*, 140 Ga. 15, 78 S. E. 408.

⁷ Where an officer of a corporation sued for services in performing labor, evidence of amounts paid another person for supervising the work was irrelevant, as it furnished no criterion of what the plaintiff was entitled to. *Alabama Securities Co. v. Dewey*, 156 Ala. 530, 47 So. 55.

Where an officer sued for work and labor performed in building a railroad, and he was not an engineer, proof of the salary paid another engineer was properly excluded. *Alabama Securities Co. v. Dewey*, 156 Ala. 530, 47 So. 55.

The test is not what witness himself might be willing to pay for services but, considering the nature and character of the services and the business of defendant, what the witness, if acquainted with these matters, would say was the reasonable value of the services rendered to others in the same line of business as defendant. *O'Brien v. John O'Brien Boiler Works Co.*, 154 Mo. App. 183, 133 S. W. 347.

⁸ *Marcy v. Shelburne Falls & C. St. R. Co.*, 210 Mass. 197, 96 N. E. 130.

⁹ Where a president sought to recover for special services rendered, the exclusion of evidence of annual reports made to the commonwealth showing the improved financial condition of the company during the period that the plaintiff sought compensation for was immaterial in view of the general verdict for the defendant, and the only bearing such evidence would have had, if competent, was upon the amount due to the

§ 2776. — Trial; instructions. An opening statement of an attorney to the effect that recovery is sought upon an express contract has been held not to preclude the plaintiff from relying upon an implied contract.¹⁰

Instructions as to implied contracts to pay for special services must conform to the usual rules as to conforming to the evidence, and the like,¹¹ and if there is evidence tending to show that the claim for compensation was an afterthought, it is proper to refer to such circumstances and give illustrations as to gratuitous services.¹² In the same way the recovery of compensation under such circumstances may be conditional, and the instructions may refer to such facts.¹³ And the exclusion of ways in which an express contract may be shown has been held proper.¹⁴

§ 2777. — Findings and questions of fact. A corporation's obligation to pay salary to an officer is frequently a question of fact,¹⁵ and if the amount is not fixed, the value of the services is for the

plaintiff. *Marcy v. Shelburne Falls & C. St. R. Co.*, 210 Mass. 197, 96 N. E. 130.

¹⁰ *Marcy v. Shelburne Falls & C. St. R. Co.*, 210 Mass. 197, 96 N. E. 130.

¹¹ Requested instructions directed in general to the point that an implied obligation will arise to pay for beneficial services are properly refused where they omit the material modification that there can be no recovery if the services of the plaintiff were rendered as a gratuity and without any intention on his part to exact payment and there is considerable evidence bearing on such point. *Marcy v. Shelburne Falls & C. St. R. Co.*, 210 Mass. 197, 96 N. E. 130.

An instruction authorizing recovery by a director and officer on an implied contract for services rendered as attorney, held supported by the evidence, and held not objectionable as ignoring the fact that the plaintiff was a director, as assuming that all the services were requested, or as being inconsistent with other instructions. *Taussig v. St. Louis & K. R. Co.*, 186 Mo. 269, 85 S. W. 378.

An instruction as to an agreement

or resolution to pay a manager's salary may be refused where another instruction in different language correctly presents the plaintiff's view. *Graham v. Coos Bay, R. & E. R. & Nav. Co.*, 71 Ore. 393, 139 Pac. 337.

¹² *Marcy v. Shelburne Falls & C. St. R. Co.*, 210 Mass. 197, 96 N. E. 130.

¹³ *Marcy v. Shelburne Falls & C. St. R. Co.*, 210 Mass. 197, 96 N. E. 130.

¹⁴ *Marcy v. Shelburne Falls & C. St. R. Co.*, 210 Mass. 197, 96 N. E. 130.

¹⁵ *Graham v. Coos Bay, R. & E. R. & Nav. Co.*, 71 Ore. 393, 139 Pac. 337. See also *Harvard Brewing Co. v. Pratt*, 185 Mass. 406, 70 N. E. 435; *Williams v. Little Falls Water Power Co.*, 99 Minn. 4, 108 N. W. 289; *Law v. New Mexico Cent. R. Co.*, 19 N. M. 242, 142 Pac. 145.

Where a trustee and secretary was appointed at an informal meeting of incorporators prior to incorporation, his compensation being \$1,000 for the first year, held that the evidence warranted a submission to the jury of whether a contract or hiring for one year was established. *Foltz & Fuller v. Fuller*, 38 App. Cas. (D. C.) 189.

jury.¹⁶ In the same way the question of the existence of an implied contract is usually one of fact.¹⁷

A question submitted to a jury as to whether there was a contract "express or implied" to pay a president for certain services is faulty for duplicity and is uncertain.¹⁸

§ 2778. — Interest on amount recovered. Where an officer neglects to draw his salary, and there is no evidence of the corporation's refusal to pay, it has been held that it is improper to allow interest on the amount recovered.¹⁹

§ 2779. Actions to recover salaries or compensation received by officers—Suit by corporation or minority stockholders. A corporation may proceed against an officer for the falsification or surcharging of an account, even after a settlement has been entered into, if there is fraud, accident or mistake, and provided that the action is brought within a reasonable time.²⁰

Where excessive salaries are paid to officers and directors, to the prejudice of minority stockholders, the corporation is primarily the party to proceed to obtain relief.²¹ Recovery may also be effected by a trustee in bankruptcy or a receiver,²² and, in certain cases, relief may be had at the instance of minority stockholders themselves, there being no laches, acquiescence or other circumstances preventing relief.²³

¹⁶ *Metropolitan Rubber Co. v. Place*, 147 Fed. 90.

¹⁷ *Red Bud Realty Co. v. South*, 96 Ark. 281, 131 S. W. 340. See also *Dial v. Inland Logging Co.*, 52 Wash. 81, 100 Pac. 157.

¹⁸ *Lowe v. Ring*, 123 Wis. 370, 3 Ann. Cas. 731, 101 N. W. 698.

¹⁹ *Merle v. Beifeld*, 275 Ill. 594, 114 N. E. 369, rev'g on other grounds 194 Ill. App. 364.

²⁰ *Loewer v. Lonoke Rice Mill Co.*, 111 Ark. 62, 161 S. W. 1042, holding that a settlement which was challenged by other directors having no knowledge of it was not conclusive.

²¹ *Matthews v. Headley Chocolate Co.*, — Md. —, 100 Atl. 645.

²² *Fillebrown v. Hayward*, 190 Mass. 472, 77 N. E. 45.

Officers are liable to a receiver to

refund excessive salaries, so far as necessary for the payment of debts, on the ground that there is a misappropriation of the assets. *Mills v. Hendershot*, 70 N. J. Eq. 258, 62 Atl. 542.

²³ *Beha v. Martin*, 161 Ky. 838, 171 S. W. 393; *Matthews v. Headley Chocolate Co.*, — Md. —, 100 Atl. 645; *Carr v. Kimball*, 153 N. Y. App. Div. 825, 139 N. Y. Supp. 253.

See §§ 2755, 2761, *supra*.

Where stockholders have no standing in a court of equity to recover excessive salaries paid to officers, they cannot obtain relief by bringing a suit in the corporation's name. *Matthews v. Headley Chocolate Co.*, — Md. —, 100 Atl. 645.

It is only when a corporation is under the control of persons whose

It has been held, however, that stockholders who become such acts are attacked and they will not act, or, if they did act, they could not be relied upon to do justice to the other stockholders, that minority stockholders may sue in their own name to obtain relief, except in those cases where the minority stockholders have suffered some peculiar injury independent of what the company has suffered. *Matthews v. Headley Chocolate Co.*, — Md. —, 100 Atl. 645.

An accounting will be ordered where directors who are also officers increase their own salaries without the consent of minority stockholders and without any increase in the duties performed, and where it appears that the minority stockholders continually opposed the increases, as the directors are, in fact, trustees for the stockholders in the management of the corporate business. *Kreitner v. Burgweger*, 174 N. Y. App. Div. 48, 160 N. Y. Supp. 256.

Where a bill on behalf of a minority stockholder states that the defendant directors voted salaries to themselves greatly in excess of the value of their services and states other facts showing a conspiracy to wreck the corporation, the diversion of corporate funds, etc., it states a cause of action cognizable in equity. *Pride v. Pride Lumber Co.*, 109 Me. 452, 84 Atl. 989.

Directors may be required to account where they vote to themselves unlawful, extravagant, improper and fraudulent salaries, and thereby seek to obtain an unfair advantage over their fellow stockholders. *Robbins v. Hill*, 81 N. Y. Misc. 441, 142 N. Y. Supp. 637.

A stockholder may maintain a representative action to compel officers to account for the wrongful diversion of the corporation's money and property, where there is evidence to sustain a finding that the directors distributed surplus earnings among

themselves and certain employee stockholders under the guise of additional salaries but upon the uniform basis of a percentage of the common capital stock held by each and not according to services rendered, it being immaterial in such case whether the payments were called dividends or additional salaries, and it appearing also that the plaintiff received no payment. *Godley v. Crandall & Godley Co.*, 212 N. Y. 121, L. R. A. 1915 D 632, 105 N. E. 818.

Where a stockholder with full knowledge of increases of salaries participated in the election and reelection of the same officers year after year, fixing their salaries and his own salary as director, he was estopped from asking an accounting of the salaries paid. *Klein v. Independent Brewing Ass'n*, 231 Ill. 594, 83 N. E. 434.

A stockholder and director who voted against an increase of salaries but subsequently made no objection to the payment of such salaries for several years is barred by acquiescence from objecting. *Murray v. Smith*, 166 N. Y. App. Div. 528, 152 N. Y. Supp. 102.

In a suit in equity by a corporation to recover excessive salaries paid to directors and officers, relief would not be granted when it appeared that the holders of seventy-five per cent. of the stock constituted the board of directors and were in fact asking relief for their own acts. *Matthews v. Headley Chocolate Co.*, — Md. —, 100 Atl. 645.

Where all the stockholders voted in favor of the payment of salaries of certain officers, a stockholder who acquiesced in such payment will not be heard in a court of equity in a suit brought on behalf of the corporation for the purpose of having the salaries reduced, it appearing that the real

after the payment of excessive salaries cannot object.²⁴ But the change of ownership of stock may enable minority stockholders to have a suit brought by the corporation for their benefit.²⁵ In the case of exorbitant and unreasonable salaries, the court may, on the petition of the minority stockholders, enjoin the payment of such salaries and permit a recovery of the excess paid.²⁶ Minority stockholders may also maintain a representative action to recover salaries voted by directors to themselves.²⁷ And when payment is made for past services, the money may be recovered by the corporation or

motive of the suit is a personal grievance arising because of the failure of the officers to keep an agreement to pay the stockholder a certain percentage on his interest. *Figge v. Berghthal*, 130 Wis. 594, 110 N. W. 798, 109 N. W. 581.

²⁴ *Matthews v. Headley Chocolate Co.*, — Md. —, 100 Atl. 645.

If the owners of at least three-fourths of the stock of a corporation are estopped from taking any action because of the payment of excessive salaries to officers and directors, and a controlling interest in the company is afterward obtained from one of such stockholders, the assignees of such stockholder do not stand in any better position than the stockholder and cannot recover the excessive amounts paid. *Matthews v. Headley Chocolate Co.*, — Md. —, 100 Atl. 645.

Where a bill in equity was filed against former directors by a corporation requiring the defendants to account for excessive salaries paid to them, and the bill did not allege that the books of the corporation were not in the plaintiff's possession, the court should have been informed as to how the stock was held and how many shares were in the defendant's possession and how many shares were owned by minority stockholders, since, if all the stockholders assented to the payments complained of and a controlling interest in the corporation

was afterwards transferred to other persons, the corporation could not recover the money paid. *Matthews v. Headley Chocolate Co.*, — Md. —, 100 Atl. 645.

²⁵ Where excessive salaries were paid directors who were also officers, and subsequently a change of ownership of the majority stock was effected and the minority stockholders at the time of the payment of the excessive salaries were enabled to have a suit brought by the corporation for their benefit instead of suing in their own name, such suit was proper. *Matthews v. Headley Chocolate Co.*, — Md. —, 100 Atl. 645.

²⁶ *Beha v. Martin*, 161 Ky. 838, 171 S. W. 393; *Sotter v. Coatsville Boiler Works*, — Pa. —, 101 Atl. 744.

²⁷ *Godley v. Crandall & Godley Co.*, 212 N. Y. 121, L. R. A. 1915 D 632, 105 N. E. 818, 153 N. Y. App. Div. 697, 139 N. Y. Supp. 236; *Tilton v. Gans*, 90 N. Y. Misc. 84, 152 N. Y. Supp. 981.

When directors or officers of a corporation appropriate the income of a corporation to the payment of salaries, thus depriving the stockholders of reasonable dividends and perhaps reducing the corporation to insolvency, such action would be a fraud on minority stockholders and a court of equity would have the right to interfere. *Green v. Felton*, 42 Ind. App. 675, 84 N. E. 166.

its receiver or by a stockholders' suit, where the corporation refuses to act.²⁸

In an action by a corporation for money had and received, a manager entitled to a salary may assert it as a counterclaim.²⁹

§ 2780. — Evidence; presumptions and burden of proof. In an action by a corporation against a director employed by it to recover for the falsification of accounts, the burden of proof is on the corporation.³⁰ And in an action by a minority stockholder questioning the compensation voted by the directors to an officer, the burden of proof to establish that the salary paid was unreasonable is on the plaintiff.³¹ In such a case the question of the value of the services depends upon what they are worth, and not upon what the officer could earn in another business.³² If there is no fraud or bad faith in charging salaries against the proceeds of a corporation and they are paid, the presumption is that such charges will continue.³³

§ 2781. — Amount of recovery. Where additional salaries have been voted by directors to themselves, they may be allowed what their services are reasonably worth and be required to account for the balance. In such a case the directors will not be required to account for sums paid to other employees who are not directors.³⁴

²⁸ *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530.

²⁹ *Bevier Black Diamond Coal Co. v. Watson*, 107 Mo. App. 451, 80 S. W. 287.

³⁰ *Loewer v. Lonoke Rice Mill Co.*, 111 Ark. 62, 161 S. W. 1042.

³¹ *Beha v. Martin*, 161 Ky. 838, 171 S. W. 393.

Where it was established that directors voted additional salaries to themselves, the burden was upon them of justifying the payment by establishing the value of their services. *Godley v. Crandall & Godley Co.*, 153 N. Y. App. Div. 697, 139 N. Y. Supp. 236.

Where minority stockholders object to the salary paid to a director for services in managing the business, the burden of showing the value of the services is on the directors. *Lillard v. Oil, Paint & Drug Co.*, 70 N. J. Eq. 197, 58 Atl. 188, 56 Atl. 254.

³² *Beha v. Martin*, 161 Ky. 838, 171 S. W. 393.

See § 2775, supra, as to the reasonableness of compensation.

³³ *Gaul v. Kiel & Arthe Co.*, 199 N. Y. 472, 92 N. E. 1069, modifying 133 N. Y. App. Div. 621, 118 N. Y. Supp. 225.

Where salaries were actually paid, the rule applies that acts done by a corporation which presuppose the existence of other acts to make them legally operative are presumptive proofs of the latter. *Gaul v. Kiel & Arthe Co.*, 199 N. Y. 472, 92 N. E. 1069, modifying 133 N. Y. App. Div. 621, 118 N. Y. Supp. 225.

³⁴ *Godley v. Crandall & Godley Co.*, 153 N. Y. App. Div. 697, 139 N. Y. Supp. 236.

There is no error, in a representative action by a stockholder against directors to recover for the diversion of money or property, in allowing re-

And a director who is not benefited and who draws no salary by reason of his own vote whereby salaries of directors are increased should not be held liable for amounts paid to other directors.³⁵

In a suit by minority stockholders, recovery may be limited by allowing the sums recovered to be paid only to the stockholders who are not barred by laches, limitations or acquiescence or other equitable defenses from a recovery.³⁶

If the findings show that the salaries paid were reasonable, there can, of course, be no recovery.³⁷

An injunction will not be granted when not demanded.³⁸

In the case of a bona fide dispute between an officer and a corporation as to what sums shall be allowed to him, where there is no unreasonable and vexatious delay in the payment of the money retained by the officer, he is not liable for interest.³⁹

covery against defendants for money paid out while they were directors, even though the resolutions purporting to authorize such payments were adopted prior thereto. *Godley v. Crandall & Godley Co.*, 212 N. Y. 121, L. R. A. 1915 D 632, 105 N. E. 818.

³⁵ *Carr v. Kimball*, 153 N. Y. App. Div. 825, 139 N. Y. Supp. 253.

³⁶ *Matthews v. Headley Chocolate Co.*, — Md. —, 100 Atl. 645.

³⁷ *Poutch v. National Foundry & Machine Co.*, 147 Ky. 242, 143 S. W. 1003.

³⁸ Where it is contended that a contract employing a general manager was obtained by fraud, but there is no demand in the complaint to restrain the defendant from acting as manager or any relief in relation thereto and no facts are shown entitling the plaintiff to such relief, an injunction will not be granted. *Maine*

Products Co. v. Alexander, 115 N. Y. App. Div. 109, 100 N. Y. Supp. 709.

³⁹ Where a president of a corporation institutes and carries on litigation in its behalf in which money is recovered, and there arises a bona fide dispute between him and the corporation as to what expenses of the litigation shall be paid out of the fund and also whether he is entitled to retain compensation for his services in connection with the litigation, and an action is brought against him to recover the money withheld in which some of his claims are upheld and some disallowed, and there is no vexatious or unreasonable delay in the payment of the money, he is not liable for interest on the money withheld. *Winfield Mortgage & Trust Co. v. Robinson*, 89 Kan. 842, Ann. Cas. 1915 A 451, 132 Pac. 979.

CHAPTER 44

CORPORATE BOOKS AND RECORDS

- § 2782. As public records.
- § 2783. Duty to keep books and records—In general.
- § 2784. — Records and minute books.
- § 2785. — Account books.
- § 2786. — Stock book.
- § 2787. Form and requisites—Minutes.
- § 2788. — Stock book.
- § 2789. — By-laws.
- § 2790. Custody of books and records—Proper place.
- § 2791. — Custodian.
- § 2792. Filing or public record of corporation's by-laws.
- § 2793. Books and records as evidence—As best evidence.
- § 2794. — Compliance with statutory requisites as affecting admissibility.
- § 2795. — Secondary evidence of corporate records or books.
- § 2796. — Parol evidence of corporate acts.
- § 2797. — Copies of corporate records as evidence—In general.
- § 2798. — — Invoices and books of account.
- § 2799. — — Pamphlets; records of fraternal societies or mutual insurance companies.
- § 2800. Authentication of books and records.
- § 2801. Purposes for which and actions in which books and records admissible—
In general.
- § 2802. — Real estate transactions; statute of frauds.
- § 2803. — Actions between corporation or members and strangers.
- § 2804. — Actions between corporation and members.
- § 2805. Production of books and papers in court.
- § 2806. Delivery of books and records to receiver.
- § 2807. Proceedings to compel delivery of books and records by officer.
- § 2808. False entries in books.

§ 2782. As public records. Though, as is seen in a subsequent section, the books, records and papers of a corporation partake, in some aspects, of the characteristics of a public record,¹ neither such records, etc., nor the by-laws of a private corporation are, strictly speaking, records,² in the sense that they relate to public transactions, or, in

¹ See § 2804, *infra*.

² A record has been defined as "a written memorial made by a public officer authorized by law to perform that function; the memorial being in-

tended to serve as evidence of something written, said or done." *Knights & Ladies of America v. Weber*, 101 Ill. App. 488.

As to judicial notice of special char-

the absence of particular requirements, are open for general inspection, or must be kept or filed in a special manner.³

§ 2783. Duty to keep books and records—In general. The duty of corporations with regard to keeping books is one which must be ascertained by reference to the provisions of the creating statutes and the corporate charters. Generally, though not uniformly, the corporation acts of the several states require that specified books of record be kept in the state.⁴ Even though the statutes are silent with regard to the keeping of books, it is unquestionably advisable as a measure of precaution, expediency and convenience, that books be kept, as providing the most accurate method of establishing the various corporate acts and transactions and of showing the ownership of the stock. This applies to the business records common to every business organization as well as to those books peculiar to corporate organization, such as books containing stock subscriptions and accounts, stock transfers, stock certificates, minutes of meetings, and such other books as the particular form and business of the corporation render necessary or advisable.⁵ And it has been held that in the absence of evidence to the contrary a court will presume that a minute book has been kept and preserved.⁶

Recent legislation has also imposed upon public service corpora-

ters and general laws, see § 428 et seq., *infra*.

³ *Wilson v. United States*, 221 U. S. 361, Ann. Cas. 1912 D 558, 55 L. Ed. 771.

⁴ Kirby's Dig. § 944, providing that the clerk or secretary of a corporation shall keep a fair record of proceedings in a book provided for that purpose applies to fraternal benefit associations. *Beasely v. Mutual Aid Ass'n*, 94 Ark. 499, 127 S. W. 974.

Cal. Civ. Code, § 377, requires private corporation to keep records such as minute book. *Union Trust Co. v. Dickinson*, 30 Cal. App. 91, 157 Pac. 615.

Montana Civ. Code, § 540, Rev. Codes, § 3902, requires all corporations for profit to keep record of their business transactions. *Smith v. Moore*, 199 Fed. 689.

What transpired at stockholders'

meeting should be matter of record as required by West Virginia Code, c. 53, § 52. *Ramsdell v. National Rivet & Novelty Co.*, 104 Fed. 16.

⁵ As an illustration of the desirability of corporate action being at once recorded in the minutes of the corporation, see *Reynick v. Allington & Curtis Mfg. Co.*, 179 Mich. 630, 146 N. W. 252.

Such reasons are well recognized also, as the formal action of directors and stockholders is usually shown by the records or minutes of a corporation. *Candell v. Athens Sav. Bank*, 140 Ga. 713, 79 S. E. 776.

It is the duty of a corporation to keep a record of the minutes of the meetings of stockholders and directors. *Howard v. Strode*, 242 Mo. 210, Ann. Cas. 1913 C 1057, 146 S. W. 792.

⁶ *Methodist Chapel Corporation v. Herrick*, 25 Me. 354.

tions the duty of keeping a prescribed character of records as to operation, maintenance and the like which are considered in a subsequent chapter.⁷

§ 2784. — Records and minute books. As a general rule a record of the corporate resolutions and acts is not essential to their validity,⁸ unless there are statutory⁹ or charter provisions requiring such record.¹⁰

The rights of third parties cannot be injuriously affected by the failure of the directors of a corporation to record properly resolutions of the board,¹¹ and the corporation cannot vitiate a contract by failing to record it in the minute book.¹²

§ 2785. — Account books. In the general course of a corporation's business, it is necessary that proper books of account be kept. This is one of the duties of the officers. And it has been said that where a statute requires a record of the corporation's business transactions to be kept, it is incumbent upon a director, by virtue of his position as trustee with respect to the stockholders, to see that proper books of account are kept.¹³ In some states, statutes exist imposing the duty on directors to keep correct books of account.¹⁴

⁷ See the chapter on Governmental Regulation, *infra*.

⁸ *Handley v. Stutz*, 139 U. S. 417, 35 L. Ed. 227; *Flakne v. Minnesota Farmers' Mut. Ins. Co.*, 105 Minn. 479, 117 N. W. 785.

Where an action is admittedly that of the corporation, the fact that no formal record thereof was made does not lessen the corporate liability. *Burke v. Sidra Bay Co.*, 116 Wis. 137, 92 N. W. 568.

As to parol evidence of corporate action, see § 2796, *infra*.

⁹ See *Knights & Ladies of America v. Weber*, 101 Ill. App. 488.

¹⁰ *Flakne v. Minnesota Farmers' Mut. Ins. Co.*, 105 Minn. 479, 117 N. W. 785.

¹¹ *Hendrie & Bolthoff Mfg. Co. v. Collins*, 29 Colo. 102, 67 Pac. 164.

The failure of the board of directors to record their action does not affect the validity of a sale of personal prop-

erty duly authorized by them. *Oakford & Fahnestock Co. v. Fischer*, 75 Ill. App. 544.

¹² *Farjeon v. Indian Territory Illuminating Oil Co.*, 120 N. Y. Supp. 298.

A trustee in bankruptcy of a corporation cannot annul an instrument duly executed by the corporation on proper consideration on the mere ground that the corporation kept no record of its meeting. In such case parol evidence may be admitted to show the facts. *Murray v. Beal*, 23 Utah 548, 65 Pac. 726.

¹³ *Smith v. Moore*, 199 Fed. 689.

¹⁴ Under the Illinois statute (Rev. St. c. 32, § 13; J. & A. ¶ 2430) the duty is imposed upon directors or trustees of every stock corporation to keep correct books of account of its business. *Venner v. Chicago City Ry. Co.*, 246 Ill. 170, 138 Am. St. Rep. 229, 20 Ann. Cas. 607, 92 N. E. 543, *rev'g* 152 Ill. App. 398.

§ 2786. — Stock book. Usually corporations are required to keep a stock transfer book, wherein a record is kept of the stockholders.¹⁵ Statutes requiring the keeping of such book are intended for the benefit of the stockholders.¹⁶

§ 2787. Form and requisites—Minutes. It is the duty of the secretary of the corporation to prepare the minutes of the meetings and to enter them in the record.¹⁷ But they may be prepared and signed at any time, even after the meeting.¹⁸ And it is not necessary that the secretary should enter the minutes in the record book in his own hand.¹⁹

The minutes should show the date when the meetings were held and who were present,²⁰ and if a resolution is adopted or some other action taken, it is the duty of the clerk or secretary to record it.²¹

Generally speaking, it is not necessary for the minutes to show the vote by which a matter coming before it was adopted. A recital that the matter was adopted is sufficient.²²

The mere fact that the corporate minutes were made up informally,

¹⁵ See the statutes of the several states and Geneva Mineral Springs Co. v. Steele, 111 N. Y. App. Div. 706, 97 N. Y. Supp. 996; Fay v. Coughlin-Sandford Switch Co., 47 N. Y. Misc. 687, 94 N. Y. Supp. 628; State v. Silver Ring Consol. Min. Co. of Utah, 37 Utah 62, 106 Pac. 520.

See also the chapter on Stock and Stockholders, *infra*.

¹⁶ State v. Silver King Consol. Min. Co. of Utah, 37 Utah 62, 106 Pac. 520.

¹⁷ Howard v. Strode, 242 Mo. 210, Ann. Cas. 1913 C 1057, 146 S. W. 792.

¹⁸ Benbow v. Cook, 115 N. C. 324, 44 Am. St. Rep. 454, 20 S. E. 453; West London Ry. Co. v. Bernard, 3 Q. B. 873, 13 L. J. Q. B. 68; Miles v. Bough, 3 Q. B. 845, 3 Gale & D. 119.

¹⁹ United Growers Co. v. Eisner, 22 N. Y. App. Div. 1, 47 N. Y. Supp. 906.

²⁰ Howard v. Strode, 242 Mo. 210, Ann. Cas. 1913 C 1057, 146 S. W. 792.

²¹ Lamkin v. Baldwin & Lamkin Mfg. Co., 72 Conn. 57, 44 L. R. A. 788, 43 Atl. 593.

²² Fraternal Relief Ass'n v. Edwards, 9 Ga. App. 43, 70 S. E. 265.

An entry in the minutes of a meeting of a corporation, or its board of directors, that a certain proposition was adopted, is *prima facie* evidence that it received the number of votes necessary to legally adopt it. Heintzelman v. Druids' Relief Ass'n, 38 Minn. 138, 36 N. W. 100.

Where, by statute, it is required that a record of all votes be kept and it is also provided by statute that a vote of three-fourths of the general stockholders shall be necessary to authorize an issue of special stock, no presumption arises that such number voted in favor of an issue of special stock where such fact does not appear on the record, even though the record shows that more than that number of stockholders were present at the meeting and that a vote was passed in favor of the issue. American Tube Works v. Boston Mach. Co., 139 Mass. 5, 29 N. E. 63.

where admittedly correct, does not destroy their force.²³ And irregularities which may occur in the keeping of the minutes of a corporation cannot be taken advantage of by the corporation as against a third person who enters into a contract with the corporation, without notice or knowledge of the irregularity. If such third person has acted in good faith, and has parted with something of value, the doctrine of estoppel will apply.²⁴

When necessary, records may be amended, so as to cause them to show what actually happened at a meeting.²⁵

§ 2788. — Stock book. The keeping of a stock certificate book is not a compliance with a provision requiring a transfer book to be kept.²⁶ And it has been held that a stock book which did not contain the addresses of the stockholders did not comply with the statute.²⁷

§ 2789. — By-laws. As has been seen in a previous chapter, unless required by statute, it is not necessary that the by-laws of a private corporation should be in writing, but they may even be adopted through the acts and conduct of the corporation and its officers, as well as by an express vote.²⁸

§ 2790. Custody of books and records—Proper place. In many of the states statutes have been enacted requiring the corporate books to be kept within the state.²⁹ The object of such statutes is to protect the rights of stockholders, so that the books may be open to examina-

²³ *Morisette v. Howard*, 62 Kan. 463, 63 Pac. 756.

²⁴ *Wyss-Thalman v. Beaver Valley Brewing Co.*, 219 Pa. 189, 68 Atl. 187.

As to books as evidence in actions between corporation or members and strangers, see § 2804, *infra*.

²⁵ *Dupage County v. Highway Com'rs Town of Winfield*, 142 Ill. 607, 32 N. E. 269, *aff'g* 39 Ill. App. 293; *Vandalia Mut. County Fire Ins. Co. v. Peasley*, 84 Ill. App. 138; *Village of Gilberts v. Rabe*, 49 Ill. App. 418.

²⁶ A stock certificate book cannot be regarded as the transfer book required to be kept by statute and which is competent evidence in an action against a stockholder (*L. 1875, c. 611*,

p. 759, § 17). *Geneva Mineral Springs Co. v. Steele*, 111 N. Y. App. Div. 706, 97 N. Y. Supp. 996.

²⁷ Under Stock Corp. L. 53, as to books of foreign corporations and their inspection, the statute is not complied with where the stock book is kept, but does not contain the addresses of the stockholders, and has the word "unknown" inserted in the column as to the amount paid on stock. *Fay v. Coughlin-Sandford Switch Co.*, 47 N. Y. Misc. 687, 94 N. Y. Supp. 628.

²⁸ See § 487.

²⁹ *Crown Coal & Tow Co. v. Thomas*, 60 Ill. App. 234.

See generally the statutes of the several states.

tion, to aid the state in exercising its visitatorial power over the corporation, and perhaps to enable the creditors to examine the books, also,³⁰ and the law should be enforced though it may necessitate additional expense or cause some inconvenience in the management of the affairs of the corporation.³¹

Under such a statute it has been held that either original or duplicate books of account must be kept within the state.³²

If the corporate books, though kept just across the state line, are brought within the state to the principal office whenever they are required by any stockholder or person entitled and desiring to see them, and there is nothing to show the slightest indisposition on the part of the corporation to have its books at the principal office when needed for any lawful purpose, a dissolution of the corporation because of the violation of the statute will not be decreed.³³

§ 2791.—Custodian. The proper custodian of the minutes and official records of a corporation is usually the secretary or some other person performing his duties.³⁴

§ 2792. Filing or public record of corporation's by-laws. Various statutory provisions exist as to the filing of various corporate records. And in some states statutes require by-laws to be filed. In the absence of a specific rule as to the time of filing, an election of corporate officers is not rendered invalid because a by-law affecting such election is not filed until after the election is held.³⁵

³⁰ North & South Rolling-Stock Co. v. People, 147 Ill. 234, 24 L. R. A. 462, 35 N. E. 608.

As to the right to inspect corporate books and records, see Chap. 45.

³¹ Crown Coal & Tow Co. v. Thomas, 60 Ill. App. 234.

³² Crown Coal & Tow Co. v. Thomas, 60 Ill. App. 234, distinguishing North & South-Rolling Stock Co. v. People, 147 Ill. 234, 24 L. R. A. 462, 35 N. E. 608.

³³ North & South-Rolling Stock Co. v. People, 147 Ill. 234, 24 L. R. A. 462, 35 N. E. 608.

³⁴ Bridges v. Southern Bell Telephone & Telegraph Co., 15 Ga. App. 291, 82 S. E. 925; Fraternal Relief Ass'n v. Edwards, 9 Ga. App. 43, 70 S.

E. 265. See also Howard v. Strode, 242 Mo. 210, Ann. Cas. 1913 C 1057, 146 S. W. 792.

³⁵ Under St. 1895, p. 221, amended by Laws of 1905 (Civ. Code § 653e) requiring associations to file codes of by-laws, an election of directors and by-laws as to such election differing from the original articles were not invalidated because of failure to file the by-laws until after the election, there being no time prescribed for filing the by-laws. Willis v. Lauridson, 161 Cal. 106, 118 Pac. 530.

As to posting and filing by-laws, see also § 487.

As to the filing and recording of incorporation papers, see § 215.

§ 2793. Books and records as evidence—As best evidence.

Where written records are kept by a corporation, not only may such records be used to show the acts and transactions of the corporation³⁶ but they should be used to establish such matters³⁷ unless the original records are lost or inaccessible,³⁸ or are incomplete,³⁹ as the original books and records of a private corporation, when properly authenticated, are the best evidence of its acts, resolutions, and proceedings.⁴⁰ This has been held to be the rule where it was sought to prove the

³⁶ In re Mandelbaum, 80 N. Y. Misc. 475, 141 N. Y. Supp. 319.

³⁷ Childs v. Ponder, 117 Ga. 553, 43 S. E. 986.

See § 2796, *infra*.

³⁸ See § 2795, *infra*.

³⁹ See § 2796, *infra*. Owings v. Speed, 5 Wheat. 420, 5 L. Ed. 124.

⁴⁰ United States. Lloyd v. Supreme Lodge, K. of P., 98 Fed. 66; Prentiss Tool & Supply Co. v. Godechaux, 66 Fed. 234.

Alabama. Booth v. Dexter Steam Fire Engine Co., 118 Ala. 369, 24 So. 405.

California. Boggs v. Lakeport Agriculture Ass'n, 111 Cal. 354, 43 Pac. 1106; Nixon v. Goodwin, 3 Cal. App. 358, 85 Pac. 169.

Connecticut. Hurd v. Hotchkiss, 72 Conn. 472, 45 Atl. 11.

Idaho. Just v. Idaho Canal & Improvement Co., 16 Idaho 639, 133 Am. St. Rep. 140, 102 Pac. 381.

Illinois. See Mullanphy Sav. Bank v. Schott, 135 Ill. 655, 25 Am. St. Rep. 401, 26 N. E. 640, *aff'd* 34 Ill. App. 500. Contents of minutes must be proved by minute book or duly certified copy thereof (J. & A. Ann. St. ¶ 5532). Central Elec. Co. v. Sprague Elec. Co., 120 Fed. 925.

Indiana. Masons' Union Life Ins. Ass'n v. Brockman, 20 Ind. App. 206, 50 N. E. 493.

Kentucky. Clary v. Com., 163 Ky. 48, 173 S. W. 171; Boyd's Ex'r v. First Nat. Bank of Williamsburg, Kentucky, 32 Ky. L. Rep. 1323, 108 S.

W. 360; White Chimney & S. C. Turnpike Road Co. v. McMahan, 21 Ky. L. Rep. 41, 50 S. W. 836.

Maine. Methodist Chapel Corporation v. Herrick, 25 Me. 354; Coffin v. Collins, 17 Me. 440.

Maryland. Harrison v. Morton, 83 Md. 456, 35 Atl. 99.

Massachusetts. Thayer v. Middlesex Mut. Fire Ins. Co., 10 Pick. 326.

Michigan. People v. Oakland County Bank, 1 Dougl. 282.

Minnesota. Heintzelman v. Druids' Relief Ass'n, 38 Minn. 138, 36 N. W. 100.

Mississippi. Smith v. Natchez Steamboat Co., 1 How. 479.

Nebraska. Yonda v. Royal Neighbors of America, 96 Neb. 730, 148 N. W. 926.

New Jersey. Durbrow v. Hackensack Meadows Co., 77 N. J. L. 89, 71 Atl. 59.

New York. Abernethy v. Society of Church of Puritans, 3 Daly 1; Clark & Farmers' Woolen Mfg. Co., 15 Wend. 256.

Rhode Island. Dennis v. Joslin Mfg. Co., 19 R. I. 666, 61 Am. St. Rep. 805, 36 Atl. 129.

Tennessee. Page v. Knights & Ladies of America, 61 S. W. 1068.

It has been pointed out by one text-writer of high authority that the record may be considered the act itself. Wigmore, Evidence, § 1074.

Attention has also been called to the fact that minutes of a corporate meeting are a mere narrative of the

existence of a by-law,⁴¹ the contents of the book,⁴² or minutes,⁴³ or the provisions of a constitution.⁴⁴

When it is sought merely to prove that a meeting was held, it is not important that the records of what transpired at the meeting should be produced.⁴⁵

Statutory provisions requiring corporations to keep a record of their transactions or proceedings have been held to make such records the best evidence.⁴⁶ The members of corporations affected by such provisions are held to enter impliedly into an agreement that the records, fairly kept and complete, shall be exclusive evidence of the corporate acts.⁴⁷

Probably because of the inconvenience caused by the use of the original records and for similar reasons, statutes have been enacted, as will

real action taken, in other words, of matters resting in parol. *Machen, Corporations*, § 1124.

⁴¹ As to the necessity for and method of proving by-laws, see § 488.

When it is sought to defeat the payment of a claim by reason of some provision in a by-law, the fact that the by-law exists must be established by the best obtainable evidence. *Yonda v. Royal Neighbors of America*, 96 Neb. 730, 148 N. W. 926.

As against general denial, the best evidence as to adoption or existence of by-laws is the production of the original record duly authenticated by the testimony of the proper custodian. *Yonda v. Royal Neighbors of America*, 96 Neb. 730, 148 N. W. 926.

⁴² On a prosecution for embezzlement, books of a corporation are the best evidence as to what they contain, and a bookkeeper testifying as to such books should not be allowed to make any statement as to what they do or do not contain. *Clary v. Com.*, 163 Ky. 48, 173 S. W. 171.

Failure to enter a deposit on the books of a bank as a time deposit could be better shown and in a more competent manner by the books themselves. *Boyd's Ex'r v. First Nat. Bank of Williamsburg, Kentucky*, 32 Ky. L. Rep. 1323, 108 S. W. 360.

⁴³ If a resolution be correctly recorded, the minutes afford best evidence as to its contents. *Durbrow v. Hackensack Meadows Co.*, 77 N. J. L. 89, 71 Atl. 59.

⁴⁴ An offer to prove by a witness that under the constitution an insurance association a policyholder could change the beneficiary in his policy is properly refused, since best evidence, or the constitution itself, should have been introduced. *Masons' Union Life Ins. Ass'n v. Brockman*, 20 Ind. App. 206, 50 N. E. 493.

⁴⁵ *Ramsdell v. National Rivet & Novelty Co.*, 104 Fed. 16.

⁴⁶ Since Rev. Codes, § 2775 require corporations for profit to keep records of their business, such records are best evidence. *Just v. Idaho Canal & Improvement Co.*, 16 Idaho 639, 133 Am. St. Rep. 140, 102 Pac. 381.

Kirby's Dig. § 944, providing that the clerk or secretary of a corporation shall keep a fair record of proceedings in a book provided for that purpose, makes such record evidence of the proceeding. *Beasely v. Mutual Aid Ass'n*, 94 Ark. 499, 127 S. W. 974.

⁴⁷ *Beasely v. Mutual Aid Ass'n*, 94 Ark. 499, 127 S. W. 974.

be noted hereafter, providing for the proof of corporate acts by copies of the records, which are held to be original evidence.⁴⁸

§ 2794. — Compliance with statutory requisites as affecting admissibility. Various statutory requirements frequently exist as to corporate books and records, and must be complied with. But non-compliance does not necessarily operate to prevent the books and records from being admitted as evidence. Thus it has been held that articles of incorporation duly signed and acknowledged were admissible though not recorded as required by statute. The evidence, however, was for the purpose of rebutting a charge of bad faith as to organization.⁴⁹ In another case a certificate of a corporate organization, although bearing no revenue stamp as required by the federal Act of 1898, was held properly admitted to show corporate existence, the ground being that in order to bar the instrument the failure to attach the stamp must have been shown to have been with intent to defraud the revenue law, and that such intent would not be presumed.⁵⁰

§ 2795. — Secondary evidence of corporate records or books. Where the original corporate records are lost, mislaid or destroyed; or are otherwise inaccessible, or where in a suit to which the corporation is a party, an adverse party makes a proper demand for the production of a book, which demand is not complied with, secondary evidence of the acts or resolutions therein recorded may be introduced.⁵¹ Usually this refers to copies of the records, either certified or sworn to, although such copies are sometimes referred to as original evidence,⁵² and to parol testimony.⁵³

§ 2796. — Parol evidence of corporate acts. When action has been made a matter of record, the records or minutes are the best evidence, and failure to produce them must be explained and excused before parol or other secondary evidence can be introduced.⁵⁴ Pur-

⁴⁸ See § 2797, *infra*.

⁴⁹ *Warren v. Syfers*, 23 Ind. App. 167, 55 N. E. 103.

⁵⁰ *State v. Glucose Sugar Refining Co.*, 117 Iowa 524, 91 N. W. 794.

⁵¹ *Fraternal Relief Ass'n v. Edwards*, 9 Ga. App. 43, 70 S. E. 265; *National Bank v. Navassa Phosphate Co.*, 56 Hun (N. Y.) 136, 8 N. Y. Supp. 929; *Clark v. Farmers' Woolen Mfg. Co.*, 15 Wend. (N. Y.) 256; *Ackerman v. Atlantic Coast Line R. Co.*, 83

S. C. 276, 65 S. E. 268; *Dial v. Valley Mut. Life Ass'n of Virginia*, 29 S. C. 560, 8 S. E. 27. See also *State v. Alpert*, 88 Vt. 191, 92 Atl. 32.

⁵² See § 2797, *infra*.

⁵³ See § 2796, *infra*.

⁵⁴ *United States*. *Blanton v. Kentucky Distilleries & Warehouse Co.*, 120 Fed. 313, 149 Fed. 31.

California. *Nixon v. Goodwin*, 3 Cal. App. 358, 85 Pac. 169.

Colorado. *Hendrie & Bolthoff Mfg.*

suant to this general rule, where better evidence is available, parol evidence has been held inadmissible to show the existence of a corporation, or its license to do business,⁵⁵ the liquidation of a corporation⁵⁶ or the merger of corporations,⁵⁷ as well as the duties of officers.⁵⁸ And in an action by a foreign corporation oral proof of the corporate

Co. v. Collins, 29 Colo. 102, 67 Pac. 164.

Connecticut. Hurd v. Hotchkiss, 72 Conn. 472, 45 Atl. 11.

Georgia. Candell v. Athens Sav. Bank, 140 Ga. 713, 79 S. E. 776.

Idaho. Corcoran v. Sonora Mining & Milling Co., 8 Idaho 651, 71 Pac. 127.

Kansas. Beeler v. Highland University Co., 8 Kan. App. 89, 54 Pac. 295.

Michigan. Ten Eyck v. Pontiac, O. & P. A. R. Co., 74 Mich. 226, 3 L. R. A. 378, 16 Am. St. Rep. 633, 41 N. W. 905.

New Hampshire. Edgerly v. Emerson, 23 N. H. 555, 55 Am. Dec. 207.

New York. National Bank v. Navassa Phosphate Co., 56 Hun 136, 8 N. Y. Supp. 929.

Acts of the directors of a corporation can be shown only by their recorded vote. Nixon v. Goodwin, 3 Cal. App. 358, 85 Pac. 169; Hurd v. Hotchkiss, 72 Conn. 472, 45 Atl. 11.

Before parol evidence can be introduced, the minutes should be produced or accounted for. Candell v. Athens Sav. Bank, 140 Ga. 713, 79 S. E. 776.

Oral evidence of the contents of a resolution must be excluded where it is not shown that notice to produce the record was given and refused, or that the custodian has been subpoenaed and has failed to produce the writing. Tobin v. Roaring Creek & C. R. Co., 86 Fed. 1020.

In an action against a corporation on a special contract witnessed by resolution of the board of directors, the resolution cannot be proved for the plaintiff by parol, without notice to produce. Soldiers' Orphans' Home v. Shaffer, 63 Ill. 243.

Where the minutes are lost, oral testimony is admissible to show the proceedings at the meeting. Blanton v. Kentucky Distilleries & Warehouse Co., 149 Fed. 31, 120 Fed. 318.

⁵⁵ For a detailed consideration of this question, see §§ 425-427, supra. And see Pattison v. Gulf Bag Co., 116 La. 963, 114 Am. St. Rep. 570, 41 So. 224; State v. Merchant, 48 Wash. 69, 92 Pac. 890.

On a prosecution for embezzlement, the fact of incorporation may be shown by parol, and record evidence is not necessary. Morrow v. Com., 157 Ky. 486, 163 S. W. 452. See also § 426.

⁵⁶ Pattison v. Gulf Bag Co., 116 La. 963, 114 Am. St. Rep. 570, 41 So. 224.

⁵⁷ Pattison v. Gulf Bag Co., 116 La. 963, 114 Am. St. Rep. 570, 41 So. 224.

⁵⁸ Where by-laws specify the duties of the general manager, objection is properly sustained to a question asked of such officer as to what his duties are. Greene v. Hereford, 12 Ariz. 85, 95 Pac. 105.

Where the constitution and by-laws of a society are in evidence it is incompetent for a witness to testify orally as to the duties of the committee and the advisory board. Chambers v. Great State Council, I. O. R. M., — W. Va. —, 86 S. E. 467.

Contra, statement by a witness in answer to an interrogatory in a deposition that he was the treasurer and manager of a corporation, party to the action, at a time embraced by the account on which suit was brought, was held not to constitute error, as against a claim that the corporate records only were competent to prove who held these offices. Empire Smel-

books, papers, and records, in the possession of the corporation outside the state, is not admissible in its behalf.⁵⁹

It would seem that the general rule prohibiting the proof of corporate existence by parol evidence is subject to the qualification that such evidence is admissible where the corporate character is a mere collateral matter, not essential to the main question in issue.⁶⁰ It has also been held that such action as the declaration of a dividend must be made matter of record, and cannot be proved by parol evidence in collateral suits between the corporation and its stockholders.⁶¹

The dedication of corporate property cannot be shown by the mere recollection of such alleged fact on the part of certain persons where no record thereof appears on the corporate books and the corporation has continued to pay taxes on and exercise control over the property.⁶² Under statutory provisions whereby certified or sworn copies of records are made original evidence, proof of such papers cannot be shown by oral testimony.⁶³

ter Co. v. Gardiner, Worthen & Gross Co. (Ariz.), 85 Pac. 729.

For a detailed treatment of the law relative to officers of corporations, see Chap. 42, *supra*.

⁵⁹ See § 437, *supra*. See also Mandel v. Swan Land & Cattle Co., Ltd., 154 Ill. 177, 27 L. R. A. 313, 45 Am. St. Rep. 124, 40 N. E. 462, rev'g 51 Ill. App. 204.

⁶⁰ State v. Rozeboom, 145 Iowa 620, 29 L. R. A. (N. S.) 37, 124 N. W. 783.

⁶¹ American Wire-Nail Co. v. Gedge, 96 Ky. 513, 16 Ky. L. Rep. 663, 29 S. W. 353; Dennis v. Joslin Mfg. Co., 19 R. I. 666, 61 Am. St. Rep. 805, 36 Atl. 129.

See also the chapter on Stock and Stockholders, *infra*.

If the record does not show a declaration of dividends, the stockholder may ask that it be corrected, or by mandamus compel the secretary to do his duty as recorder. Dennis v. Joslin Mfg. Co., 19 R. I. 666, 61 Am. St. Rep. 805, 36 Atl. 129.

In an action by a trustee in bankruptcy to recover dividends paid by corporation, the account books, par-

ticularly the ledger, are admissible to show the financial status of corporation when the dividends were paid. Wesp v. Muckle, 136 N. Y. App. Div. 241, 120 N. Y. Supp. 976.

A general statement of the auditor that the company had not earned dividends is properly excepted to, as the best evidence is the books of account. Shelby v. New York Steam Co., 121 N. Y. Supp. 619.

⁶² Stacy v. Glen Ellyn Hotel & Springs Co., 223 Ill. 546, 8 L. R. A. (N. S.) 966, 79 N. E. 133.

⁶³ Lloyd v. Supreme Lodge Knights of Pythias, 98 Fed. 66; Chicago, B. & Q. R. Co. v. Weber, 219 Ill. 372, 4 L. R. A. (N. S.) 272, 76 N. E. 489, rev'g 121 Ill. App. 455; Mandel v. Swan Land & Cattle Co., Ltd., 154 Ill. 177, 27 L. R. A. 313, 45 Am. St. Rep. 124, 40 N. E. 462, rev'g 51 Ill. App. 204.

Where the approved mode of showing corporate existence is by the introduction of the original articles or a duly certified copy thereof, and no statute provides otherwise, proof by one having knowledge of the existence of the corporation, or even by general reputation, may be allowed. And

A statute requiring the directors of a corporation to keep full entries of their transactions, but not providing that parol evidence shall be inadmissible to prove their acts when no record is kept, does not render such evidence inadmissible.⁶⁴

Parol evidence is frequently introduced to show matters not of record.

The mere fact that the corporate minutes were made up informally does not destroy their force, where they are admittedly correct,⁶⁵ nor does a failure to make a record of proceedings at the time invalidate them.⁶⁶ As a general rule, a vote or other action on the part of the directors need not be by a formal resolution entered on the minutes or records of the corporation, unless it is expressly required, and when it is not a matter of record it may be proved by parol evidence.⁶⁷

where oral testimony of corporate character has been received without objection, claim made later that the proof of incorporation was insufficient will not be sustained. *State v. Pittam*, 32 Wash. 137, 72 Pac. 1042.

A conflict of the decisions in regard to parol evidence of corporate existence has been considered in a preceding chapter. See § 427, *supra*.

⁶⁴ *Zalesky v. Iowa State Ins. Co.*, 102 Iowa 512, 71 N. W. 433, 70 N. W. 187.

If any corporate act is required to appear on the records of the corporation, and it does not so appear, the remedy is to bring an appropriate proceeding to correct the records. *Dennis v. Joslin Mfg. Co.*, *supra*.

⁶⁵ *Morisette v. Howard*, 62 Kan. 463, 63 Pac. 756. See also § 2787, *supra*.

⁶⁶ *Benbow v. Cook*, 115 N. C. 324, 44 Am. St. Rep. 454, 20 S. E. 453, and cases in the note following.

⁶⁷ *United States. Handley v. Stutz*, 139 U. S. 417, 35 L. Ed. 227.

Alabama. *Birmingham Ry. & Elec. Co. v. Birmingham Traction Co.*, 128 Ala. 110, 29 So. 187.

California. *Hughes Manufacturing & Lumber Co. v. Wilcox*, 13 Cal. App. 22, 108 Pac. 871.

Colorado. *Hendrie & Bolthoff Mfg.*

Co. v. Collins, 29 Colo. 102, 67 Pac. 164.

Connecticut. *Hurd v. Hotchkiss*, 72 Conn. 472, 45 Atl. 11; *Goodwin v. United States Annuity & Life Ins. Co.*, 24 Conn. 591; *Stamford Bank v. Benedict*, 15 Conn. 437.

Georgia. *Candell v. Athens Sav. Bank*, 140 Ga. 713, 79 S. E. 776; *Childs v. Ponder*, 117 Ga. 553, 43 S. E. 986.

Illinois. *Illinois Conference of Evangelical Ass'n of North America v. Plagge*, 177 Ill. 431, 69 Am. St. Rep. 252, 53 N. E. 76, aff'g 76 Ill. App. 468; *Oakford & Fahnstock v. Fischer*, 75 Ill. App. 544; *Nimmo v. Jackman*, 21 Ill. App. 607.

Iowa. *Iowa Drug Co. v. Souers*, 139 Iowa 72, 19 L. R. A. (N. S.) 115, 117 N. W. 300; *Selley v. American Lubricator Co.*, 119 Iowa 591, 93 N. W. 590; *Zalesky v. Iowa State Ins. Co.*, 102 Iowa 512, 71 N. W. 433, 70 N. W. 187; *Foley v. Tipton Hotel Ass'n*, 102 Iowa 272, 71 N. W. 236; *Rollins v. Shaver Wagon & Carriage Co.*, 80 Iowa 380, 20 Am. St. Rep. 427, 45 N. W. 1037.

Kansas. *Beeler v. Highland University Co.*, 8 Kan. App. 89, 54 Pac. 295.

Michigan. *Reynick v. Allington & Curtis Mfg. Co.*, 179 Mich. 630, 146 N. W. 252; *Ismon v. Loder*, 135 Mich. 345, 97 N. W. 769; *Ten Eyck v. Pon-*

And of course they may be proved by parol where it is shown that

tiac, O. & P. A. R. Co., 74 Mich. 226, 3 L. R. A. 378, 16 Am. St. Rep. 633, 41 N. W. 905.

Minnesota. State v. Guertin, 106 Minn. 248, 180 Am. St. Rep. 610, 119 N. W. 43; Flakne v. Minnesota Farmers' Mut. Ins. Co., 105 Minn. 479, 117 N. W. 785.

New Hampshire. Edgerly v. Emerson, 23 N. H. 555, 55 Am. Dec. 207.

New Jersey. Rutherford, B. S. & C. Elec. Co. v. Franklin Trust Co., 58 N. J. Eq. 584, 43 Atl. 1098; Franklin Trust Co. v. Rutherford, B. S. & C. Elec. Co., 57 N. J. Eq. 42, 41 Atl. 488; McMichael v. Brennan, 31 N. J. Eq. 496; Wells v. Rahway White-Rubber Co., 19 N. J. Eq. 402.

New York. Outterson v. Fonda Lake Paper Co., 66 Hun 629, 20 N. Y. Supp. 980; Ehrlich v. Chevra Agudas Achin Aushi Wizna, 86 N. Y. Supp. 820.

Pennsylvania. Bank of Kentucky v. Schuylkill Bank, 1 Pars. Eq. Cas. 180.

Tennessee. Tradesman Pub. Co. v. Knoxville Car Wheel Co., 95 Tenn. 634, 663, 31 L. R. A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097.

Thus oral evidence that a formal ballot was taken and that a certain person was elected is admissible. State v. Guertin, 106 Minn. 248, 130 Am. St. Rep. 610, 119 N. W. 43.

In the absence of charter or statutory restriction, the appointment of an agent and his authority may be shown by parol. Columbia River & P. S. Nav. Co. v. Vancouver Transp. Co., 32 Ore. 532, 52 Pac. 513.

The introduction of parol evidence to show the appointment of trustees has been held unobjectionable. Wiles v. Philippi Church, 63 Ind. 206.

Upon the question of the implied authority of officers from course of dealing, much that is relevant may be

said and done at directors' meetings which might not be of record. Smith v. Bank of New England, 72 N. H. 4, 54 Atl. 385. See Ismon v. Loder, 135 Mich. 345, 97 N. W. 769.

The cashier of a bank can properly testify that money was credited to a certain person without being required to produce the books. Smith v. First Nat. Bank of Flatonia, 43 Tex. Civ. App. 495, 95 S. W. 1111.

Failure to enter in the books of a corporation, at the time it was adopted, a resolution increasing the amount of the capital stock, does not affect the validity of the increase, as such corporate acts may be proved as well by parol as by written evidence. Handley v. Stutz, 139 U. S. 417, 35 L. Ed. 227.

Proof of a verbal decision of the directors held proper notwithstanding the fact that a document purporting to contain minutes of meeting and which contained no record of such decision was offered, especially as the document did not on its face purport to contain the complete minutes of the meeting. Housley v. Feilchenfeld Co., 152 Ill. App. 68.

The president of a railroad may testify as to an intention to improve the railroad by adding tracks and it is unnecessary to show a recorded vote of the directors authorizing the improvements. New York, N. H. & H. R. Co. v. Off, 78 Conn. 1, 60 Atl. 740, aff'd 203 U. S. 372, 51 L. Ed. 231.

Refusal to strike an answer that the witness was treasurer of the corporation during a certain time, which was objected to on the ground that the fact could only be proved by records, held not error. Empire Smelter Co. v. Gardiner, Worthen & Gross Co. (Ariz.), 85 Pac. 729.

In an action on an insurance policy parol evidence is admissible to show

the record has been lost.⁶⁸ And also where the books have been destroyed, what was done at the meeting may be shown by other evidence.⁶⁹

Where the minutes contain a record of action taken, it will be presumed, prima facie, that the record covers the entire action. This is not conclusive, however, and parol evidence may be introduced to show what was in fact done.⁷⁰ Furthermore, if it is apparent upon the face of the minutes that they are incomplete, they cannot be treated as conclusive evidence of what transpired.⁷¹

When an objection is made to the introduction of parol evidence on the ground that it is not the best evidence, a proper foundation should be laid by showing that a record of the corporate act exists.⁷²

On an issue as to the existence of a corporation de facto, it has been

that the insurance company decided to rebuild, where no record was made of the action of the board. *Zalesky v. Iowa State Ins. Co.*, 102 Iowa 512, 71 N. W. 433, 70 N. W. 187.

In an action by a subcontractor to recover for material and labor furnished, evidence of the secretary as to the authority of the building committee was properly admitted where it was not shown that a record of the proceedings of the board was kept, and defendant did not object that the testimony of the witness was not best evidence. *Foley v. Tipton Hotel Ass'n*, 102 Iowa 272, 71 N. W. 236.

A trustee in bankruptcy of a corporation cannot annul an instrument duly executed by the corporation on proper consideration on the mere ground that the corporation kept no record of its meeting. In such case parol evidence may be admitted to show the facts. *Murray v. Beal*, 23 Utah 548, 65 Pac. 726.

It is otherwise if a record is expressly required. Where a statute provides that a corporation should have a clerk, who should be sworn, and who should record all votes in a book to be kept for the purpose, it was held that the vote of a corporation to issue special stock was invalid, where the record of the meeting failed

to show that three-fourths of the general stockholders voted for the issue, as required by statute. *American Tube-Works v. Boston Mach. Co.*, 139 Mass. 5, 29 N. E. 63. Compare *Heintzelman v. Druids' Relief Ass'n*, 38 Minn. 138, 36 N. W. 100.

⁶⁸ *Blanton v. Kentucky Distilleries & Warehouse Co.*, 120 Fed. 318, aff'd 149 Fed. 31.

⁶⁹ See *Trammell v. Mower*, 182 Ala. 347, 62 So. 528.

⁷⁰ *Selley v. American Lubricator Co.*, 119 Iowa 591, 93 N. W. 590.

Parol evidence held proper where minority stockholders sought to show that the minutes were not only false, but were not minutes taken at the meeting. *Just v. Idaho Canal & Improvement Co.*, 16 Idaho 639, 133 Am. St. Rep. 140, 102 Pac. 381.

⁷¹ *State v. Guertin*, 106 Minn. 248, 130 Am. St. Rep. 610, 119 N. W. 43.

⁷² *Flakne v. Minnesota Farmers' Mut. Ins. Co.*, 105 Minn. 479, 117 N. W. 785.

An amendment to the by-laws is properly proved by oral testimony of the president, although such evidence is objected to as not the best evidence, where plaintiff did not lay a foundation for the objection by showing that the resolution had been reduced to writing or that a record of it had

held that oral evidence is admissible as to acts of the corporation, without producing the records of the corporation or accounting for their loss.⁷³

Corporate records such as the articles of association and franchise provisions dealing with the purpose of the company cannot be limited by parol evidence.⁷⁴ But parol evidence is admissible to explain or supplement the minutes of a corporation⁷⁵ or to aid in ascertaining the true meaning of indefinite or ambiguous records.⁷⁶

been made. *Flakne v. Minnesota Farmers' Mut. Ins. Co.*, 105 Minn. 479, 117 N. W. 785.

It should be shown that the minutes of a corporation have been called for and not produced, or that no entry of a resolution appears in the corporate minutes, before parol evidence is admitted in an action against a corporation for the purpose of proving a resolution forming the basis of the corporate liability. This on the ground that in the absence of such showing no foundation for parol evidence can be deemed to have been laid. The court said: "Where the minutes are silent as to a transaction claimed to have occurred, oral evidence is admissible; but we are aware of no authority for such evidence when it does not appear that there was any omission or error in the records as kept." *Ehrlich v. Chevra Agudas Achin Aushi Wizna*, 86 N. Y. Supp. 820.

⁷³ See §§ 425-435, *supra*.

For the purpose of establishing the existence of corporation *de facto*, oral testimony, not purporting to give the contents of records, tending to show meetings of members and the doing of business as a corporation, is admissible without producing the records or accounting for their loss. *Johnson v. Okerstrom*, 70 Minn. 303, 73 N. W. 147.

⁷⁴ *Kalamazoo v. Kalamazoo Heat, Light & Power Co.*, 124 Mich. 74, 82 N. W. 811.

⁷⁵ *Indian Refining Co. v. Buhrman*, 220 Fed. 426; *Northland Produce Co. v. Stephens*, 116 Minn. 23, 133 N. W. 93; *Rose v. Independent Chevra Kadisho*, 215 Pa. 69, 64 Atl. 401.

Where the minutes show a motion to suspend a member, but do not show what action was taken on such motion, parol evidence is admissible to show what action was taken. *Hamill v. Supreme Council of Royal Arcanum*, 152 Pa. 537, 25 Atl. 645.

Mistakes in the minutes may be explained. *Forest Glen Brick & Tile Co. v. Gade*, 55 Ill. App. 181.

Merriman v. National Zinc Corporation, 82 N. J. Eq. 493, 89 Atl. 764.

⁷⁶ *Rose v. Independent Chevra Kadisho*, 215 Pa. 69, 64 Atl. 401.

To aid in ascertaining the true meaning of a resolution of the directors when its terms are not certain and definite, resort may be had to the circumstances under which it was passed, the situation of the company, the object of the resolution and meeting and the conduct of the corporate authorities, and parol evidence is admissible in applying descriptive terms used to the subject-matter. *Chesapeake & O. Ry. Co. v. Deepwater Ry. Co.*, 57 W. Va. 641, 50 S. E. 890.

If the entry in the books of the proprietors as to a grant of land is not the record vote of such proprietors but may be act of either the proprietors, a clerk or other officer, and if the book is ambiguous in this respect, parol evidence is admissible to show

A recorded fact cannot be changed by oral evidence,⁷⁷ and parol evidence is not admissible when the records are complete and it does not appear that there is any omission or error in them as kept.⁷⁸

The rule as to parol evidence of a corporate intent inconsistent with action which has been taken and is on record has no application to parol evidence as to a corporate intent respecting action to be taken in the future.⁷⁹

The oral evidence as to a corporate act is usually given by a person present at time such action was taken,⁸⁰ and there is no preference between those present at the meeting as to who shall prove what took place. So testimony of a person who was present at the meeting, but had no connection with the company, will not be excluded because the testimony of the officers of the company as to what took place is obtainable.⁸¹ The fact involved cannot be proved by subsequent declarations of a person who was present. The rule as to oral evidence does not extend to the introduction of hearsay evidence.⁸²

by whom and with what intent the entry was made. *Williams v. Ingell*, 21 Pick. (Mass.) 288.

⁷⁷*Indian Refining Co. v. Buhrman*, 220 Fed. 426.

Oral testimony cannot be received to affect a formal resolution reduced to writing and entered upon the official records of the corporation. *Dusenberry v. Sagamore Development Co.*, 164 N. Y. App. Div. 573, 150 N. Y. Supp. 229.

Parol evidence to change the effect of an unambiguous resolution passed by an authorized board of a corporation is inadmissible or, if admitted, is without effect. *Saulsbury v. American Vulcanized Fibre Co.*, — Del. —, 91 Atl. 536.

⁷⁸*Ehrlich v. Chevra Agudas Achin Aushi Wizna*, 86 N. Y. Supp. 820.

⁷⁹*New York, N. H. & H. R. Co. v. Offield*, 78 Conn. 1, 60 Atl. 740, aff'd 203 U. S. 372, 51 L. Ed. 231.

⁸⁰*Childs v. Ponder*, 117 Ga. 553, 43 S. E. 986.

⁸¹"It is shown conclusively that the record book of the company, containing minutes of the meetings of the stockholders and directors, is lost;

and the sole evidence of what took place at the meeting is the testimony of the complainant, who was present, but who had no connection with the company. It is urged that this is not admissible evidence, especially as the testimony of the officers of the company as to what took place was obtainable. The point is not well taken. * * * We are aware of no rule which requires a preference between those present at the meeting, as to who shall prove what took place." *Blanton v. Kentucky Distilleries & Warehouse Co.*, 120 Fed. 318, aff'd 149 Fed. 31. See also *Roach v. Burgess* (Tex. Civ. App.), 62 S. W. 803.

⁸²*Childs v. Ponder*, 117 Ga. 553, 43 S. E. 986.

A statement of the president, made some time after the meeting, as to action taken at the meeting was not part of the res gestae, was not binding on other trustees, and was not binding as an admission. *Childs v. Ponder*, 117 Ga. 553, 43 S. E. 986. It was also held that since the president did not have authority to make an admission as to the proceedings at a meeting and his statement did not affect the

§ 2797. — Copies of corporate records as evidence—In general. In general, certified copies of corporate records are not admissible in evidence. A fact to be proved should be shown by the original records unless they are not available.⁸³

In a number of states, statutes exist providing that copies of books or records, sworn to or certified by officers of the corporation, are admissible in evidence.⁸⁴ Accordingly, copies of corporate records which comply with the statute are proper evidence,⁸⁵ but such a statute

actions of plaintiffs, it did not create an estoppel. *Childs v. Ponder*, 117 Ga. 553, 43 S. E. 986.

⁸³ *In re Mandelbaum*, 80 N. Y. Misc. 475, 141 N. Y. Supp. 319.

A certified copy of a corporation's report of its financial condition is not legal evidence of the truth of its statements. *Whitaker v. Miller*, 63 N. J. L. 587, 44 Atl. 643.

If it is shown that the books themselves should not, for any good reason, or cannot conveniently, be attached to the bill of exceptions, then a printed copy duly authenticated by the testimony of one who has compared it with the original may be received and attached thereto. *Yonda v. Royal Neighbors of America*, 96 Neb. 730, 148 N. W. 926.

Certificates of clerks of corporations and other recording officers are evidence of verity of copies, where the original records have been destroyed. *Oakes v. Hill*, 14 Pick. (Mass.) 442.

⁸⁴ As, for example, the following:

California. *Cole Civ. Proc.*, § 1918, subd. 6, 7.

Georgia. *Civ. Code*, § 5236.

Illinois. *Ill. St. c. 51*, § 15; *J. & A. Ann. St.* ¶ 5532. Records of the transactions of a board of directors may be proved by a duly certified copy thereof, by a copy proved to be such by a credible witness, and by original records. *Cantwell v. Stockmen's Building, Loan & Savings Union*, 88 Ill. App. 247, *aff'd* 187 Ill. 275, 58 N. E. 414.

Indiana. *Burns' Ann. St.* 1914,

§ 489. *Supreme Tribe of Ben Hur v. Kraft*, 183 Ind. 427, 109 N. E. 403; *Coppes v. Union Nat. Sav. Loan Ass'n*, 33 Ind. App. 367, 69 N. E. 702.

Missouri. *Rev. St.* 1899, § 955. *Boatmen's Bank v. Gillespie*, 209 Mo. 217, 108 S. W. 74.

Tennessee. *Shannon's Code*, § 5569; *Mill & V. Code*, § 4537.

⁸⁵ In an action of assumpsit against a consolidated railroad company upon a note executed by one of the consolidated companies, certified copies of the articles of consolidation are to be received and be as competent evidence as the originals under the statute. *Columbus, C. & I. C. R. Co. v. Skidmore*, 69 Ill. 566.

A certified copy of a lease of property to a railway company was held properly admitted in evidence in *Chicago, B. & Q. R. Co. v. Weber*, 219 Ill. 372, 76 N. E. 489, distinguishing the case of *Chicago, W. & V. Coal Co. v. Moran*, 210 Ill. 9, 71 N. E. 38, on the ground that in that case the contract offered in evidence was not properly certified.

Under the Tennessee statute (*Shannon's Code*, § 5569; *Mill & V. Code*, § 4537), a copy of the proceedings of the directors, certified by the secretary would be admissible in evidence in an action against society on a policy. *Page v. Knights & Ladies of America* (Tenn.), 61 S. W. 1068.

A paper purporting to contain extracts from the minutes of meetings of the board of directors, and showing authorizations to borrow money,

apparently applies only to the regular matters acted upon by the corporation and which are committed to record.⁸⁶ Also, these statutes have been held to make the papers mentioned therein original, and not secondary, evidence,⁸⁷ and when such a statute exists, proof of corporate records by other evidence has been usually held improper.⁸⁸ Furthermore, it has been seen that in accordance with statutes which usually exist, corporate existence may be shown by the production of a

which paper had attached to it an affidavit of the president that the extracts were true, was held not admissible because not properly certified (Code Civ. Proc. § 1918, subd. 6, 7). *Nixon v. Goodwin*, 3 Cal. App. 358, 85 Pac. 169.

⁸⁶ It would seem that the scope of Rev. St. c. 51, §§ 15, 16, is to authorize the admission in evidence of copies of the record of acts and proceedings of the board or body of officers charged by law with the conduct of the business of corporation in such matters and such matters only as by law are provided or required to be acted upon by such board or body. It is merely the action of such board which when committed to "paper entry or record" may be proven by a duly certified copy. *Chicago, B. & Q. R. Co. v. Weber*, 121 Ill. App. 455.

⁸⁷ Under sec. 15 of the Evidence Act (J. & A. Ann. St. ¶ 5532) which provides that papers, entries and records of any corporation may be proved by a copy thereof, certified under the hand of the secretary, clerk, cashier, or other keeper thereof, to which the seal of the corporation shall be affixed, it was held that the papers therein mentioned are thereby made original, and not secondary, evidence. *Chicago, B. & Q. R. Co. v. Weber*, 219 Ill. 372, 4 L. R. A. (N. S.) 272, 76 N. E. 489, rev'g 121 Ill. App. 455.

The intention of the similar act of Feb. 12, 1853, was to place certified copies of such books and records on the same footing with the originals

and not to make such books and records or copies thereof evidence, when such books and records were not evidence before. *Pittsfield & F. Plank-Road Co. v. Harrison*, 16 Ill. 81.

⁸⁸ Printed copy of the by-laws not proved as required by the statute is properly ruled out. *High Court Independent Order of Foresters of Illinois v. Heath*, 80 Ill. App. 239.

Oral testimony of the adoption of a by-law has been held improperly received as secondary evidence when certified copies of the record evidence were available under statute. *Lloyd v. Supreme Lodge Knights of Pythias*, 98 Fed. 66.

The original books and the evidence provided for by sections 15 and 18 of the statute, J. & A. Ann. St. ¶¶ 5532, 5535, are original evidence, and evidence of a secondary nature is not to be resorted to where there is in the possession of a party evidence of a higher and more satisfactory character. Proof of the papers, entries and records of a corporation of its possession cannot therefore be shown by the opinion or conclusion of a witness. *Chicago, B. & Q. R. Co. v. Weber*, 219 Ill. 372, 4 L. R. A. (N. S.) 272, 76 N. E. 489, rev'g 121 Ill. App. 455; *Mandel v. Swan Land & Cattle Co., Ltd.*, 154 Ill. 177, 27 L. R. A. 313, 45 Am. St. Rep. 124, 40 N. E. 462, rev'g 51 Ill. App. 204. Contra, see *State v. Pit-tam*, 32 Wash. 137, 72 Pac. 1042, where parol evidence was held admissible.

duly certified copy of the articles or certificate of incorporation.⁸⁹ Under such a statute the certificate has been held conclusive evidence of existence even when obtained by fraud.⁹⁰ But papers from such an office which are neither records nor certified copies of records are not admissible.⁹¹ Nor is a certified copy of a charter of a consolidated company taken from the records of the secretary of state admissible where there exists no law requiring such charter to be placed of record.⁹²

⁸⁹ See §§ 432 and 440.

United States. Samuel Bros. & Co. v. Hostetter Co., 118 Fed. 257.

Delaware. Star Loan Ass'n v. Moore, 4 Pennew. 308, 55 Atl. 946.

Minnesota. Danvers Farmers' Elevator Co. v. Johnson, 93 Minn. 323, 101 N. W. 492.

Montana. Western Iron Works v. Montana Pulp & Paper Co., 30 Mont. 550, 77 Pac. 413.

North Carolina. State Bank of Chicago v. Carr, 130 N. C. 479, 41 S. E. 876.

Oregon. Columbia Valley Trust Co. v. Smith, 56 Ore. 6, 107 Pac. 465; Pioneer Hardware Co. v. Farrin, 55 Ore. 590, 107 Pac. 456; Leavengood v. McGee, 50 Ore. 233, 91 Pac. 453.

Washington. State v. Pittam, 32 Wash. 137, 72 Pac. 1042.

"The production of the certificate of the secretary of state of the complete organization of the corporation, with a copy of the papers filed in his office, authenticated under his hand and the seal of state, and recorded in the office of the recorder of deeds, where the principal office of the company is located, is prima facie evidence of the existence of the corporation." Gunderson v. Illinois Trust & Savings Bank, 199 Ill. 422, 65 N. E. 326, aff'g 100 Ill. App. 461.

Prima facie proof of the existence of a corporation formed by the consolidation of several corporations is made by production of a copy of the articles of consolidation duly certified under seal of the secretary of

state as provided by the statute. Ramsey's Estate v. People, 197 Ill. 572, 90 Am. St. Rep. 177, 64 N. E. 549, aff'g 97 Ill. App. 283; East St. Louis Connecting Ry. Co. v. Wabash, St. L. & P. Ry. Co., 24 Ill. App. 279.

The Missouri Act of March 24, 1870, authorizing the consolidation of railroads, makes a certified copy of the articles, which are required to be filed in the office of the secretary of state, conclusive evidence of the consummation of the consolidation in all actions or suits by or against the corporation, except in a proceeding by the state to have the consolidation declared a nullity, in which the copy from the secretary's office would, it seems, be prima facie evidence only. Leavenworth County Com'rs v. Chicago, R. I. & P. R. Co., 134 U. S. 688, 33 L. Ed. 1064.

A certified copy of articles of incorporation has been held not properly authenticated, and also insufficient because not containing a certificate that the attestation was in proper form. Milwaukee Gold Extraction Co. v. Gordon, 37 Mont. 209, 95 Pac. 995.

⁹⁰ Boatmen's Bank v. Gillespie, 209 Mo. 217, 108 S. W. 74.

⁹¹ So a paper containing the act of incorporation of an association is not admissible where it was neither the record nor a certified copy of the record, but merely a paper which came from the secretary of state. Star Loan Ass'n v. Moore, 4 Pennew. (Del.) 308, 55 Atl. 946.

⁹² Montgomery v. Seaboard Air Line Ry., 73 S. C. 503, 53 S. E. 987.

Under statutes requiring the recording of certain documents, it has been held that they need not be certified as required by other statutes, when introduced in evidence.⁹³

§ 2798. — Invoices and books of account. Invoices of a corporation are documents of a private nature, and a copy of the same is not evidence unless the original is lost, destroyed or in the hands of a third person who cannot be compelled to produce it.⁹⁴

The fact that an officer testifies that an unwritten rule of the corporation prohibits the taking of original papers from the files does not render copies of invoices admissible.⁹⁵

A statute providing that acts and proceedings of corporations may be proved by sworn copy of record is not intended to provide that contents of books of account of private corporation may be used in evidence in a manner different from that in which contents of such books of natural persons may be used.⁹⁶ Accordingly, proof of an account by an affidavit of the secretary of a building and loan association to the effect that a paper annexed thereto is a true copy of the original record of the account is not authorized.⁹⁷

§ 2799. — Pamphlets; records of fraternal societies or mutual insurance companies. Books containing the constitution and by-laws which are generally acted under, as in the case of fraternal organizations, are usually admissible in evidence,⁹⁸ and are presumed correct.⁹⁹ The facts as to their authenticity may be shown indepen-

⁹³ Where the original articles of association, properly recorded are produced, they may be read in evidence without a certificate of the clerk of the corporation. *Fortin v. United States Wind-Engine & Pump Co.*, 48 Ill. 451, 95 Am. Dec. 560; *Garlick v. Mutual Loan & Building Ass'n*, 129 Ill. App. 402.

⁹⁴ *State v. Alpert*, 88 Vt. 191, 92 Atl. 32.

⁹⁵ *State v. Alpert*, 88 Vt. 191, 92 Atl. 32.

⁹⁶ *Coppes v. Union Nat. Sav. Loan Ass'n*, 33 Ind. App. 367, 69 N. E. 702.

⁹⁷ *Coppes v. Union Nat. Sav. Loan Ass'n*, 33 Ind. App. 367, 69 N. E. 702.

⁹⁸ *Star Loan Ass'n v. Moore*, 4

Pennew. (Del.) 308, 55 Atl. 946; *Page v. Knights & Ladies of America (Tenn.)*, 61 S. W. 1068.

A constitution which is kept in the archives of a society and is found there and which has been acted under is evidence to show liability of the members of the society. *Tarbell & Whitham v. Gifford*, 82 Vt. 222, 17 Ann. Cas. 1143, 72 Atl. 921.

⁹⁹ Books containing constitution and laws of fraternal society, and proved to be genuine by secretary, will be presumed accurate. *Schubert Lodge, No. 118 K. P. of New York v. Schubert Kranken Unterstuetzungs-Verein*, 56 N. J. Eq. 78, 38 Atl. 347.

dently.¹ A like rule applies to publications of mutual insurance companies.²

As to evidence of authenticity, the mere production of the printed pamphlet which shows upon its face that it is not the original record, and as to which there is no testimony that it has been compared or examined with the original record, is not sufficient.³ And the statement by a third person that a printed pamphlet contains by-laws in force during a certain year is nothing more than parol evidence as to a fact of which the records of the corporation are the best evidence.⁴

§ 2800. Authentication of books and records. As a general rule the books and records of a corporation cannot be introduced in evidence without sufficient preliminary proof as to their genuineness or authenticity. In other words the books or records must be properly identified and shown to be authentic when offered in evidence, since they do not prove themselves.⁵ This is especially true if the corpora-

¹Page v. Knights & Ladies of America (Tenn.), 61 S. W. 1068.

²The publications of a mutual insurance company, generally circulated among its members and purporting to contain its rules and by-laws, are admissible as prima facie evidence of such rules and by-laws. Knights & Ladies of America v. Weber, 101 Ill. App. 488.

³Yonda v. Royal Neighbors of America, 96 Neb. 730, 148 N. W. 926.

See Supreme Lodge Knights of Pythias v. Robbins, 70 Ark. 364, 67 S. W. 759, in which the printed pamphlet offered was subject to like infirmities. In that case the court said: "This pamphlet is not such a publication as proved itself. Its correctness must be established by evidence, and, instead of so much circumlocution, the witness should have stated that he had compared it with the record of these laws, and that it was a true copy of the same."

⁴Yonda v. Royal Neighbors of America, 96 Neb. 730, 148 N. W. 926.

⁵Fraternal Relief Ass'n v. Edwards, 9 Ga. App. 43, 70 S. E. 265; United Growers' Co. v. Eisner, 22 N. Y. App. Div. 1, 47 N. Y. Supp. 906.

In a foreclosure proceeding by a loan association against a member, the books of the association are admissible to prove the alleged indebtedness only after such preliminary proof as is required to entitle private books of account to admission. Trainor v. German-American Savings, Loan & Building Ass'n, 204 Ill. 616, 68 N. E. 650, rev'g 102 Ill. App. 604.

With reference to authentication of corporate records, the court in a Georgia case said: "The books do not prove themselves, but when they are produced by an officer of the corporation, who is shown to be the proper custodian of the books, and who testifies that they are the original books, and the court by inspection becomes satisfied that there is nothing in the books to raise a suspicion of fraud, the identification is sufficient to admit them in evidence. Mere proof that the entries therein are in the handwriting of an officer of the corporation does not seem to be sufficient identification, unless it appears that it was the duty of such officer to make the entries. If the books are shown to come from the proper custody—that is, the custody of the of-

tion itself relies upon its own record for the purpose of establishing a fact.⁶

The written or printed by-laws of a corporation are documents and the general rules as to the production and proof of documentary evidence apply to them.⁷ Also, records and by-laws of a fraternal beneficiary association must be proved in the same manner as those of other private corporations.⁸

In case of doubt as to the authenticity of the records, they may be properly rejected as evidence.⁹

The secretary or person performing the duties of the secretary is usually the proper person to make the proof as to the authenticity fier whose duty it is to keep and preserve them, or the custody of any person upon whom such duty is imposed, even temporarily by the corporation—and the books appear to be the corporate books, and free from suspicion of fraud, this is sufficient to show prima facie that they are the books of the corporation. In each case the question to be determined is whether the books are the books of the corporation. Direct proof by the official custodian to this effect, or proof that they came from the proper custody, and an inspection by the judge sufficient to satisfy him that they appear to be corporate books and free from suspicion of fraud, is all that could be reasonably required to make a prima facie case of identification." *Lowry Nat. Bank v. Fickett*, 122 Ga. 489, 50 S. E. 396.

Entries made by a vendee corporation in the books of the vendor corporation which passes its entire assets to the vendee corporation, relative to the transaction, may be admitted in evidence, without additional authentication in a suit against the vendee corporation based on a contract of the vendor corporation which the vendee corporation assumed as part of the transaction. *Dancel v. Goodyear Shoe Machinery Co.*, 137 Fed. 157.

As to the proof of by-laws, see § 488.

⁶ *Fraternal Relief Association v. Ed-*

wards, 9 Ga. App. 43, 70 S. E. 265.

As to the proof of by-laws, see § 488.

⁷ *Knights & Ladies of America v. Weber*, 101 Ill. App. 488. See § 488.

As to the production of books in court, see § 2805, *infra*.

As to the proof of by-laws, see § 488.

⁸ *Yonda v. Royal Neighbors of America*, 96 Neb. 730, 148 N. W. 926. See also § 488.

In mutual and fraternal benefit associations and in similar orders, the relation of the corporation to its members, especially where a right is asserted by the corporation against a member, can be shown only by the official records properly authenticated. *Fraternal Relief Ass'n v. Edwards*, 9 Ga. App. 43, 70 S. E. 265.

⁹ *Fraternal Relief Ass'n v. Edwards*, 9 Ga. App. 43, 70 S. E. 265.

Where a fraternal benefit association offered its minutes in evidence, and an interlineation appeared therein concerning the matter at issue, which could not be explained by the president, who as a witness admitted that the interlineation might have been inserted after the death of the member who was a party to the action, the court properly rejected the record from the evidence. *Fraternal Relief Ass'n v. Edwards*, 9 Ga. App. 43, 70 S. E. 265.

of the records,¹⁰ although such preliminary proof may be supplied by other officers.¹¹

¹⁰ *Bridges v. Southern Bell Telephone & Telegraph Co.*, 15 Ga. App. 291, 82 S. E. 925; *Fraternal Relief Ass'n v. Edwards*, 9 Ga. App. 43, 70 S. E. 265; *Wyss-Thalman v. Beaver Valley Brewing Co.*, 219 Pa. 189, 68 Atl. 187. See also *Lowry Nat. Bank v. Fickett*, 122 Ga. 489, 50 S. E. 396.

The secretary of a company, or other person having their custody, is the proper person to prove its books. *Smith v. Natchez Steamboat Co.*, 1 How. (Miss.) 479.

A book purporting to contain the records of the transactions of a society at its meetings, held properly authenticated, where a witness testified as to its authenticity and also that he was secretary. *Tarbell & Whitham v. Gifford*, 82 Vt. 222, 17 Ann. Cas. 1143, 72 Atl. 921.

A resolution may be admitted in evidence when contained in the regular book of minutes kept by the secretary, and when its correctness is authenticated by the secretary and his signature is proved. *United Growers Co. v. Eisner*, 22 N. Y. App. Div. 1, 47 N. Y. Supp. 906.

A book purporting to be a book of minutes of the corporation is admissible to show prima facie the validity of a sale of corporate property, where it is identified by the officer having its custody, and there is no allegation or proof of fraud in the keeping of the book. *Bridges v. Southern Bell Telephone & Telegraph Co.*, 15 Ga. App. 291, 82 S. E. 925.

Where a minute book was never in possession of the person who was secretary of the corporation at the time of trial and there was a dispute as to who was the lawful custodian of the minute book, but it was not denied that the book in question was the minute book, it was not improper

to permit its introduction in evidence when the jury was cautioned as to its effect. *Wyss-Thalman v. Beaver Valley Brewing Co.*, 219 Pa. 189, 68 Atl. 187.

It is not sufficient that such books be shown to be in the handwriting of one who appeared from the entries therein, but in no other way, to have been secretary of the corporation. *Highland Turnpike Co. v. McKean*, 10 Johns. (N. Y.) 154, 6 Am. Dec. 324.

A book purporting to be proprietary records of a corporation, in the handwriting of the clerk, found among his papers after his decease, and remaining ever since in the hands of his executor, is sufficiently authenticated to justify its admission as evidence, especially where it appears that there were never any other records or clerk. *Brackett v. Persons Unknown*, 53 Me. 228, 87 Am. Dec. 548.

A certificate of the secretary of a railroad company purporting to recite proceedings of a meeting of stockholders, which is not shown to come from any book of records, and is contradicted as to its recital that said secretary and a large stockholder, who acted as chairman, were there, by the testimony of said persons that they were not there, fails to prove any such proceedings by the company. *Brown v. Dibble's Estate*, 65 Mich. 520, 32 N. W. 656.

¹¹ The record of the proceedings of the trustees of an association and the treasurer's record may be identified by one who was a member of the board of trustees and the treasurer of the association at the time the entries involved were made. *Illinois Conference of Evangelical Ass'n of North America v. Plagge*, 177 Ill. 431, 69 Am. St. Rep. 252, 53 N. E. 76, aff'g 76 Ill. App. 468.

If the party who made the entries in a book has no personal knowledge of their correctness, but made them from memoranda furnished by another, the latter must testify to the correctness of the items, or there must be other proof of such fact to entitle the books to admission in evidence.¹³ And the court may decline to permit the existence of a corporation to be established by the mere testimony of a subscribing witness to an instrument which purports to be the corporate articles, the witness testifying merely that he saw the instrument executed and that one of the alleged incorporators claimed to be president of the corporation.¹³

While, as a general rule, the authenticity of every document offered in evidence is a question for the jury,¹⁴ the preliminary showing is addressed to the court, and frequently the discretion imposed upon the court in this preliminary showing is largely controlled by ocular inspection of the document offered, taken in connection with such explanation as the party submitting the document may offer.¹⁵ But if the preliminary showing fails to make at least a *prima facie* case of authenticity, the judge has the discretion of excluding the document from evidence.¹⁶

It is not essential that the minutes be in the handwriting of the secretary,¹⁷ and the books are not necessarily to be excluded because of the secretary's neglect to append his signature to the records.¹⁸

Minutes of a stockholders' meeting are not identified to such degree

The record book of an officer of a fraternal insurance society which by its terms is made *prima facie* evidence of the standing of the members, and entries of which were proved to have been made by the officer or his assistant is admissible in evidence though the entries of items were not proved by the assistant. *Chambers v. Great State Council, I. O. R. M.*, — W. Va. —, 86 S. E. 467.

¹³ *Trainor v. German-American Savings, Loan & Building Ass'n*, 204 Ill. 616, 68 N. E. 650, rev'g 102 Ill. App. 604.

¹³ *Goodale Lumber Co. v. Shaw*, 41 Ore. 544, 69 Pac. 546.

As to the necessity of proving corporate existence and the method in which it may be shown, see §§ 416-440.

¹⁴ *Fraternal Relief Ass'n v. Edwards*, 9 Ga. App. 43, 70 S. E. 265.

¹⁵ *Fraternal Relief Ass'n v. Edwards*, 9 Ga. App. 43, 70 S. E. 265.

¹⁶ *Fraternal Relief Ass'n v. Edwards*, 9 Ga. App. 43, 70 S. E. 265.

¹⁷ *United Growers' Co. v. Eisner*, 22 N. Y. App. Div. 1, 47 N. Y. Supp. 906.

¹⁸ Where the secretary actually took the minutes and entered them in the corporate minute book, the mere fact that he has neglected to append his signature does not render the minutes incompetent for the purpose of showing whether a certain resolution was passed. *Woodhaven Bank v. Brooklyn Hills Improvement Co.*, 69 N. Y. App. Div. 489, 74 N. Y. Supp. 1023.

as to make them admissible in evidence where they consist merely of separate sheets of paper fastened to the leaves of a record book,¹⁹ and pages of a minute book are not admissible where it does not appear that they are part of the minutes of a corporate meeting.²⁰ But if it does not appear that the minutes were ever transcribed in a book, they may be admitted though written on a sheet of paper.²¹

As a general rule, notice to produce operates to relieve both parties to the case from the preliminary proof of the authenticity of the document which has been made the subject-matter of the notice.²² It is also held that if the correctness of the minutes is attacked it is necessary first to offer them for that purpose.²³

Usually special meetings of directors are not legal unless called and noticed as required by the by-laws, but a party relying upon the regularity of acts need not show affirmatively that the meeting was in fact called and noticed as required.²⁴

§ 2801. Purposes for which and actions in which books and records admissible—In general. The books of corporations are, for many purposes, evidence not only as between the corporation and its members, and between the corporation or its members and strangers, but they are also received in evidence generally to prove corporate acts of a corporation, such as its incorporation, its stockholders, its by-laws, the formal proceedings of its board of directors, and its financial condition, when its solvency comes in question.²⁵

While, as has been heretofore noted, the original charter of a corporation, duly authenticated, forms the best evidence of incorporation,²⁶ the properly identified and authenticated books and records of

¹⁹ *McConnell v. Combination Mining & Milling Co.*, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194.

²⁰ *Davison v. West Oxford Land Co.*, 126 N. C. 704, 36 S. E. 162.

²¹ Minutes of a stockholders' meeting, written upon a sheet of paper, signed by the secretary and bearing the initials of the president of the corporation are competent where it does not appear that they were ever transcribed in the record book. *Chott v. Tivoli Amusement Co.*, 114 Ill. App. 178.

²² *Fraternal Relief Ass'n v. Edwards*, 9 Ga. App. 43, 70 S. E. 265.

And see § 2805, *infra*, as to production of books.

²³ *Durbrow v. Hackensack Meadows Co.*, 77 N. J. L. 89, 71 Atl. 59.

²⁴ *Sferlazzo v. Oliphant*, 24 Cal. App. 81, 140 Pac. 289.

²⁵ *Rudd v. Robinson*, 126 N. Y. 113, 12 L. R. A. 473, 22 Am. St. Rep. 816, 26 N. E. 1046.

Corporate books are competent evidence of corporate acts. *Oregon & C. R. Co. v. Grubissich*, 206 Fed. 577; *Wesp v. Muckle*, 136 N. Y. App. Div. 241, 120 N. Y. Supp. 976.

²⁶ § 432.

the corporation²⁷ are competent evidence, *prima facie*, to prove the organization of the corporation, and performance of conditions precedent,²⁸ and the minutes of the meetings of corporation for the purpose of organizing a corporation are *prima facie* evidence of the proceedings at such meeting.²⁹

The method of proving the corporate existence of corporations created by private acts, as distinguished from the method where the source of its authority is a general law, has already been discussed.³⁰

The principles relative to the proof of subscriptions to stock, including the use of corporate books and records for such purpose, have been discussed at length in a preceding section.³¹ In a subsequent chapter herein will be treated the methods in which membership in a corporation may be established and a stockholder's liability be shown.³²

The minutes and records, when properly authenticated, are usually held to be competent *prima facie* evidence of action taken at directors' meetings.³³ Of course the minutes are properly excluded when immaterial to the issues.³⁴

A party may introduce a portion of the minutes in evidence, when relevant, since the other party has the privilege of introducing other portions of the minutes.³⁵ A like rule applies to the introduction of a portion of the by-laws as evidence.³⁶

²⁷ § 431.

As to authentication of books and records, see § 2800, *supra*.

²⁸ See *McKenney v. Bowie*, 94 Me. 397, 47 Atl. 918.

²⁹ See § 431 and *Central Elec. Co. v. Sprague Elec. Co.*, 120 Fed. 925.

³⁰ See §§ 428, 429.

³¹ See § 569.

³² See chapter on Stock and Stockholders, *infra*.

³³ *Alabama*. *Booth v. Dexter Steam Fire Engine Co.*, 118 Ala. 369, 24 So. 405.

California. *Hughes Manufacturing & Lumber Co. v. Wilcox*, 13 Cal. App. 22, 108 Pac. 871.

Connecticut. *Chase v. Tuttle*, 55 Conn. 455, 3 Am. St. Rep. 64, 12 Atl. 874.

Idaho. *Just v. Idaho Canal & Improvement Co.*, 16 Idaho 639, 133 Am. St. Rep. 140, 102 Pac. 381.

Illinois. *Cantwell v. Welch*, 187 Ill. 275, 58 N. E. 414, *aff'd* 88 Ill. App.

247; *Cantwell v. Stockmen's Building, Loan & Savings Union*, 88 Ill. App. 247, *aff'd* 187 Ill. 275, 58 N. E. 414.

Minnesota. *Northland Produce Co. v. Stephens*, 116 Minn. 23, 133 N. W. 93; *State v. Guertin*, 106 Minn. 248, 130 Am. St. Rep. 610, 119 N. W. 43; *Heintzelman v. Druids' Relief Ass'n*, 38 Minn. 138, 36 N. W. 100.

New Jersey. *North River Meadow Co. v. Christ Church at Shrewsbury*, 22 N. J. L. 424, 53 Am. Dec. 258.

New York. *Boardman v. Lake Shore & M. S. Ry. Co.*, 84 N. Y. 157.

Pennsylvania. *Rose v. Independent Chevra Kadisho*, 215 Pa. 69, 64 Atl. 401.

Texas. *McIlhenny v. Binz*, 80 Tex. 1, 26 Am. St. Rep. 705, 13 S. W. 655.

³⁴ *Morgan v. Lehigh Valley Coal Co.*, 215 Pa. 443, 64 Atl. 633.

³⁵ *Fouche v. Merchants' Nat. Bank of Rome*, 110 Ga. 827, 36 S. E. 256.

³⁶ Where the by-laws are all recorded in the same book and part are

Books of a corporation are not admissible to prove a certain fact where the persons who made the entries therein are dead and it is not shown that the entries were made in the usual course of the corporation's business.³⁷ But in a suit in equity, where there was an issue as to whether a purchase of land was for a corporation or was the individual transaction of a certain person, evidence from the ledger books of the corporation as to accounts of the person mentioned was admissible, it appearing that such person had seen the account, had made entries therein, and had acquiesced in the contention of the corporation.³⁸

The books of a corporation may of course be used by it to supply memoranda to persons testifying from personal knowledge.³⁹

§ 2802. — **Real estate transactions; statute of frauds.** Corporate books and records are admissible to show title to property,⁴⁰ and the validity of a sale of real estate,⁴¹ and entries in a minute book made some fifty years prior to the time of suit have been held proper as showing exercise of authority over certain land, and hence as tending to prove title thereto by adverse possession.⁴²

A map filed by a corporation among public land records and allowed to remain there for years must be considered authorized by the owner, *prima facie*, and minutes of other evidence as to adoption of such map are not necessary.⁴³

introduced by plaintiffs, defendants have the right to introduce the remainder. *McConnell v. Combination Mining & Milling Co.*, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194.

³⁷ *Montgomery County v. Bean*, 26 Ky. L. Rep. 568, 82 S. W. 240.

³⁸ *Becker v. Donalson*, 138 Ga. 634, 75 S. E. 1122.

Where a ledger book of a corporation was admitted in evidence to show whether certain land had been purchased by the corporation or by another person, it was immaterial that Georgia Civil Code, § 5769, as to preliminary proof for admission of books of account, was not complied with. *Becker v. Donalson*, 138 Ga. 634, 75 S. E. 1122.

³⁹ *Chesapeake & O. Ry. Co. v. Deepwater Ry. Co.*, 57 W. Va. 641, 50 S. E. 890.

⁴⁰ In condemnation proceedings, ex-

tracts from the minutes of a railroad corporation were properly admitted to show title to the right of way, but such extracts were inadmissible to show the value of the property. *North Shore R. Co. v. Pennsylvania Co.*, 251 Pa. 445, 96 Atl. 990.

⁴¹ Where the validity of a sale of property was attacked, a book purporting to be the book of minutes of the corporation was admissible to show *prima facie* the validity of the sale, such book being identified by its custodian and there being no allegation or proof of fraud in the keeping of the book. *Bridges v. Southern Bell Telephone & Telegraph Co.*, 15 Ga. App. 291, 82 S. E. 925.

⁴² *Hamerslag v. Duryea*, 58 N. Y. App. Div. 288, 68 N. Y. Supp. 1061.

⁴³ *Village of Ridgefield Park v. New York, S. & W. R. Co.*, 85 N. J. L. 278, 89 Atl. 773.

Where there is in evidence a properly certified copy of the corporate articles, there is no merit in an objection to admitting in evidence a deed to a corporation as grantee without proving incorporation. From such certified copy of corporate articles it will be presumed that the requirements of law relative to incorporation have been complied with.⁴⁴

Where a corporation passes a resolution authorizing the president and secretary to execute a deed, it may be presumed that the secretary either made a record of the resolution or preserved the paper containing it, or both.⁴⁵

The authority to execute a mortgage is shown by a recital in the records of a corporation that when all stockholders, which embraced all directors, were present, the instrument was drawn, read, and a motion approving it passed.⁴⁶

The minutes of a meeting containing the terms of an agreement, signed by the chairman, constitute a sufficient memorandum to satisfy the statute of frauds,⁴⁷ but the corporate records alone are not sufficient to show a contract of sale.⁴⁸

The dedication of corporate property cannot be shown by the mere

⁴⁴ Thomas v. Wilcox, 18 S. D. 625, 101 N. W. 1072.

⁴⁵ Mullanphy Sav. Bank v. Schott, 135 Ill. 655, 25 Am. St. Rep. 401, 26 N. E. 640, aff'g 34 Ill. App. 500.

⁴⁶ Crossette v. Jordan, 132 Mich. 78, 92 N. W. 782.

⁴⁷ Tufts v. Plymouth Gold Min. Co., 14 Allen (Mass.) 407; Jones v. Victoria Graving Dock Co., 2 Q. B. Div. 314, 46 L. J. Q. B. Div. 219. And see Marden v. Champlin, 17 R. I. 423.

A resolution authorizing the sale of real estate, containing all essential elements and signed by the president and secretary is a sufficient written memorandum to constitute compliance with requirements of the statute of frauds. Western Timber Co. v. Kalamazoo River Lumber Co., 42 Wash. 620, 6 L. R. A. (N. S.) 397, 114 Am. St. Rep. 137, 7 Ann. Cas. 667, 85 Pac. 338.

The vote of the directors of the corporation duly recorded is a sufficient memorandum in writing, and the signature of recording officer in the at-

testation of the minutes is sufficient signing by party to be charged, within the statute of frauds. Lamkin v. Baldwin & Lamkin Mfg. Co., 72 Conn. 57, 44 L. R. A. 786, 43 Atl. 593, 1042.

Evidence tending to show that the defendant, in a mere matter of book-keeping in a corporation of which he was manager and complainant a stockholder, had entered a charge against the corporation for counsel fees paid by defendant in respect to property sought to be charged with a trust, and the fact that at one time defendant made a written lease of the property, executed with the word "Agent" affixed, without more is not sufficient to show a memorandum in writing which will take the case out of the operation of the statute of frauds. Kennedy v. Bates, 142 Fed. 51.

⁴⁸ A resolution adopted on the part of the directors or at a stockholders' meeting declaring willingness to sell the corporate property and empowering the president to consummate the sale is not alone a contract of sale.

recollection of such alleged fact on the part of certain persons, where no record thereof appears on the corporate books and the corporation has continued to pay taxes on and exercise control over the property.⁴⁹

§ 2803. — Actions between corporation or members and strangers. The books and records of a corporation cannot be used to establish claims or rights of the corporation against strangers or third persons, unless pursuant to the sanction of some statute.⁵⁰ Such books and records are declarations in the corporation's own favor and

Cumberland & O. V. R. Co. v. Shelbyville, B. & O. R. Co., 117 Ky. 95, 77 S. W. 690.

⁴⁹ **Stacy v. Glen Ellyn Hotel & Springs Co.,** 223 Ill. 546, 79 N. E. 133.

Where suit was brought to set aside a sale of stock for failure to pay assessments thereon, it was held not proper to prove the records of the corporation by oral evidence. **Corcoran v. Sonora Mining & Milling Co.,** 8 Idaho 651, 71 Pac. 127.

⁵⁰ **United States. Hayden v. Williams,** 96 Fed. 279; **Carey v. Williams,** 79 Fed. 906; **Coosaw Min. Co. v. Carolina Min. Co.,** 75 Fed. 860.

California. Union Trust Co. v. Dickinson, 30 Cal. App. 91, 157 Pac. 615.

Idaho. Just v. Idaho Canal & Improvement Co., 16 Idaho 639, 133 Am. St. Rep. 140, 102 Pac. 381.

Illinois. Trainor v. German-American Savings, Loan & Building Ass'n, 204 Ill. 616, 68 N. E. 650, rev'g 102 Ill. App. 604.

Kansas. Dolan v. Wilkerson, 57 Kan. 758, 48 Pac. 23.

Minnesota. Northland Produce Co. v. Stephens, 116 Minn. 23, 133 N. W. 93.

New Jersey. Fleming v. Reed, 77 N. J. L. 563, 72 Atl. 299.

New York. Young v. United States Mortgage & Trust Co., 214 N. Y. 279, 108 N. E. 418; **Farjeon v. Indian Territory Illum. Oil Co.,** 120 N. Y. Supp. 298; **In re Dittman,** 65 App. Div. 343, 72 N. Y. Supp. 886; **Sparks v. Mc-**

Creery, 61 App. Div. 402, 70 N. Y. Supp. 610.

Pennsylvania. Miller v. Dilkes, 251 Pa. 44, 95 Atl. 935.

Rhode Island. Dennis v. Joslin Mfg. Co., 19 R. I. 666, 61 Am. St. Rep. 805, 36 Atl. 129.

Utah. Eureka Hill Mining Co. v. Bullion, Beck & Champion Min. Co., 32 Utah 236, 125 Am. St. Rep. 835, 90 Pac. 157.

West Virginia. Chesapeake & O. Ry. Co. v. Deepwater Ry. Co., 57 W. Va. 641, 50 S. E. 890.

Such books and records are not competent evidence against third persons to prove contracts with them in absence of proof that they knew and assented thereto. **Oregon & C. R. Co. v. Grubissich,** 206 Fed. 577. **Gabriel v. Bank of Suisun,** 145 Cal. 266, 78 Pac. 736.

The records of a private corporation are not competent evidence against third persons to establish their relation of stockholders to corporation, or to prove other contracts between them and corporation in absence of proof of their knowledge and assent. **Harrison v. Remington Paper Co.,** 140 Fed. 385, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314.

In an action by a judgment creditor to set aside fraudulent conveyances, books of an insolvent bank were properly excluded, being incompetent as to the purchaser of the property, as she was not responsible for them or privy to them, under the maxim *res in-*

are within the general rule as to evidence of a self-serving character. And since such books are under the control of the corporation, third persons cannot be chargeable with knowledge of entries made therein. Of course the entries, like all other entries, may be proved to be correct by proper testimony,⁵¹ and it has been held that the corporate books may be introduced to show the character and terms of instruments involved.⁵² Also books of a corporation are admissible against other creditors to prove a claim of a creditor, if they are shown to be correctly kept and if all the circumstances support the entries as to their verity.⁵³

As between members of a corporation and strangers, the corporate books and records are sometimes involved and may be introduced in evidence. Thus the books may be admissible to show fraud in an action for the rescission of an exchange of property,⁵⁴ and in an action for the price of stock sold, the books of the corporation have been held proper evidence to show that a surplus existed at or near the time of the transaction.⁵⁵

Corporate minutes may not be excluded on the ground that the secretary who produces them is a stockholder and therefore interested in the outcome of the action.⁵⁶

The exclusion of books is not prejudicial error when the facts are established by other competent evidence.⁵⁷

§ 2804. — Actions between corporation and members. In general, books of a corporation are admissible as evidence against it in disputes with members, being admissions made by the agents or officers of the company.⁵⁸

ter alios acta alteri nocere non debet.
Calvert v. Alvey, 152 N. C. 610, 136
Am. St. Rep. 847, 68 S. E. 153.

⁵¹ Hayden v. Williams, 96 Fed. 279.

⁵² Chesapeake & O. Ry. Co. v. Deepwater Ry. Co., 57 W. Va. 641, 50 S. E. 890.

⁵³ New Orleans Canal & Banking Co. v. Leeds & Co., 49 La. Ann. 123, 21 So. 168.

⁵⁴ In an action to rescind an exchange of property, books and statements of a bank were properly received in evidence not only as tending to prove the falsity of representations as to stock conveyed for land, but also as a basis for expert testimony as to the condition of the

bank and the value of its shares.
Ludowese v. Amidon, 124 Minn. 288,
144 N. W. 965.

⁵⁵ Gilboa v. Kimball (R. I.), 69 Atl. 765.

⁵⁶ Morgan v. Lehigh Valley Coal Co., 215 Pa. 443, 64 Atl. 633.

⁵⁷ In an action to recover a broker's commission, the exclusion of the minutes of the corporation was not prejudicial error when other competent evidence showed authorized employment of plaintiff. Lawson v. Black Diamond Coal Min. Co., 58 Wash. 614, 102 Pac. 759.

⁵⁸ Dolan v. Wilkerson, 57 Kan. 758, 48 Pac. 23. See also Hayden v. Williams, 96 Fed. 279.

Admissions of a party against his interest, inscribed upon the record books of a corporation, are as competent and persuasive evidence as though written elsewhere.⁵⁹

As to officers of the corporation, the books kept by them or under their direction may be used in the establishment of wrongdoing on their part.⁶⁰ Also such books or records are admissible to show an officer's participation in the corporate affairs,⁶¹ and authority as to a certain act.⁶²

The books of a building and loan association are evidence, as between it and its stockholders, against the association as admissions. *Columbus Building & Loan Ass'n v. Kriete*, 87 Ill. App. 51, modified 192 Ill. 128, 61 N. E. 510.

A minute book kept by a subordinate lodge containing entries required to be made by it in the performance of its agency for the society is competent where it contains relevant admissions against such society. *Platt-deutsche Grot Gilde Von de Vereinigten Staaten Von Nord America v. Ross*, 117 Ill. App. 247.

"In an action by a depositor in a bank against a stockholder, the ledger of the bank, though not a book of original entries, is competent testimony against the stockholder as an admission of the company, on its own books of the amount due the depositor." *Dows v. Naper*, 91 Ill. 44; quoted in *Lederer v. Morrow*, 132 Mo. App. 438, 111 S. W. 902.

⁵⁹ *Harrison v. Remington Paper Co.*, 140 Fed. 385, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314.

Admissions are evidence against the party making them, though they relate to the contents of a written paper or to a corporate vote. *Clarke v. Warwick Cycle Mfg. Co.*, 174 Mass. 434, 54 N. E. 887.

⁶⁰ *New Haven Trust Co. v. Doherty*, 74 Conn. 353, 50 Atl. 887.

In an action against the officers of corporation because of fraudulent representations of defendants as to the

solvency of the company and the value of the stock, books of the company are admissible in evidence though not a record of original entries and not made by defendants. *Lederer v. Morrow*, 132 Mo. App. 438, 111 S. W. 902.

Where a statute requires all corporations for profit to keep a record of all their business transactions (Mont. Civ. Code, § 540; Rev. Code, § 3902) the books of the corporation are admissible in an action against the officers for an accounting and will not be presumed erroneous. *Smith v. Moore*, 199 Fed. 689.

⁶¹ Minutes and other writings are admissible to prove an officer's participation in the affairs of the corporation as a stockholder or director and to show his acquiescence in the conduct of the corporation in printing his name as director. *Bradford v. National Ben Ass'n*, 26 App. Cas. (D. C.) 268.

⁶² Minutes are admissible to show extent of authority conferred by the directors upon officers appointed to carry out corporate action. *Fleming v. Reed*, 77 N. J. L. 563, 72 Atl. 299.

The records of a corporation concerning written authority to an officer to purchase stock is admissible on the issue of whether such authority was given, but they are not conclusive as to the issue. *W. R. Case & Sons Cutlery Co. v. Folsom*, — Tex. Civ. App. —, 170 S. W. 1066.

A minute book is proper and competent means for proving adoption by the board of directors of a resolution

As against members of the corporation, the books of a corporation are not admissible to show their private transactions or dealings with the corporation. In respect to such transactions the members must be regarded as strangers.⁶³ Thus, account books cannot be said to be admissions against a member as in the case of a partnership.⁶⁴

With regard to the admissibility of the books and records as between a corporation and its members on the ground that they are of a public nature, the nature of the relation in which the corporation and the member stand towards each other in the proceeding would

authorizing the borrowing of money from plaintiff and the execution of a note as evidence of loan. *Union Trust Co. v. Dickinson*, 30 Cal. App. 91, 157 Pac. 615.

The record of a special meeting of stockholders authorizing "the president" to file a petition in insolvency and the schedule of creditors filed with petition, are evidence to show an admission that plaintiff was a creditor. *Clarke v. Warwick Cycle Mfg. Co.*, 174 Mass. 434, 54 N. E. 887.

Where the records show the election of one as president, the fact that he acted two years later and assumed to carry out a vote two years after that tends to show that he acted as president two years after election. *Clarke v. Warwick Cycle Mfg. Co.*, 174 Mass. 434, 54 N. E. 887.

Where a letter of a director stated that the board of directors at their meeting authorized an officer to handle the matter of the employment of a servant, such letter would not of itself bind the company, but it was evidence to show the authority of the manager to act in the matter and was competent. *Golden Age No. 2 Mining & Milling Co. v. Langridge*, 39 Colo. 157, 88 Pac. 1070.

⁶³ *Hayden v. Williams*, 96 Fed. 279; *Carey v. Williams*, 79 Fed. 906; *Haynes v. Brown*, 36 N. H. 545.

⁶⁴ In *Rudd v. Robinson*, 126 N. Y. 113, 12 L. R. A. 473, 22 Am. St. Rep. 816, 26 N. E. 1046, it was said: "After

a careful consideration of all the cases which have come to our attention, we can perceive no principle upon which the account books of a corporation can be evidence against a member of the corporation of the accounts and entries therein made, in a suit brought by the corporation or its representatives against him to enforce his liability upon such account. The officers and book keepers of a corporation are in no sense his agents. Individually he has no control over their acts, and has no responsibility therefor; and in making the entries they do not, in any legal sense, represent or bind him. * * * It would be quite a dangerous, and we think startling, proposition to hold that a clerk or other officer in a business corporation could enter charges in its books of account against a director or stockholder which could be proved in favor of the corporation by the mere production of the books, thus throwing upon him, or his personal representatives after his death, the burden of explaining the entries or showing them to be untrue, and we believe the doctrine has no support in principle or authority. A corporation seeking to enforce a claim against one of its directors or stockholders must establish it by the application of the same rules of evidence which are applied in an action brought by an individual to enforce a claim against any defendant."

seem to control. Thus it has been said: "Such books are evidence of the election of officers of the corporation and other corporate acts and proceedings, for the reason the books are for these purposes in the nature of public books or documents. * * * But we think it well, and moreover justly, settled that the books of a corporation are, as to matters pertaining to the dealings of a corporation with one of its members as an individual, not books of a public nature * * *." ⁶⁵ Accordingly such books may be introduced as competent evidence of what was done at a meeting,⁶⁶ and they are prima facie evidence of the facts which are required to be there stated,⁶⁷ and particularly is it held that the corporate records are prima facie evidence against stockholders, especially with respect to subscriptions to stock.⁶⁸ The books have been held admissible also to show the acceptance of an amendment to a corporate charter.⁶⁹ Again, there are modified hold-

⁶⁵ *Trainor v. German-American Savings, Loan & Building Ass'n*, 204 Ill. 616, 68 N. E. 650. See *Dolan v. Wilkerson*, 57 Kan. 758, 48 Pac. 23.

So such books are not admissible in evidence in a suit by the corporation against a member to enforce an indebtedness in favor of the corporation upon the ground that they are public, but only when brought within the rule established by the statute authorizing the introduction of private books of account in evidence. *Trainor v. German-American Savings, Loan & Building Ass'n*, 204 Ill. 616, 68 N. E. 650, rev'g 102 Ill. App. 604.

The rule to the effect that books of a merchant cannot be given in his favor does not apply to corporations. *Hincks v. Converse*, 38 La. Ann. 871.

Books and records of a lodge when properly identified are receivable in evidence against members of the lodge and their privies, in an action by lodge. *Union Pac. Lodge No. 17 A. O. U. W. v. Bankers Surety Co.*, 79 Neb. 801, 113 N. W. 263.

The books of a bank are, among shareholders, public records and evidence of what they show. *Brown v. Ellis*, 103 Fed. 834.

That in an action between stock-

holders the books are admissible to show the financial transactions of the corporation, its assets and liabilities, see *Hubbell v. Meigs*, 50 N. Y. 480, 491.

⁶⁶ *Booth v. Dexter Steam Fire Engine Co.*, 118 Ala. 369, 24 So. 405. See also *Hayden v. Williams*, 96 Fed. 279; *Miller v. Dilkes*, 251 Pa. 44, 95 Atl. 935.

⁶⁷ *Middleton v. Arastraville Min. Co.*, 146 Cal. 219, 79 Pac. 889; *Rose v. Independent Chevra Kadisho*, 215 Pa. 69, 64 Atl. 401.

⁶⁸ See § 569, *supra*.

United States. *Farwell v. Houghton Copper Works*, 8 Fed. 66.

Georgia. *Wood v. Coosa & C. R. R. Co.*, 32 Ga. 273.

Idaho. *Just v. Idaho Canal & Improvement Co.*, 16 Idaho 639, 133 Am. St. Rep. 140, 102 Pac. 381.

Massachusetts. *Holden v. Hoyt*, 134 Mass. 181.

Minnesota. *Fletcher v. Chicago, St. P., M. & O. Ry. Co.*, 67 Minn. 339, 69 N. W. 1085.

⁶⁹ The record or journal of proceedings of the corporation is admissible in evidence against the shareholders to show an acceptance of an amendment of the charter, without first showing

ings to the effect that the books and records cannot be considered conclusive evidence against stockholders.⁷⁰ And they are not even prima facie evidence of the truth of statements of fact which they show were made to the meeting by the secretary or others, and which were based on information derived from outside sources.⁷¹ But the unsupported statement in the minutes of the secretary will be deemed secondary to the testimony of a stockholder as to the amount of stock he held on a particular occasion. So, also, where by statute the stock and transfer book are made the source from which they are to be ascertained the amount of stock outstanding and by whom held, the record in the stock and transfer book will take precedence over a recital in the corporate minutes.⁷²

Corporate records are not personal transactions,⁷³ and the exclusion of minutes on the ground that the secretary who produced them was a stockholder and therefore interested has been held improper.⁷⁴

It is error to admit books to show acts which take place at a meeting where the defendants were not present and it is not shown that they had any knowledge of the acts in question. In such case the members are strangers with respect to the particular transaction.⁷⁵

§ 2805. Production of books and papers in court. When records, books or papers are required in the administration of justice, a cor-

that the persons accepting were directors, they being named as directors in the journal. *Dows v. Napier*, 91 Ill. 44; *Ryder v. Alton & S. R. Co.*, 13 Ill. 516. See also chapter on Amendment and Repeal of Charter, *infra*.

⁷⁰ *Middleton v. Arastraville Min. Co.*, 146 Cal. 219, 79 Pac. 889; *Rose v. Independent Chevra Kadisho*, 215 Pa. 69, 64 Atl. 401. So held as to an individual transaction between a stockholder and the corporation. *Dennis v. Joslin Mfg. Co.*, 19 R. I. 666, 61 Am. St. Rep. 805, 36 Atl. 129.

The rule that records are conclusive should not apply to minority stockholders. *Just v. Idaho Canal & Improvement Co.*, 16 Idaho 639, 133 Am. St. Rep. 140, 102 Pac. 381.

⁷¹ *Middleton v. Arastraville Min. Co.*, 146 Cal. 219, 79 Pac. 889.

⁷² *Middleton v. Arastraville Min.*

Co., 146 Cal. 219, 79 Pac. 889.

⁷³ *Poppenhusen v. Poppenhusen*, 68 N. Y. Misc. 548, 125 N. Y. Supp. 269.

⁷⁴ *Morgan v. Lehigh Valley Coal Co.*, 215 Pa. 443, 64 Atl. 633.

A witness producing and proving such record, even if an agent of the corporation, is not a party to the action and is not interested, and therefore is not disqualified. *Poppenhusen v. Poppenhusen*, 68 N. Y. Misc. 548, 125 N. Y. Supp. 269.

⁷⁵ *Thayer v. Schley*, 137 N. Y. App. Div. 166, 121 N. Y. Supp. 1064.

In an action for deceit it was held error to admit the minute books of the directors as to meetings at which neither of the defendants was present, without any proof of knowledge on their part as to what transpired at the meetings. *Thayer v. Schley*, 137 N. Y. App. Div. 166, 121 N. Y. Supp. 1064.

poration is under the duty to produce them,⁷⁶ even though the object of the inquiry may be to detect abuses committed by the corporation, or to discover violations of statutes.⁷⁷ So the officers cannot withhold the corporate books to prevent punishment being inflicted on the corporation,⁷⁸ or to evade punishment themselves.⁷⁹

The production of books and papers cannot be resisted upon the ground of self-crimination.⁸⁰ This is contrary to the English doctrine.⁸¹

⁷⁶ A corporation possessing the privileges of a legal entity and having records, books and papers is under a duty to produce them when they may be properly required in the administration of justice. *Wilson v. United States*, 221 U. S. 361, Ann. Cas. 1912 D 558, 55 L. Ed. 771.

⁷⁷ So the fact that the object of the inquiry is to detect the abuses the corporation has committed, to discover its violations of law and to inflict punishment by forfeiture of franchises or otherwise, does not relieve it from the duty of submitting its books and papers to duly constituted authority when demand is suitably made. This is involved in the reservation of the visitatorial power of the state and in the authority of the national government, where the corporate activities are in the domain subject to the powers of congress. *Wilson v. United States*, 221 U. S. 361, Ann. Cas. 1912 D 558, 55 L. Ed. 771.

⁷⁸ *Wilson v. United States*, 221 U. S. 361, Ann. Cas. 1912 D 558, 55 L. Ed. 771.

An officer cannot withhold corporate books required to be produced before a grand jury, because the corporation is not charged with criminal abuses. *Wilson v. United States*, 221 U. S. 361, Ann. Cas. 1912 D 558, 55 L. Ed. 771.

⁷⁹ If an officer of a corporation is implicated in the violations of the law, he cannot withhold the corporate books to protect himself from the effect of their disclosures. *Wilson v. United*

States, 221 U. S. 361, Ann. Cas. 1912 D 558, 55 L. Ed. 771.

⁸⁰ *Wilson v. United States*, 221 U. S. 361, Ann. Cas. 1912 D 558, 55 L. Ed. 771; *Manning v. Mercantile Securities Co.*, 242 Ill. 584, 30 L. R. A. (N. S.) 725, 90 N. E. 238, aff'd 217 U. S. 597, 54 L. Ed. 896 (mem. dec.).

The constitutional provision against self-crimination does not extend to corporations. *Com. v. Southern Exp. Co.*, 160 Ky. 1, L. R. A. 1915 B 913, Ann. Cas. 1916 A 378, 169 S. W. 517.

The privilege of exemption from self-crimination may not be claimed for a corporation by its officers and agents. *Com. v. Southern Exp. Co.*, 160 Ky. 1, L. R. A. 1915 B 913, Ann. Cas. 1916 A 378, 169 S. W. 517.

Physical custody of incriminating documents does not of itself protect the custodian against their compulsory production. *Wilson v. United States*, 221 U. S. 361, Ann. Cas. 1912 D 558, 55 L. Ed. 771.

Where books of a corporation are demanded by a subpoena duces tecum, the fact that an officer himself wrote or signed official letters copied into a book, does not condition nor enlarge his privilege against self-crimination. *Wilson v. United States*, 221 U. S. 361, Ann. Cas. 1912 D 558, 55 L. Ed. 771.

⁸¹ While the English cases as to protection against self-crimination have been held not controlling in the United States, as the corporate duty and the duty of its officers are to be determined by our laws (*Wilson v. United States*,

Books and papers may be required to be produced before a grand jury by subpoena duces tecum ad testificandum directed to the agent of the corporation having possession of such records, or by a subpoena duces tecum without the ad testificandum clause, the subpoena being directed to the corporation itself and served upon the proper agents.⁸²

The usual practice when records and documents are sought is to subpoena the officer who has them in his custody,⁸³ but it would seem

221 U. S. 361, Ann. Cas. 1912 D 558, 55 L. Ed. 771), the following illustrations show the rule laid down in that jurisdiction. In *Rex v. Granatelli*, Reports of State Trials, New Series, 979, 986, Prince Granatelli was prosecuted for breach of the Foreign Enlistment Act in fitting out certain vessels to be used in hostilities against the King of the Two Sicilies. A witness was subpoenaed to produce an agreement whereby Granatelli agreed to buy the vessels of a certain navigation company of which the witness was the secretary. The witness refused to produce it, on the ground that it might contain matter that might criminate himself or other parties for whom he was interested. It was ruled that he could not be compelled to produce the agreement.

In *Rex v. Cornelius*, 2 Strange 1210, an information was granted against the defendants, who were justices of the peace, for taking money for granting licenses to alehouse keepers. A rule to inspect the books of the corporation was applied for. It was refused, on the ground that it would in effect oblige a defendant indicted for misdemeanor to furnish evidence against himself.

In *Reg. v. Mead*, 2 Ld. Raym. 927, books of the defendant who, with eight others, was incorporated as highway surveyors, being considered of a private nature, were not required to be produced. For the same reason, in *Rex v. Worsenham*, 1 Ld. Raym. 705, the production of customhouse

books in an information against customhouse officers for forging a customhouse bond were not compelled.

"In *Rex v. Purnell*, 1 W. Bl. 37, 1 Wils. 239, an information was exhibited against the defendant, who was the vice chancellor of Oxford, for neglect of his duty for not punishing certain persons who had spoken treasonable words in the streets of Oxford. The attorney general moved for a rule directed to the proper officers of the university to permit their books and archives to be inspected to furnish evidence against the defendant. The motion was attempted to be supported 'on a suggestion that the King, being a visitor of the university, had a right to inspect their books whenever he thought proper.' It was argued besides that 'when a man is a magistrate, and as such has books in his custody, his having the office shall not secrete those books which another vice chancellor must have produced.' The rule was refused the court saying: 'We know no instance wherein this court has granted a rule to inspect books in a criminal prosecution nakedly considered.' " From dissenting opinion of *Wilson v. United States*, 221 U. S. 361, Ann. Cas. 1912 D 558, 55 L. Ed. 771.

⁸² *Com. v. Southern Exp. Co.*, 160 Ky. 1, L. R. A. 1915 B 913, Ann. Cas. 1916 A 378, 169 S. W. 517.

⁸³ *Wilson v. United States*, 221 U. S. 361, Ann. Cas. 1912 D 558, 55 L. Ed. 771.

Where a writ is directed to a cus-

that the writ may be directed to the corporation itself,⁸⁴ being then in effect a command to the corporate officers.⁸⁵ If such officers fail to comply with the writ, or if they prevent compliance, they, no less than the corporation itself, are guilty of disobedience and may be punished for contempt.⁸⁶

A subpoena cannot be resisted on the ground that there is an unreasonable search and seizure,⁸⁷ or because the witness is not informed of the witnesses who will appear before the grand jury.⁸⁸

The removal of records knowing that they will be called for and required by the grand jury, and for the purpose of obstructing investigation by such jury, constitutes the offense of obstructing justice.⁸⁹

Under a statute providing for the taking of depositions, a witness may be required to produce corporate books and records in his custody, or under his control.⁹⁰

A corporation is not relieved from producing books when they contain matters material to an issue, merely because they are private.⁹¹

In one case, it was contended that the books contained "trade secrets" and consequently need not be produced. But the quoted term was held not to denote the mere privacy with which ordinary com-

todian and he has no privilege with respect to the corporation books it is his duty to obey the writ. *Dreier v. United States*, 221 U. S. 394, 55 L. Ed. 784.

⁸⁴ *Wilson v. United States*, 221 U. S. 361, Ann. Cas. 1912 D 558, 55 L. Ed. 771.

⁸⁵ *Wilson v. United States*, 221 U. S. 361, Ann. Cas. 1912 D 558, 55 L. Ed. 771.

⁸⁶ *Wilson v. United States*, 221 U. S. 361, Ann. Cas. 1912 D 558, 55 L. Ed. 771.

⁸⁷ Under U. S. Rev. St. § 877 as to subpoenaing witnesses, where a subpoena to a corporation calls for the production of books, the process is not invalid under Constitution, Amend. IV, since there is no unreasonable search and seizure when a proper writ calls for the production of documents which the party procuring its issuance is entitled to have produced. *Wilson v. United States*, 221 U. S. 361, Ann. Cas. 1912 D 558, 55 L. Ed. 771.

⁸⁸ Under U. S. Rev. St. § 877, as to subpoenaing witnesses, it cannot be contended that a defendant in the prosecution which follows an indictment by the grand jury would not be apprised of the name of the precise witness appearing against him, in violation of Rev. St. § 829, and Constitution, Amend. VI, since such contention ignores fact that writ calls for books and not for oral testimony, and since neither Constitution nor the statute accords the right to be apprised of names of witnesses who appear before the grand jury. *Wilson v. United States*, 221 U. S. 361, Ann. Cas. 1912 D 558, 55 L. Ed. 771.

⁸⁹ *Com. v. Southern Exp. Co.*, 160 Ky. 1, L. R. A. 1915 B 913, Ann. Cas. 1916 A 378, 169 S. W. 517.

⁹⁰ *Rem. & Bal. Code*, §§ 1236, 1237. In *re Bolster*, 59 Wash. 655, 29 L. R. A. (N. S.) 716, 110 Pac. 547.

⁹¹ In *re Bolster*, 59 Wash. 655, 29 L. R. A. (N. S.) 716, 110 Pac. 547.

mercial business is carried on, and consequently the books were required to be produced.⁹²

§ 2806. Delivery of books and records to receiver. When so ordered, it is the duty of an officer of an insolvent corporation to turn over to the receiver appointed the books, records and papers of the corporation. Any constitutional privilege against self-incrimination which might be accorded a witness who has been called upon to produce in court, to be used in evidence, the books of a corporation of which he is an officer⁹³ cannot be invoked by an officer of an insolvent corporation as ground for refusal to comply with an order of court requiring him to turn over the books and records to a receiver appointed by the court. "If an officer of a corporation could by claiming that the books, etc., of the corporation in his possession contained evidence of his criminal misconduct in the management of the affairs of the corporation, prevent the receiver of the corporation from obtaining the possession of the books, etc., of the corporation which were necessary for him to have in order to properly administer the affairs of the corporation and close up its business under the direction of the court, such officer would have the power, in effect, to deprive a court of equity of jurisdiction to close up the affairs of an insolvent corporation by declining to deliver possession of the books, etc., of the corporation to the receiver appointed by the court."⁹⁴ Even though it should be conceded that an officer of an insolvent corporation who has been ordered to turn over the corporation's books and records to a receiver can claim the privilege of a witness, the bare statement of the officer in answer to such an order by a state court that the matters in such books and records are a part of the matters charged in an indictment found against him in a United States court and would tend to incriminate him in the prosecution is not sufficient to excuse him from obeying the order to turn over the books, but the answer "should place the matter in such shape that the court can intelligently determine the question from an examination of the averments of the answer, or, if necessary, from an inspection of the books." And it was further held that the answer should have pointed out which of the books and records contained incriminating matter and should have offered to turn over those of them which did not contain such matter.⁹⁵

⁹² *In re Bolster*, 59 Wash. 655, 29 L. B. A. (N. S.) 716, 110 Pac. 547. Co., 242 Ill. 584, 30 L. B. A. (N. S.) 725, 90 N. E. 238, aff'd 217 U. S. 597,

⁹³ See § 2805, *supra*.

54 L. Ed. 896 (mem. dec.).

⁹⁴ *Manning v. Mercantile Securities*

⁹⁵ *Manning v. Mercantile Securities*

§ 2807. Proceedings to compel delivery of books and records by officer. When a retiring officer refuses to deliver books and papers belonging to the corporation, the proper remedy to compel such delivery is by mandamus.⁹⁶ The remedy by replevin is inadequate.⁹⁷

In a suit to compel the production of the books, it has been held no defense that the books are not in the officer's possession or that they have been turned over to a stranger.⁹⁸

Where books are necessary for an accounting, there being other litigation between the parties, it has been held proper to order delivery to a county clerk who can arrange for inspection and access by the relator and other parties.⁹⁹

§ 2808. False entries in books. A statute prohibiting the making of false entries in books of account or other records or documents, applies to minute books and covers any record or document required to be kept by a corporation.¹

Under a statute as to forgery it has been held that a book or record is falsified only when by some alteration therein it is made to speak differently from what it did previously, or given a different aspect in some material aspect with a fraudulent and corrupt intent. Every change made, although in a sense a falsification, is not necessarily a forgery.²

Co., 242 Ill. 584, 30 L. R. A. (N. S.) 725, 90 N. E. 238, aff'd 217 U. S. 597, 54 L. Ed. 896 (mem. dec.).

⁹⁶ People v. Powers, 145 N. Y. App. Div. 693, 130 N. Y. Supp. 529; Beard v. Beard, 66 Ore. 512, 134 Pac. 1196, 133 Pac. 797.

⁹⁷ Beard v. Beard, 66 Ore. 512, 134 Pac. 1196, 133 Pac. 797.

⁹⁸ People v. Powers, 145 N. Y. App. Div. 693, 130 N. Y. Supp. 529.

⁹⁹ People v. Powers, 145 N. Y. App. Div. 693, 130 N. Y. Supp. 529.

¹ Ex parte McKenney, 10 Cal. App. 357, 101 Pac. 927.

² Spilker v. Abrahams, 133 N. Y.

App. Div. 226, 117 N. Y. Supp. 376.

Where the treasurer of a corporation agreed to an increase of capital stock and accepted a certificate, but later, being advised that the increase was illegal, returned the new certificate and took the old certificate from the stock book although the old certificate had been marked "canceled," which acts resulted in his being prosecuted for forgery, it was held in a suit for malicious prosecution that the question whether defendant had probable cause for prosecuting him was for the jury. Spilker v. Abrahams, 133 N. Y. App. Div. 226, 117 N. Y. Supp. 376.

CHAPTER 45

INSPECTION OF CORPORATE BOOKS AND RECORDS

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I. SOURCES OF RIGHT OF INSPECTION

§ 2809. In general. While, as has been seen heretofore, the corporation and the stockholders are separate and distinct legal entities and the title to the corporate property is vested in the corporation and not in the stockholder,¹ nevertheless, the right of inspection of the corporation's books and records rests upon the ownership by stockholders of the corporation's assets and property,² whether this interest be termed an equitable ownership,³ a beneficial interest⁴ or a quasi ownership,⁵ as the records of a corporation are not public records,⁶ and

¹ See § 25, *supra*, and see generally §§ 22-52, and *State v. Whited & Wheelless*, 104 La. 125, 28 So. 922.

² *Klotz v. Pan-American Match Co.*, 221 Mass. 38, 108 N. E. 764; *Kuhbach v. Irving Cut Glass Co.*, 220 Pa. 427, 28 L. R. A. (N. S.) 185, 69 Atl. 981.

The property of a corporation, although subject in some conditions to rights of creditors is in the last analysis that of the stockholders, and when one seeks inspection of books, records or property, he is in reality but seeking an inspection of his own. *Cincinnati Volksblatt Co. v. Hoff-*

meister, 62 Ohio St. 189, 48 L. R. A. 732, 78 Am. St. Rep. 707, 56 N. E. 1033.

A stockholder in a mining company is entitled to inspect the property of the corporation. *Hobbs v. Davis*, 168 Cal. 556, 143 Pac. 733.

³ *Varney v. Baker*, 194 Mass. 239, 10 Ann. Cas. 989, 80 N. E. 524.

⁴ *Clawson v. Clayton*, 33 Utah 266, 93 Pac. 729.

⁵ *State v. Whited & Wheelless*, 104 La. 125, 28 So. 922.

⁶ See § 2782 *ante*, and *Lipscomb's Adm'r v. Condon*, 56 W. Va. 416, 67

also upon the proposition that those in charge of the corporation are merely the stockholders' agents,⁷ concerning whose good faith in discharging their duties the stockholders have an interest in knowing.⁸

While the books and papers of the corporation are necessarily in the hands of the corporate officers and agents, they are the common property of the stockholders⁹ who have the right to know what the corporation is doing¹⁰ and have the same right as the members of an ordinary partnership to examine the books and records of the organization¹¹ in order that they may protect their own interests.¹² "There can be no question that the ownership of stock confers the authority to see that the property is well managed. The exercise of this authority involves primarily the right to examine the books."¹³

Visitation of a corporation is the examination of its affairs by the proper authority (which is, in the United States, the state or federal government, except in the case of private eleemosynary corporations)

L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

⁷ Wight v. Heublein, 111 Md. 649, 75 Atl. 507; State v. Doe Run Lead Co. (Mo. App.), 178 S. W. 298; State v. Donnell Mfg. Co., 129 Mo. App. 206, 107 S. W. 1112; Huylar v. Cragin Cattle Co., 40 N. J. Eq. 392, 2 Atl. 274; Harkness v. Guthrie, 27 Utah 248, 107 Am. St. Rep. 664, 75 Pac. 624, aff'd 199 U. S. 148, 50 L. Ed. 130, 4 Ann. Cas. 433.

It cannot be contended that the corporate records are for the benefit of the officers and that the stockholders are not entitled to inspection. Poor v. Yarnell, 28 Cal. App. 714, 153 Pac. 976.

⁸ Varney v. Baker, 194 Mass. 239, 10 Ann. Cas. 989, 80 N. E. 524; Clawson v. Clayton, 33 Utah 266, 93 Pac. 729.

⁹ Com. v. Phoenix Iron Co., 105 Pa. St. 111, 51 Am. Rep. 184.

"The books are not the private property of the directors or managers, but are the records of their transactions as trustees for the stockholders." Huylar v. Cragin Cattle Co., 40 N. J. Eq. 392, 2 Atl. 274.

¹⁰ Stone v. Kellogg, 62 Ill. App. 444,

aff'd 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222.

The purpose of inspection is to give the stockholder all the information which he may desire with regard to corporate affairs. Clawson v. Clayton, 33 Utah 266, 93 Pac. 729.

A stockholder has a broad legal right to look into the books at proper times and places and for a proper purpose. State v. Donnell Mfg. Co., 129 Mo. App. 206, 107 S. W. 1112.

¹¹ Harkness v. Guthrie, 199 U. S. 148, 50 L. Ed. 130, 4 Ann. Cas. 433; State v. New Orleans Gaslight Co., 49 La. Ann. 1556, 22 So. 815; Com. v. Phoenix Iron Co., 105 Pa. St. 111, 51 Am. Rep. 184; State v. Pacific Brewing & Malting Co., 21 Wash. 451, 47 L. R. A. 208, 58 Pac. 584.

¹² Hodder v. George Hogg Co., 223 Pa. 196, 72 Atl. 553.

Inspection by stockholder is primarily to protect his individual interest. Machen v. Machen & Meyer Elec. Mfg. Co., 237 Pa. 212, 42 L. R. A. (N. S.) 1079, Ann. Cas. 1914 B 420, 85 Atl. 100.

¹³ Legendre v. New Orleans Brewing Ass'n, 45 La. Ann. 669, 40 Am. St. Rep. 243, 12 So. 837.

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for the purpose of supervising, correcting and controlling the management of the corporation. The common-law right of inspection is a personal privilege of the stockholder which arises from his ownership of the stock and can be exercised for any legitimate purpose beneficial to him without any special appointment for that purpose, but which does not authorize him in exercising the right to interfere with or direct the general operations of the corporation.¹⁴

§ 2810. **Right at common law.** At common law, every stockholder of a corporation has a right, by reason of his interest therein, to inspect and examine its books and papers, if he asserts the right at a reasonable time and place, and for proper purposes.¹⁵ This right of a

¹⁴ *Harkness v. Guthrie*, 27 Utah 248, 107 Am. St. Rep. 664, 75 Pac. 624, aff'd 199 U. S. 148, 50 L. Ed. 130, 4 Ann. Cas. 433.

¹⁵ *United States. Guthrie v. Harkness*, 199 U. S. 148, 50 L. Ed. 130, 4 Ann. Cas. 433.

California. See *Hobbs v. Tom Reed Gold Min. Co.*, 164 Cal. 497, 43 L. R. A. (N. S.) 1112, 129 Pac. 781; *Johnson v. Langdon*, 135 Cal. 624, 87 Am. St. Rep. 156, 67 Pac. 1050.

Connecticut. *State v. Middlesex Banking Co.*, 87 Conn. 483, 88 Atl. 861.

Delaware. *State v. Jessup & Moore Paper Co.*, 24 Del. 379, 77 Atl. 16.

Georgia. See *Oliver v. Oliver*, 118 Ga. 362, 45 S. E. 232.

Illinois. *Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222, aff'g 62 Ill. App. 444.

Maine. *Withington v. Bradley*, 111 Me. 384, 89 Atl. 201; *White v. Manter*, 109 Me. 408, 42 L. R. A. (N. S.) 332, 84 Atl. 890.

Massachusetts. *Klotz v. Pan-American Match Co.*, 221 Mass. 38, 108 N. E. 764; *Powelson v. Tennessee Eastern Elec. Co.*, 220 Mass. 380, Ann. Cas. 1917 A 102, 107 N. E. 997; *Butler v. Martin*, 220 Mass. 224, 107 N. E. 999.

Michigan. *Eldred v. Elliott*, 161 Mich. 262, 126 N. W. 219; *Woodworth v. Old Second Nat. Bank*, 154 Mich. 459, 15 Det. L. N. 773, 118 N. W. 581, 117 N. W. 893.

Minnesota. *State v. Monida & Y. Stage Co.*, 110 Minn. 193, 125 N. W. 676, 124 N. W. 971.

Missouri. *State v. Doe Run Lead Co. (Mo. App.)*, 178 S. W. 298; *State v. German Mut. Life Ins. Co.*, 169 Mo. App. 354, 152 S. W. 618; *State v. St. Louis Transit Co.*, 124 Mo. App. 111, 100 S. W. 1126; *State v. Laughlin*, 53 Mo. App. 542.

New York. *In re Steinway*, 159 N. Y. 250, 45 L. R. A. 461, 53 N. E. 1103; *Hitchcock v. Union Ferry Co. of New York & Brooklyn*, 157 App. Div. 328, 142 N. Y. Supp. 247; *People v. Consolidated Fire Alarm Co.*, 142 App. Div. 753, 127 N. Y. Supp. 348; *Latimer v. Herzog Teleseme Co.*, 75 App. Div. 522, 78 N. Y. Supp. 314, 12 N. Y. Ann. Cas. 9; *In re Kennedy*, 75 App. Div. 188, 77 N. Y. Supp. 714.

North Dakota. *Schmidt v. Anderson*, 29 N. D. 262, 150 N. W. 871.

Pennsylvania. *Rochester v. Indiana County Gas Co.*, 246 Pa. 571, 92 Atl. 717; *Kuhbach v. Irving Cut Glass Co.*, 220 Pa. 427, 28 L. R. A. (N. S.) 185, 69 Atl. 981; *Schondelmeyer v. Columbia Fireproofing Co.*, 219 Pa. 610, 69 Atl. 49; *Com. v. Phoenix Iron Co.*, 105 Pa. St. 111, 51 Am. Rep. 184.

Utah. *Kimball v. Dern*, 39 Utah 181, 35 L. R. A. (N. S.) 134, Ann. Cas. 1913 E 166, 116 Pac. 28; *Clawson v. Clayton*, 33 Utah 266, 93 Pac. 729; *Harkness v. Guthrie*, 27 Utah 248, 107

stockholder was recognized in the early English decisions,¹⁶ and exists in the absence of any statutory provision on the subject,¹⁷ unless the stockholder is precluded by some statute, or by some article of the company's charter from inspecting the books.¹⁸ It may exist with reference to certain books and papers of a corporation, where the right to inspect granted by virtue of statutory provisions is limited to a certain book or certain kinds of books.¹⁹

The common-law right of inspection is clearly distinguishable from the statutory right,²⁰ since it is a qualified and not an absolute right,²¹

Am. St. Rep. 576, 1 Ann. Cas. 129, 75 Pac. 624.

Washington. *State v. Pacific Brewing & Malting Co.*, 21 Wash. 451, 47 L. R. A. 208, 58 Pac. 584.

Wyoming. *Wyoming Coal Min. Co. v. State*, 15 Wyo. 97, 123 Am. St. Rep. 1014, 87 Pac. 337.

¹⁶ See *In re Steinway*, 159 N. Y. 250, 45 L. R. A. 461, 53 N. E. 1103 (where a number of early English decisions are referred to).

¹⁷ *Woodworth v. Old Second Nat. Bank*, 154 Mich. 459, 15 Det. L. N. 773, 118 N. W. 581, 117 N. W. 893; *In re Steinway*, 159 N. Y. 250, 45 L. R. A. 461, 53 N. E. 1103.

In Delaware the right of inspection is recognized as a common-law right. *State v. Jessup & Moore Paper Co.*, 24 Del. 379, 77 Atl. 16.

In Wyoming, it seems that there is no statute declaratory of, or in anywise changing or modifying the common rule. *Wyoming Coal Min. Co. v. State*, 15 Wyo. 97, 123 Am. St. Rep. 1014, 87 Pac. 337.

The fact that statutes have been enacted conferring the right of inspection does not raise an inference that there is no such right at common law. *Com. v. Phoenix Iron Co.*, 105 Pa. St. 111, 51 Am. Rep. 184.

A statute which is not as comprehensive as the common-law right, and which partly affirms the same, is usually held not to operate as a limitation upon the common-law right of inspection. *State v. Donnell Mfg. Co.*,

129 Mo. App. 206, 107 S. W. 1112; *State v. Laughlin*, 53 Mo. App. 542.

The fact that a statute which contains no negative words gives stockholders an absolute right to inspect certain books or papers or to inspect them at a particular time does not deprive a stockholder of his common-law right to inspect other books or papers or to inspect them at other reasonable times. *People v. Eadie*, 133 N. Y. 573, 30 N. E. 1147, 63 Hun (N. Y.) 320, 18 N. Y. Supp. 53; *Sage v. Lake Shore & M. S. R. Co.*, 70 N. Y. 220; *People v. Lake Shore & M. S. Ry. Co.*, 11 Hun (N. Y.) 1.

¹⁸ *State v. Lazarus*, 127 Mo. App. 401, 105 S. W. 780.

A stockholder has the right to inspect books unless it is taken away by some provision of the charter or some by-law of the corporation. *Cockburn v. Union Bank*, 13 La. Ann. 289.

¹⁹ See *State v. Donnell Mfg. Co.*, 129 Mo. App. 206, 107 S. W. 1112; *In re Steinway*, 159 N. Y. 250, 45 L. R. A. 461, 53 N. E. 1103; *Althause v. Giroux*, 56 N. Y. Misc. 508, 107 N. Y. Supp. 191.

²⁰ *Althause v. Giroux*, 56 N. Y. Misc. 508, 107 N. Y. Supp. 191.

²¹ **Connecticut.** *State v. Middlesex Banking Co.*, 87 Conn. 483, 88 Atl. 861.

Massachusetts. *Klotz v. Pan-American Match Co.*, 221 Mass. 38, 108 N. E. 764; *Powelson v. Tennessee Eastern Elec. Co.*, 220 Mass. 380, Ann. Cas. 1917 A 102, 107 N. E. 997; *Butler v. Martin*, 220 Mass. 224, 107 N. E. 999.

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although it is broad and comprehensive.²³ In other words, the common-law right of inspection is rather a matter of privilege than a matter of right.²³

The restrictions are as to time, place and purpose, and are governed largely by the circumstances of each particular case.²⁴

§ 2811. Constitutional and statutory provisions—In general. In some states constitutional provisions exist in regard to the right of inspecting the books of corporations.²⁵

The subject of inspection of corporate books is also one with which the legislature may deal, and numerous statutes upon the subject have been enacted in the various states. While varying somewhat in phraseology, such statutes are in harmony with regard to their purpose, and are generally held either to have confirmed or to have enlarged the common-law right.²⁶

Under some general statutes, stockholders are given the broad

Minnesota. *State v. Monida & Y. Stage Co.*, 110 Minn. 193, 125 N. W. 676, 124 N. W. 971.

Missouri. *State v. Doe Run Lead Co.* (Mo. App.), 178 S. W. 298; *State v. German Mut. Life Ins. Co.*, 169 Mo. App. 354, 152 S. W. 618; *State v. Lazarus*, 127 Mo. App. 401, 105 S. W. 780; *State v. St. Louis Transit Co.*, 124 Mo. App. 111, 100 S. W. 1126.

Utah. *Kimball v. Dern*, 39 Utah 181, 35 L. R. A. (N. S.) 134, Ann. Cas. 1913 E 166, 116 Pac. 28; *Clawson v. Clayton*, 33 Utah 266, 93 Pac. 729.

²³ *State v. Donnell Mfg. Co.*, 129 Mo. App. 206, 107 S. W. 1112.

²³ *Clawson v. Clayton*, 33 Utah 266, 93 Pac. 729.

²⁴ *State v. Bucklin*, 83 Wash. 23, L. R. A. 1915 D 285, 145 Pac. 58.

²⁵ Under California Const. art. 12, § 14, corporations other than religious, educational or benevolent shall have books where transfers of stock shall be made for inspection by each person having an interest therein, books in which shall be recorded the amount of capital stock prescribed, etc. *Gavin v. Pacific Coast Marine Firemen's Union of San Francisco*, 2 Cal. App. 638, 84 Pac. 270.

Under Louisiana Const. 1879, art. 245 (Const. 1898, art. 273), it is made the duty of all corporations to maintain a public office "where shall be kept for public inspection books in which shall be recorded the amount of the capital stock subscribed," etc. *State v. Citizens' Bank of Jennings*, 51 La. Ann. 426, 25 So. 318; *State v. New Orleans Gaslight Co.*, 49 La. Ann. 1556, 22 So. 815; and see *State v. Whited & Wheless*, 104 La. 125, 28 So. 922. This constitutional provision is self-executing. *State v. New Orleans Gaslight Co.*, 49 La. Ann. 1556, 22 So. 815.

²⁶ *Guthrie v. Harkness*, 199 U. S. 148, 50 L. Ed. 130, 4 Ann. Cas. 433; *State v. Middlesex Banking Co.*, 87 Conn. 483, 88 Atl. 861; *Kimball v. Dern*, 39 Utah 181, 35 L. R. A. (N. S.) 134, Ann. Cas. 1913 E 166, 116 Pac. 28; *Clawson v. Clayton*, 33 Utah 266, 93 Pac. 729; *Bergman Clay Mfg. Co. v. Bergman*, 73 Wash. 144, 131 Pac. 485; *State v. Pacific Brewing & Malting Co.*, 21 Wash. 451, 47 L. R. A. 208, 58 Pac. 584.

right to examine and inspect the books, records and papers of the corporation at reasonable and proper times,²⁷ while other statutes provide that the right shall be subject to such regulations as may be prescribed by the by-laws;²⁸ and some statutes differ from the common-law rule in that they contain specific provisions as to the inspection of certain books or records only.²⁹ The statutes also vary as to the persons en-

²⁷ **Alabama.** Under Code 1886, § 1677, stockholders have the general right to examine books at any and all reasonable times. *Cobb v. Lagarde*, 129 Ala. 488, 30 So. 326; *Winter v. Baldwin*, 89 Ala. 483, 7 So. 734; *Foster v. White*, 86 Ala. 467, 6 So. 88.

Illinois. Rev. St. c. 32, § 13; *J. & A. Ann. St. ¶ 2430*. *Venner v. Chicago City R. Co.*, 246 Ill. 170, 138 Am. St. Rep. 229, 20 Ann. Cas. 607, 92 N. E. 643; *Coquard v. National Linseed-Oil Co.*, 171 Ill. 480, 49 N. E. 563, aff'g 67 Ill. App. 20; *Stone v. Kellogg*, 163 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222, aff'g 62 Ill. App. 444; *People v. Weber Co.*, 159 Ill. App. 588; *Heitkamp v. American Pigment & Chemical Co.*, 158 Ill. App. 587; *Rodger Ballast Car Co. v. Perrin*, 88 Ill. App. 323; *Mathews v. McClaughry*, 83 Ill. App. 224.

Maryland. Code, art. 23, § 5. *Wight v. Heublein*, 111 Md. 649, 75 Atl. 507; *Weißenmayer v. Bitner*, 88 Md. 325, 45 L. R. A. 446, 42 Atl. 245.

Minnesota. Under Rev. L. 1905, § 2869, all books and records shall at all reasonable times and for all proper purposes be open to inspection of every stockholder. *State v. Monida & Y. Stage Co.*, 110 Minn. 193, 125 N. W. 676, 124 N. W. 971.

Ohio. Rev. St. § 3254. *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 48 L. R. A. 732, 78 Am. St. Rep. 707, 56 N. E. 1033.

Utah. Comp. L. 1907, § 329, and Penal Code, § 4415. *Kimball v. Dern*, 39 Utah 181, 35 L. R. A. (N. S.) 134, Ann. Cas. 1913 E 166, 116 Pac. 28; *Clawson v. Clayton*, 33 Utah 266, 93 Pac. 729.

²⁸ **Missouri.** Rev. St. 1909, § 3349, provides that each shareholder "may at all proper times have access to the books of the company, to examine the same, and under such regulations as may be prescribed by the by-laws." *State v. Doe Run Lead Co.* (Mo. App.), 178 S. W. 298.

Missouri. Ann. St. 1906, § 966 (Rev. St. 1899, § 966), although not as comprehensive as the common-law right, in part affirms the same. *State v. Donnell Mfg. Co.*, 129 Mo. App. 206, 107 S. W. 1112. See *State v. Laughlin*, 53 Mo. App. 542.

²⁹ *Powelson v. Tennessee Eastern Elec. Co.*, 220 Mass. 380, Ann. Cas. 1917 A 102, 107 N. E. 997.

Under Connecticut Pub. Acts 1911, c. 215, § 1, it is provided that designated books shall at all times during the usual hours of business be open to examination to every stockholder, thus enlarging common-law right as to the books so designated. *State v. Middlesex Banking Co.*, 87 Conn. 483, 88 Atl. 861.

Massachusetts. Business Corporation Law, § 30, St. 1903, c. 437, provides that "The stock and transfer books of every corporation, which shall contain a complete list of all stockholders, their residences and the amount of stock held by each, shall be kept at an office of the corporation in this Commonwealth for the inspection of its stockholders." Liability for damages caused by a refusal to exhibit the books, etc., is specified; and the section concludes as follows: "The Supreme Judicial Court or the Superior Court shall have jurisdiction in equity, upon petition of a stock-

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titled to inspection of the books and other records of the corporation.³⁰

The object of statutes of this character is to guaranty to every stockholder, regardless of the amount of his interest, the right to examine into the transactions of his trustees,³¹ and to protect his interests.³²

The enactment of such statutes is a proper exercise of the police power of the state,³³ and does not deprive the corporation of any vested rights or impair the obligations of any contract.³⁴

holder, to order any or all of said copies, books or records to be exhibited to him and to such other stockholders as may become parties to said petition, at such a place and time as may be designated in the order." *Powelson v. Tennessee Eastern Elec. Co.*, 220 Mass. 380, Ann. Cas. 1917 A 102, 107 N. E. 997; *Varney v. Baker*, 194 Mass. 239, 10 Ann. Cas. 989, 80 N. E. 524.

New York Stock Corp. Law, § 29 (L. 1890, c. 564, as amended by L. 1901, c. 354), provides that every stock corporation shall keep at its office a stock book containing the names of stockholders, residence, number of shares held, etc., and states that such stock books shall be opened daily during at least three business hours for the inspection of stockholders and judgment creditors who may make extracts therefrom and imposes a penalty for neglect or refusal to comply with the statute. *People v. National Park Bank*, 122 N. Y. App. Div. 635, 107 N. Y. Supp. 369.

³⁰ Under Mill's Colorado Ann. St. § 508, only stockholders and creditors and their personal representatives are entitled to inspection. *Butterfly-Terrible Gold Min. Co. v. Brind*, 41 Colo. 29, 91 Pac. 1101, judgment reversed *Butterfield v. Sullivan*, 41 Colo. 155, 92 Pac. 235.

North Dakota Comp. Laws 1913, § 5460, requires books to be kept open for inspection by stockholders or creditors. *Schmidt v. Anderson*, 29 N. D. 262, 150 N. W. 871.

³¹ *State v. Doe Run Lead Co. (Mo.*

App.), 178 S. W. 298; *Kimball v. Dern*, 39 Utah 181, 35 L. R. A. (N. S.) 134, Ann. Cas. 1913 E 166, 116 Pac. 28. See also *Foster v. White*, 86 Ala. 467, 6 So. 88; *Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222, aff'g 62 Ill. App. 444.

The purpose is the protection of minority stockholders and to prevent delays incident to determining motives in desiring inspection. *Schmidt v. Anderson*, 29 N. D. 262, 150 N. W. 871.

³² The principal purpose of the legislature in passing a statute allowing the inspection of corporate books is to protect the rights and interest of stockholders. *Venner v. Chicago City R. Co.*, 246 Ill. 170, 138 Am. St. Rep. 229, 20 Ann. Cas. 607, 92 N. E. 643.

³³ *Venner v. Chicago City R. Co.*, 246 Ill. 170, 138 Am. St. Rep. 229, 20 Ann. Cas. 607, 92 N. E. 643.

In order to protect the public from monopolies, unlawful combinations and unreasonable exactions from corporations enjoying special franchises and privileges, the state has a right to exercise a visitatorial power over them, and to make this power effective and to facilitate its exercise is one of the purposes in requiring by statute that every stock corporation shall keep correct books of account of all its business. *Venner v. Chicago City R. Co.*, 246 Ill. 170, 138 Am. St. Rep. 229, 20 Ann. Cas. 607, 92 N. E. 643.

³⁴ *Venner v. Chicago City R. Co.*, 246 Ill. 170, 138 Am. St. Rep. 229, 20 Ann. Cas. 607, 92 N. E. 643.

In construing a statute allowing inspection the intent of the legislature is the controlling consideration,³⁵ and such a statute has been held to apply to pre-existing corporations.³⁶

The fact that the right to inspect books under a statute is sought to be strictly enforced by a penal statute providing that the refusal to allow inspection is a misdemeanor emphasizes the existence of the right, rather than qualifies it.³⁷

§ 2812. — Extent of stockholder's interest. Usually the statutory right of inspection is conferred upon all stockholders³⁸ and inspection will not be refused because of the small interest of the stockholder,³⁹ but some statutes containing provisions as to the furnishing of information to stockholders or directors provide that the applicant shall be the owner of a certain amount of stock.⁴⁰

§ 2813. By-laws providing for inspection. A corporation may make by-laws providing for inspection,⁴¹ and such by-laws are as legal

³⁵ *Venner v. Chicago City R. Co.*, 246 Ill. 170, 138 Am. St. Rep. 229, 20 Ann. Cas. 607, 92 N. E. 643.

³⁶ Rev. St. c. 32, § 13, as to corporate books and providing for inspection applies to pre-existing corporations. *Venner v. Chicago City R. Co.*, 246 Ill. 170, 138 Am. St. Rep. 229, 20 Ann. Cas. 607, 92 N. E. 643.

³⁷ *Clawson v. Clayton*, 33 Utah 266, 93 Pac. 729.

³⁸ Under a statute providing that every stock corporation shall keep correct books, and also providing for inspection by every stockholder, the word "every" means "each one and all." *Venner v. Chicago City R. Co.*, 246 Ill. 170, 138 Am. St. Rep. 229, 20 Ann. Cas. 607, 92 N. E. 643.

³⁹ *Richmond v. Hill*, 148 Ill. App. 179; *In re De Vengoechea*, 86 N. J. L. 35, 91 Atl. 314; *Hitchcock v. Union Ferry Co. of New York & Brooklyn*, 157 N. Y. App. Div. 328, 142 N. Y. Supp. 247; *In re O'Neill*, 47 N. Y. Misc. 495, 95 N. Y. Supp. 964.

As has already been noted, the object of the statutes is to guarantee the right of inspection to all stockholders. See § 2811, *supra*.

⁴⁰ See § 2811, *supra*.

Under Stock Corp. Law, § 69 (Consol. Laws, c. 59, L. 1909, c. 61), stockholders owning five per cent. of the capital stock may demand a statement of the affairs of the corporation concerning a particular account and the treasurer shall make and deliver such statement within thirty days, being subjected to a penalty in case of refusal. *Townsend v. Davis*, 153 N. Y. App. Div. 599, 138 N. Y. Supp. 758.

The statute applies to a stockholder who is a director. *Townsend v. Davis*, 153 N. Y. App. Div. 599, 138 N. Y. Supp. 758.

The owner of one-twentieth of the capital stock of a corporation which has no market value, and which the owner was forced to acquire for his own protection and which he desires to sell, is entitled to inspect and make extracts of the books of the corporation for the purpose of ascertaining its value. *State v. Jessup & Moore Paper Co.*, 24 Del. 379, 77 Atl. 16.

⁴¹ *Wyoming Coal Min. Co. v. State*, 15 Wyo. 97, 123 Am. St. Rep. 1014, 87 Pac. 337, 984.

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and binding as though they were general laws enacted by the legislature.⁴²

II. PURPOSES FOR WHICH ALLOWED

§ 2814. In general. The common-law right of inspection was subject to the limitation that it be made in good faith and for a proper purpose,⁴³ the motives of the stockholder being subject to judicial inquiry.⁴⁴

In accordance with this rule, it has been stated frequently as a general rule that the stockholder is only entitled to inspection when the right is sought for a proper purpose.⁴⁵ But there has been considerable disagreement of the courts as to what is a proper purpose, or rather as to what facts are sufficient to warrant the court to grant permission by mandamus to inspect,⁴⁶ and the common-law rule resulted in officers or stockholders sitting in trial on the motives of the applicant asking to make the examination, and, in the case of minority

⁴² Wyoming Coal Min. Co. v. State, 15 Wyo. 97, 123 Am. St. Rep. 1014, 87 Pac. 337, 984.

A by-law of an abstract company providing that "each stockholder shall have the right to inspect the books and records of the company at any time during reasonable business hours of said company" has all the force and effect of the statute containing such provision. State v. Bucklin, 83 Wash. 23, L. R. A. 1915 D 285, 145 Pac. 58.

⁴³ State v. Middlesex Banking Co., 87 Conn. 483, 88 Atl. 861; State v. Pan American Co., 5 Pennw. (Del.) 391, 63 Atl. 1118, 61 Atl. 398; Withington v. Bradley, 111 Me. 384, 89 Atl. 201; State v. Doe Run Lead Co. (Mo. App.), 178 S. W. 298; State v. German Mut. Life Ins. Co., 169 Mo. App. 354, 152 S. W. 618; State v. St. Louis Transit Co., 124 Mo. App. 111, 100 S. W. 1126.

Courts will not enforce common-law right except when desired examination is reasonable and in interest of essential justice. State v. Middlesex Banking Co., 87 Conn. 483, 88 Atl. 861.

⁴⁴ State v. German Mut. Life Ins. Co., 169 Mo. App. 354, 152 S. W. 618; State v. Lazarus, 127 Mo. App. 401, 105 S. W. 780; Kimball v. Dern, 39 Utah 181, 35 L. R. A. (N. S.) 134, Ann. Cas. 1913 E 166, 116 Pac. 28.

At common law such restrictions as were imposed upon the right of inspection, whether as to the mode of procedure or matters of substance were judicial regulations incidental to the exercise of a discretionary power. O'Hara v. National Biscuit Co., 69 N. J. L. 198, 54 Atl. 241.

⁴⁵ Huylar v. Cragin Cattle Co., 40 N. J. Eq. 392, 2 Atl. 274; Kuhbach v. Irving Cut Glass Co., 220 Pa. 427, 28 L. R. A. (N. S.) 185, 59 Atl. 981; Com. v. Phoenix Iron Co., 105 Pa. St. 111, 51 Am. Rep. 184.

Mandamus may not be denied to stockholder who seeks information for legitimate purposes. Guthrie v. Harkness, 199 U. S. 148, 50 L. Ed. 130, 4 Ann. Cas. 433.

⁴⁶ State v. Pacific Brewing & Malt-ing Co., 21 Wash. 451, 47 L. R. A. 208, 58 Pac. 584.

stockholders, it frequently resulted in their being deprived of their lawful rights.⁴⁷

At the present time there is an unmistakable tendency on the part of the courts to disregard the purpose of the stockholder in seeking inspection, and to hold, in accordance with the statutory provisions on the subject, that the right of the stockholder to inspect the corporate books is absolute.⁴⁸

In some of the earlier decisions it has been stated that if the right of inspection exists, whether under statute or at common law, the purpose of the exercise of such right is immaterial.⁴⁹ Such decisions are contrary to the weight of authority of the earlier cases,⁵⁰ and as is pointed out in the later cases there is a well-recognized distinction between the right to inspect under the common law and that given by statute.⁵¹

§ 2815. Effect of statutes as to inspection. The most common statutory provision gives the broad right to examine books, records and papers at reasonable times. It is as to the effect of such a provision that the conflict of authority arises.⁵²

It is held by some courts that such enactments confer an absolute right of inspection and do not operate as a mere affirmation of the common-law rule,⁵³ and the right of inspection is without qualification

⁴⁷ *Schmidt v. Anderson*, 29 N. D. 262, 150 N. W. 871.

⁴⁸ See § 2815, *infra*.

⁴⁹ See *State v. Laughlin*, 53 Mo. App. 542.

⁵⁰ See cases cited this section, *infra*.

⁵¹ *Venner v. Chicago City R. Co.*, 246 Ill. 170, 138 Am. St. Rep. 229, 20 Ann. Cas. 607, 92 N. E. 643.

⁵² *White v. Manter*, 109 Me. 408, 42 L. R. A. (N. S.) 332, 84 Atl. 890; *State v. Doe Run Lead Co.* (Mo. App.), 178 S. W. 298.

⁵³ *White v. Manter*, 109 Me. 408, 42 L. R. A. (N. S.) 332, 84 Atl. 890; *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 48 L. R. A. 732, 78 Am. St. Rep. 707, 56 N. E. 1033; *Kimball v. Dern*, 39 Utah 181, 35 L. R. A. (N. S.) 134, Ann. Cas. 1913 E 166, 116 Pac. 28; *Clawson v. Clayton*, 33 Utah 266, 93 Pac. 729.

The statute (Missouri Rev. St. 1909, § 3349) gives a right which is ordinarily regarded as absolute. *State v. Doe Run Lead Co.* (Mo. App.), 178 S. W. 298.

The language of Mass. St. 1903, c. 437, § 30, and the history of the legislation on the subject indicate that the stockholder's right to know the names, addresses and extent of interest of his associates in the common enterprise, who, with him, must elect directors to manage the business of the company, is an absolute right. *Powelson v. Tennessee Eastern Elec. Co.*, 220 Mass. 380, Ann. Cas. 1917 A 102, 107 N. E. 997.

The common-law right of inspection is by statute (Pub. Acts 1911, c. 215, § 1) made absolute. *State v. Middlesex Banking Co.*, 87 Conn. 483, 88 Atl. 861.

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except that it be made at reasonable hours.⁵⁴ Following this reasoning, it is held that the motive or purpose of the stockholder in seeking to exercise the right of inspection is immaterial, and is not the proper subject of judicial inquiry.⁵⁵ This is the rule sustained by the great weight of American authority⁵⁶ and is in accordance with the prevailing modern tendency, referred to in some decisions, to give the widest publicity among stockholders, concerning corporate affairs.⁵⁷

⁵⁴ *Clawson v. Clayton*, 33 Utah 266, 93 Pac. 729. See also *State v. Doe Run Lead Co.* (Mo. App.), 178 S. W. 298.

⁵⁵ *California*. *Johnson v. Langdon*, 135 Cal. 624, 87 Am. St. Rep. 156, 67 Pac. 1050.

Illinois. *Venner v. Chicago City R. Co.*, 246 Ill. 170, 138 Am. St. Rep. 229, 20 Ann. Cas. 607, 92 N. E. 643; *Maremont v. Old Colony Life Ins. Co.*, 189 Ill. App. 231; *Laughlin v. Chicago Ry. Equipment Co.*, 185 Ill. App. 132; *Baumrucker v. Jones*, 172 Ill. App. 188; *Pease v. Chicago Crayon Co.*, 167 Ill. App. 31.

Maine. *Withington v. Bradley*, 111 Me. 384, 89 Atl. 201; *White v. Manter*, 109 Me. 408, 42 L. R. A. (N. S.) 332, 84 Atl. 890.

Massachusetts. *Powelson v. Tennessee Eastern Elec. Co.*, 220 Mass. 380, Ann. Cas. 1917 A 102, 107 N. E. 997.

New Hampshire. *Hub Const. Co. v. New England Breeders' Club*, 74 N. H. 282, 67 Atl. 574.

New York. *Henry v. Babcock & Wilcox Co.*, 196 N. Y. 302, 134 Am. St. Rep. 835, 89 N. E. 942.

Ohio. *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 48 L. R. A. 732, 78 Am. St. Rep. 707, 56 N. E. 1033.

Wisconsin. *State v. Bergenthal*, 72 Wis. 314, 39 N. W. 566.

The clear legal right to inspect books and records given by the statute (California Civ. Code, § 377; Pen. Code, § 565) cannot be affected by the fact that the stockholder desires in-

spection for improper motives. *Poor v. Yarnell*, 28 Cal. App. 714, 153 Pac. 976.

Under the statute (Pub. Acts 1911, c. 215, § 1) it is the manifest intention that a stockholder seeking information from the books should be relieved of the burden of first showing a satisfactory reason and proper purpose. *State v. Middlesex Banking Co.*, 87 Conn. 483, 88 Atl. 861.

Under U. S. Rev. St. § 5210, as to inspection of stockholders' lists by shareholders of national banks, the motive for wishing to inspect the list is immaterial. *Murray v. Walker*, 156 Ky. 536, Ann. Cas. 1915 C 363, 161 S. W. 512. See also *Foster v. White*, 86 Ala. 467, 6 So. 88.

⁵⁶ *Venner v. Chicago City R. Co.*, 246 Ill. 170, 138 Am. St. Rep. 229, 20 Ann. Cas. 607, 92 N. E. 643; *Maremont v. Old Colony Life Ins. Co.*, 189 Ill. App. 231; *Laughlin v. Chicago Ry. Equipment Co.*, 185 Ill. App. 132; *Hub Const. Co. v. New England Breeders' Club*, 74 N. H. 282, 67 Atl. 574; *Schmidt v. Anderson*, 29 N. D. 262, 150 N. W. 871.

⁵⁷ See *Maremont v. Old Colony Life Ins. Co.*, 189 Ill. App. 231.

The tendency of the modern decisions is to hold that a stockholder, as such, has a right to inspect the books and other documents of the corporation, where his sole object is to inform himself as to the manner in which the business of the corporation is being conducted. *State v. Pacific Brewing & Malting Co.*, 21 Wash. 451, 47 L. R. A. 208, 58 Pac. 584.

It is probably the better rule,⁵⁸ and is sustained by convincing argument.⁵⁹

The decisions show that various pretexts have been put forward by officers of corporations for refusing to let a shareholder inspect the books, and in almost every instance these reasons have been held insufficient to justify a refusal. Among the excuses resorted to, were that the shareholder intended to use the information he might obtain to harass the company of its officers with lawsuits, or to compel a purchase of his stock, or to annoy other shareholders.⁶⁰

In accordance with the foregoing rule some decisions seem to hold that nothing is left to the discretion of the court, and if the stockholder seeks to enforce his right, mandamus must issue as a matter of course.⁶¹

If a mandatory statute is enacted, it is immaterial for what purpose the information is desired, or whether the demand of the stockholder is in good faith,⁶² although courts will not lend their aid to parties

⁵⁸ Interests will be better protected by holding that a stockholder of a corporation has the right, at reasonable times, to inspect and examine the books and records of the corporation, as long as his purpose is to inform himself as to the manner and fidelity with which the corporate affairs are being conducted and his examination is made in the interests of the corporation. *State v. Pacific Brewing & Malting Co.*, 21 Wash. 451, 47 L. R. A. 208, 58 Pac. 584.

⁵⁹ The argument that managers of a rival concern may acquire stock in the corporation and use the privilege for the purpose of benefiting the rival concern, to the detriment of the corporation, is not more forceful than the other, that, under the restricted rule, a combination can be made by persons holding the majority of the stock, by which the corporation is managed for their own interests, to the exclusion and detriment of the minority holders and injury to the public dealing with it. *State v. Pacific Brewing & Malting Co.*, 21 Wash. 451, 47 L. R. A. 208, 58 Pac. 584.

⁶⁰ See *State v. Lazarus*, 127 Mo.

App. 401, 105 S. W. 780. See also *infra*, this section.

⁶¹ *Venner v. Chicago City R. Co.*, 246 Ill. 170, 138 Am. St. Rep. 229, 20 Ann. Cas. 607, 92 N. E. 643; *Ellsworth v. Dorwart*, 95 Iowa 108, 58 Am. St. Rep. 427, 63 N. W. 588; *In re Steinway*, 159 N. Y. 250, 45 L. R. A. 461, 53 N. E. 1103.

Where a suitor demands the enforcement of a clear legal right, whether the remedy be legal or equitable, his motive for such action is not a proper subject for judicial investigation. *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 48 L. R. A. 732, 78 Am. St. Rep. 707, 56 N. E. 1033.

A clear legal right given by a statute cannot be defeated by showing an improper motive. If this were so the stockholder would be driven from a certain definite right given him by the statute to the realm of uncertainty and speculation. *Venner v. Chicago City R. Co.*, 246 Ill. 170, 138 Am. St. Rep. 229, 20 Ann. Cas. 607, 92 N. E. 643.

⁶² *State v. Monida & Y. Stage Co.*, 110 Minn. 193, 125 N. W. 676, 124 N.

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seeking to perpetrate a crime when it is clear that they are endeavoring to make use of the examination to aid them in so doing.⁶³

Other decisions in speaking of the absolute statutory right carefully refer to the right and not to the remedy⁶⁴ and usually such decisions qualify the absolute right of inspection by referring to the discretion of the court and its power to refuse inspection when desired for some evil, improper or unlawful purpose.⁶⁵

In some well-considered opinions it is held that the statutory right is subject to the express limitation that it shall be exercised at reasonable and proper times,⁶⁶ and in addition is subject to the implied limitation that it shall not be exercised for a merely vexatious or unlawful purpose, nor for idle curiosity.⁶⁷ Such decisions have been criticised

W. 971; *Schmidt v. Anderson*, 29 N. D. 262, 150 N. W. 871.

Where the right to inspect books is conferred by statute in absolute terms, the purpose or motive of the stockholder in connection with the demand for an inspection is not material and he cannot be required to state his reasons therefor. *Venner v. Chicago City R. Co.*, 246 Ill. 170, 138 Am. St. Rep. 229, 20 Ann. Cas. 607, 92 N. E. 643.

Court cannot read into plain statute qualifications destroying its meaning. *Schmidt v. Anderson*, 29 N. D. 262, 150 N. W. 871.

⁶³ *Schmidt v. Anderson*, 29 N. D. 262, 150 N. W. 871.

Evidence held to show that stockholders sought examination for lawful and proper purpose. *Schmidt v. Anderson*, 29 N. D. 262, 150 N. W. 871.

⁶⁴ *Withington v. Bradley*, 111 Me. 384, 89 Atl. 201; *White v. Manter*, 109 Me. 408, 42 L. R. A. (N. S.) 332, 84 Atl. 890.

While the motive or purpose of a stockholder in seeking inspection is, under the statute, immaterial, the courts are not agreed that it is compulsory to enforce the right by mandamus, the latter being a discretionary writ. *White v. Manter*, 109 Me. 408, 42 L. R. A. (N. S.) 332, 84 Atl. 890.

⁶⁵ *Wight v. Heublein*, 111 Md. 649, 75 Atl. 507; *Weißenmayer v. Bitner*, 88 Md. 325, 45 L. R. A. 446, 42 Atl. 245.

The enactment of a statute authorizing the inspection of corporate books does not render it compulsory upon the court to enforce the stockholder's right by granting mandamus, the writ being discretionary. *Eaton v. Manter*, 114 Me. 259, 95 Atl. 948.

⁶⁶ *Foster v. White*, 86 Ala. 467, 6 So. 88; *Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222, aff'g 62 Ill. App. 444.

⁶⁷ *Winter v. Baldwin*, 89 Ala. 483, 7 So. 734; *Foster v. White*, 86 Ala. 467, 6 So. 88; *Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222, aff'g 62 Ill. App. 444; *Meysenburg v. People*, 88 Ill. App. 328; *Weißenmayer v. Bitner*, 88 Md. 325, 45 L. R. A. 446, 42 Atl. 245; *State v. National Biscuit Co.*, 69 N. J. L. 198, 54 Atl. 241. See also *Eaton v. Manter*, 114 Me. 259, 95 Atl. 948; *State v. Doe Run Lead Co.* (Mo. App.), 178 S. W. 298.

The right given by statute (R. L. 1905, § 2869) is not absolute and may be refused when the information is not sought in good faith, or is to be used to the detriment of the corporation. *State v. Monida & Y. Stage Co.*, 110 Minn. 193, 125 N. W. 676, 124 N. W. 971.

by the courts of other states,⁶⁸ and in Illinois, at least, a conflict in the decisions has arisen because of the later holding, already referred to, to the effect that the right of the stockholder is absolute and his purpose immaterial.⁶⁹ In one case it was contended that the decisions might be harmonized by recognizing a distinction between a mere improper motive and an unlawful purpose,⁷⁰ but later in another decision in the Appellate Court, the tendency in favor of making the right absolute was referred to.⁷¹

"The only express limitation is that the right shall be exercised at reasonable and proper times. The implied limitation is that it shall not be exercised for improper or unlawful purposes." *Meysenburg v. People*, 88 Ill. App. 328.

In an Alabama case it was said: "The statute was enacted in view of the restrictions and limitations placed by the common law upon the exercise of the right; and the purpose is to protect small and minority stockholders against the power of the majority, and against the mismanagement and faithlessness of agents and officers, by furnishing mode and opportunity to ascertain, establish and maintain their rights, and to intelligently perform their corporate duties. * * * The only express limitation is, that the right shall be exercised at reasonable and proper times; the implied limitation is, that it shall not be exercised from idle curiosity, or for improper or unlawful purposes. In all other respects, the statutory right is absolute. The shareholder is not required to show any reason or occasion rendering an examination opportune and proper, or a definite or legitimate purpose. The custodian of the books and papers cannot question or inquire into his motives and purposes. If he has reason to believe that they are improper or illegitimate, and refuses the inspection on this ground, he assumes the burden to

prove them such. If it be said, this construction of the statute places it in the power of a single shareholder to greatly injure and impede the business, the answer is, the legislature regarded his interests in the successful promotion of the objects of the corporation a sufficient protection against unnecessary or injurious interference. The statute is founded on the principle, that the shareholders have a right to be fully informed as to the condition of the corporation, the manner in which its affairs are conducted, and how the capital, to which they have contributed, is employed and managed." *Foster v. White*, 86 Ala. 467, 6 So. 88.

⁶⁸ See *State v. Bucklin*, 83 Wash. 23, L. R. A. 1915 D 285, 145 Pac. 58, where the court pointed out that the Alabama and Maryland courts might possibly have had in mind an inspection by a stockholder with a view of obtaining some trade secret, or where the motive of the stockholder was to get temporary possession of a record for the purpose of mutilation or theft or some equally unlawful purpose.

⁶⁹ *Venner v. Chicago City R. Co.*, 246 Ill. 170, 138 Am. St. Rep. 229, 20 Ann. Cas. 607, 92 N. E. 643.

⁷⁰ See *Laughlin v. Chicago Ry. Equipment Co.*, 185 Ill. App. 132.

⁷¹ *Maremont v. Old Colony Life Ins. Co.*, 189 Ill. App. 231.

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§ 2816. Effect of by-law provisions. Under a by-law providing that books and papers shall be opened at all times during business hours to inspection, the common-law rule as to the necessity of alleging or proving the purpose for which examination is sought is changed,⁷² and if the object of the examination sought is mere idle curiosity or an illegitimate purpose, that is a matter of defense.⁷³

§ 2817. Relation between inspection and interest of stockholder. At common law it was essential that the purpose of a stockholder in seeking inspection should relate to his interest as such stockholder.⁷⁴

In the leading English case on the subject it was held that the stockholder must show some specific purpose rendering examination necessary, and that while it was not essential that there be an actual suit instituted, it was necessary that some controversy or matter in dispute be involved.⁷⁵

⁷² *Wyoming Coal Min. Co. v. State*, 15 Wyo. 97, 123 Am. St. Rep. 1014, 87 Pac. 337, 984.

As to by-laws regulating inspection, see § 519.

⁷³ *Wyoming Coal Min. Co. v. State*, 15 Wyo. 97, 123 Am. St. Rep. 1014, 87 Pac. 337, 984.

⁷⁴ *Illinois*. As to cases stating rule, see *Venner v. Chicago City R. Co.*, 246 Ill. 170, 138 Am. St. Rep. 229, 20 Ann. Cas. 607, 92 N. E. 643; *Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222, aff'g 62 Ill. App. 444.

Maine. *Withington v. Bradley*, 111 Me. 384, 89 Atl. 201; *White v. Manter*, 109 Me. 408, 42 L. R. A. (N. S.) 332, 84 Atl. 890.

Missouri. See *State v. Doe Run Lead Co.* (Mo. App.), 178 S. W. 298; *State v. German Mut. Life Ins. Co.*, 169 Mo. App. 354, 152 S. W. 618.

New York. *Taylor v. Citizens' Nat. Bank of Saratoga Springs*, 117 App. Div. 348, 101 N. Y. Supp. 1039; *Latimer v. Herzog Teleseme Co.*, 75 App. Div. 522, 78 N. Y. Supp. 314, 12 N. Y. Ann. Cas. 9.

Pennsylvania. *Com. v. Empire Passenger Ry. Co.*, 134 Pa. St. 237, 19

Atl. 629; *Com. v. Phoenix Iron Co.*, 105 Pa. St. 111, 51 Am. Rep. 184.

⁷⁵ "In the early case of *Rex v. Master and Wardens of the Merchant Tailors' Company*, 2 Barn. & Adol. 115, this question received consideration by the court of the King's Bench in England, on which the several judges expressed opinions. The rule to show cause why a writ of mandamus should not issue was obtained upon the affidavits of certain liverymen and freemen of the company, who alleged, among other things, that the attention of the deponents had for a considerable time been called to the affairs of the company by reports, which they believed to be well founded, that the revenues of the company were misemployed through malpractices on the part of those members who had the management of the company's affairs; that the fine for admitting freemen to the livery had been recently twice raised, without any corresponding increase, as deponents were informed and believed, in the pensions and charitable disbursements of the company; that a lavish expense had taken place, unsanctioned by the majority of the

There is some difficulty in determining whether this doctrine of the English courts has ever been adopted in this country. Some decisions of the courts of last resort would seem to indicate such adoption,⁷⁶

members of the company; that a clerk of the company had, as deponents had heard and believed, misappropriated funds of the company to a large amount, but that no accounts or information had been laid before the freemen by which they could learn the amount of such defalcation, nor could they ascertain, unless allowed to look at their charters, by-laws, books, muniments, and documents, whether such their common funds were properly applied and accounted for or not; that they had no other wish in desiring the inspection of the books than to see, on behalf of a body of the members, by whom they were authorized, how their joint funds were disbursed, and that the legal rights and privileges of the members were enjoyed agreeably to their charters. On motion to discharge the rule, the judges were unanimous in their opinion that no sufficient cause was shown to warrant the court in issuing the writ. It was held that before the writ could issue some distinct cause or purpose affecting the applicant personally must be shown, and that a desire to examine the books for the purpose of ascertaining whether the company's affairs were being properly managed was not sufficient cause. Passing upon the motion, Littledale, J., said: 'The master and wardens, who have the care of the documents in question, are bound to produce them if a proper occasion is made out, in a matter affecting the members of the corporation. But I think the members have no right on speculative grounds to call for an examination of the books and muniments, in order to see if by possibility the company's affairs may be better administered than they think they are

at present. If they have any complaint to make, some suit should be instituted, some definite matter charged; and then the question will arise whether or not the court will grant a mandamus.' Taunton, J., said: 'There is no express rule that to warrant an application to inspect corporation documents there must actually have been a suit instituted; but it is necessary that there should be some particular matter in dispute, between members, or between the corporation and individuals in it; there must be some controversy, some specific purpose in respect of which the examination becomes necessary.' Patteson, J., said: 'I am far from saying that there may not be particular instances in which a corporator may apply for a mandamus to inspect documents, or some of them, of the kind here mentioned, if he can show a specific ground of application, and that the granting of it is necessary to prevent his suffering injury, or to enable him to perform his duties. But he must state a definite object; and here that is not done.''' *State v. Pacific Brewing & Malting Co.*, 21 Wash. 451, 47 L. R. A. 208, 58 Pac. 584. See also *Varney v. Baker*, 194 Mass. 239, 10 Ann. Cas. 989, 80 N. E. 524; *Kimball v. Dern*, 39 Utah 181, 35 L. R. A. (N. S.) 134, Ann. Cas. 1913 E 166, 116 Pac. 28.

⁷⁶ See *Com. v. Phoenix Iron Co.*, 105 Pa. St. 111, 51 Am. Rep. 184; *Lyon v. American Screw Co.*, 16 R. I. 472, 17 Atl. 61.

On petition for a writ of mandamus by the holders of four shares of a large corporation, to allow them to inspect the stock ledger of the company, it was held that, to show a right to the writ, they must show

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while, on the other hand, there is dictum to a contrary effect,⁷⁷ and in some cases the rule has been expressly repudiated.⁷⁸ At any rate, the injustice of the common-law rule when applied in all its strictness was keenly felt, which was probably one of the reasons why statutes were enacted making the right absolute.⁷⁹ The general rule prevailing in this country is that it is not necessary that there should be any particular dispute to entitle the stockholder to exercise the right. Nothing more is required than that, acting in good faith for the protection of the interests of the corporation and his own interests, he desires to ascertain the condition of the company's business.⁸⁰

"Such a right," said the New Jersey court, "is necessary to their protection. To say that they have the right, but that it can be enforced only when they have ascertained, in some way without the books, that their affairs have been mismanaged, or that their interests are in danger, is practically to deny the right in the majority of cases. Oftentimes frauds are discoverable only by examination of the books by an expert accountant."⁸¹

There are some decisions where the court has attached to the statutory guaranty the common-law limitation referred to,⁸² but such a

some controversy pending, or some question at issue, as to which the contents of the books were of consequence, and that it was not enough to show an expectation of benefit from knowing the contents. *Lyon v. American Screw Co.*, 16 R. I. 472, 17 Atl. 61.

⁷⁷ "The doctrine has not been adopted in America, the cases which go furthest in that direction holding that a dispute as to the alleged mismanagement of the corporation is enough to entitle the stockholder to an examination of the accounts to see whether there is ground for an action." *Varney v. Baker*, 194 Mass. 239, 10 Ann. Cas. 989, 80 N. E. 524.

⁷⁸ *Foster v. White*, 86 Ala. 467, 6 So. 88.

⁷⁹ *State v. Pacific Brewing & Malting Co.*, 21 Wash. 451, 47 L. R. A. 208, 58 Pac. 584.

The English rule has been modified by statute. See St. 8 & 9 Vict. c. 16, §§ 117, 119, and St. 25 & 26 Vict. c. 89, Table A 78.

⁸⁰ *United States. Guthrie v. Harkness*, 199 U. S. 148, 50 L. Ed. 130, 4 Ann. Cas. 433.

Massachusetts. Varney v. Baker, 194 Mass. 239, 10 Ann. Cas. 989, 80 N. E. 524.

New Jersey. Huylar v. Cragin Cattle Co., 40 N. J. Eq. 392, 2 Atl. 274.

New York. In re Steinway, 159 N. Y. 250, 45 L. R. A. 461, 53 N. E. 1103.

Pennsylvania. Hodder v. George Hogg Co., 223 Pa. 196, 72 Atl. 553.

Washington. State v. Pacific Brewing & Malting Co., 21 Wash. 451, 47 L. R. A. 208, 58 Pac. 584.

⁸¹ *Huylar v. Cragin Cattle Co.*, 40 N. J. Eq. 392, 2 Atl. 274.

⁸² *O'Hara v. National Biscuit Co.*, 69 N. J. L. 198, 54 Atl. 241.

Gen. Corp. Act, § 33 (Pamph. 1898, p. 409), as to inspection of books, gives right to "stockholders," and such term not only defines class upon which right is conferred but states class by which right is to be enjoyed, namely that it must be in respect to

rule is contrary to the great weight of authority,⁸³ and under the statutory provisions, it is usually held that a stockholder is not confined to an object relating to his interest.⁸⁴ The effect of the common-law rule may, however, be noticed in some of the earlier decisions where the right of inspection has been denied when sought for the benefit of the stockholder in his own private suit against certain individuals⁸⁵ or where the granting of extensive relief has been held improper on the ground that no laudable object was shown by the stockholder.⁸⁶

§ 2818. Investigation of corporate affairs—In general. The right of inspection is not to be denied on the ground that the stockholder is on unfriendly terms with the officers of the company whose records are sought to be inspected.⁸⁷

Stockholders are entitled to full information as to the management

relator's interests as a stockholder, or be germane to his status as such. *O'Hara v. National Biscuit Co.*, 69 N. J. L. 198, 54 Atl. 241.

⁸³ *White v. Manter*, 109 Me. 408, 42 L. R. A. (N. S.) 332, 84 Atl. 890.

⁸⁴ Under the statute (Maine Rev. St. c. 47, § 20), the purpose of a stockholder in seeking inspection is not confined to his interest as a stockholder. *White v. Manter*, 109 Me. 408, 42 L. R. A. (N. S.) 332, 84 Atl. 890.

⁸⁵ Where a stockholder seeks an information to aid him in a suit for deceit against certain directors, the writ will be denied, since the information is sought not as a stockholder but as plaintiff in a suit against individuals. *Taylor v. Citizens' Nat. Bank of Saratoga Springs*, 117 N. Y. App. Div. 348, 101 N. Y. Supp. 1039.

⁸⁶ Where a stockholder occupied such position for six years and desired examination of the minutes of stockholders' meetings for twelve years, together with other books to ascertain if the business had been properly conducted, the writ was improperly granted as the stockholder without any laudable object was accorded most extensive relief. *Colwell v. Colwell*

Lead Co., 76 N. Y. App. Div. 615, 78 N. Y. Supp. 607.

Such a drastic remedy should never be granted except in emergency or for a necessary purpose and should be limited by some regard for the interests of the other stockholders and of the corporation. *Colwell v. Colwell Lead Co.*, 76 N. Y. App. Div. 615, 78 N. Y. Supp. 607.

⁸⁷ *Cobb v. Lagarde & Sons*, 129 Ala. 488, 30 So. 326; *Ellsworth v. Dorwart*, 95 Iowa 108, 58 Am. St. Rep. 427, 63 N. W. 588; *State v. German Mut. Life Ins. Co.*, 169 Mo. App. 354, 152 S. W. 618; *In re Hastings*, 128 N. Y. App. Div. 516, 112 N. Y. Supp. 800; *In re O'Neill*, 47 N. Y. Misc. 495, 95 N. Y. Supp. 964.

On the petition of a stockholder for a writ of mandamus to enforce his statutory right to inspect the books of a corporation, it was held that an answer setting forth that the relator cherished animosity towards the company's president, and had threatened to injure the business of the company by disclosing its business secrets to customers and business rivals, showed no ground for denying the writ. *Meysenburg v. People*, 88 Ill. App. 328.

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of the corporation and the manner of expenditure of its funds,⁸⁸ especially in a case of mismanagement.⁸⁹

The lapse of a considerable period of time is an indication that the stockholder is entitled to inspection,⁹⁰ and where a petitioner shows that he is a stockholder and is unable to secure information as to the financial standing of company and its method of conducting its business, a *prima facie* case of good faith is presented.⁹¹

The fact that the stockholder seeking to inspect the books is an officer and stockholder in an illegal monopoly does not deprive him of his rights.⁹²

§ 2819. — For purpose of suit by stockholder. This right of a stockholder to inspect the books is not affected by the fact that the object may be to commence an action against the majority stockholders, the officers or the corporation to correct abuses.⁹³

⁸⁸ *Klotz v. Pan-American Match Co.*, 221 Mass. 38, 108 N. E. 764.

Thus a stockholder is entitled to information as to the management of the corporation and the manner of the expenditure of funds on property of the sister of the president. *People v. Ludwig & Co.*, 126 N. Y. App. Div. 696, 111 N. Y. Supp. 94.

⁸⁹ *Powelson v. Tennessee Eastern Elec. Co.*, 220 Mass. 380, Ann. Cas. 1917 A 102, 107 N. E. 997.

When a stockholder furnishes data warranting a conclusion of mismanagement and that the affairs of the company are not conducted in a proper manner and in the interest of the stockholders, he has the right to demand an examination of the books, records and accounts so that he may protect his interests. *Kuhbach v. Irving Cut Glass Co.*, 220 Pa. 427, 28 L. E. A. (N. S.) 185, 69 Atl. 981.

The fact that a stockholder is for some reason dissatisfied with the conduct of the business of the corporation will not prevent enforcement of the right of inspection. *Butler v. Martin*, 220 Mass. 224, 107 N. E. 999.

⁹⁰ Where the relator had not had access to the books for about two

years, the demand is not such as clearly to show abuse of the statutory right. *State v. Doe Run Lead Co.* (Mo. App.), 178 S. W. 298.

A petitioner is entitled to inspection where no proper report had been made by the corporation from the commencement of its existence, a period of about three years, and the petitioner had been unable to ascertain the condition of the company. In re O'Neill, 47 N. Y. Misc. 495, 95 N. Y. Supp. 964.

⁹¹ *State v. Monida & Y. Stage Co.*, 110 Minn. 193, 125 N. W. 676, 124 N. W. 971.

⁹² *State v. Lazarus*, 127 Mo. App. 401, 105 S. W. 780.

⁹³ A stockholder who has been refused access to the books, papers and records of a corporation may obtain inspection by mandamus, though his purpose is to prepare and file a bill in equity to obtain relief against abuses. *Rochester v. Indiana County Gas Co.*, 246 Pa. 571, 92 Atl. 717.

An averment of intention to file a bill in equity to restrain the officers from mismanagement and of the need of information to that end is sufficient for granting mandamus. *Hodder*

Where the statute is mandatory, it is immaterial that the stockholder desires to get information on which to predicate litigation which he may desire to institute against the company.⁹⁴

The indiscreet action of a stockholder in furnishing an account of his litigation to a newspaper does not deprive him of his rights.⁹⁵

Usually, stockholders are entitled to inspection, where the information is necessary for the prosecution of a private lawsuit,⁹⁶ and it has been held that such a purpose is not vexatious, improper or unlawful.⁹⁷

§ 2820. Ascertainment of value of stock. A stockholder who desires to ascertain the value of his stock is entitled to inspection,⁹⁸

v. George Hogg Co., 223 Pa. 196, 72 Atl. 553.

The fact that the inspection sought by a director may disclose a right of action in him against the corporation or some of its agents does not preclude the right of inspection. *State v. Ice*, 75 W. Va. 476, 84 S. E. 181.

The right of inspection cannot be denied when the purpose of a stockholder is to enforce a claim against the corporation itself. *White v. Manner*, 109 Me. 408, 42 L. R. A. (N. S.) 332, 84 Atl. 890.

Where a stockholder alleges that bonds were redeemed by the company for more than market value at the time of redemption, he is entitled to a writ so that the corporation or stockholder may proceed against the directors for wrongs. *Hitchcock v. Union Ferry Co. of New York & Brooklyn*, 157 N. Y. App. Div. 328, 142 N. Y. Supp. 247.

⁹⁴*Schmidt v. Anderson*, 29 N. D. 262, 150 N. W. 871.

⁹⁵*People v. Ludwig & Co.*, 126 N. Y. App. Div. 696, 111 N. Y. Supp. 94.

⁹⁶Where a stockholder desires to examine the books and documents of a bank to ascertain the losses suffered by the bank in certain dealings, and to determine the existence and contents of certain named documents, the same being necessary as primary evidence in a lawsuit, the purpose of the demand is legitimate and proper.

Woodworth v. Old Second Nat. Bank, 154 Mich. 459, 118 N. W. 581, 117 N. W. 893, 15 Det. L. N. 773.

But where a stockholder has commenced an action of deceit against a person who is president of the corporation, and seeks examination of books to ascertain whether defendant in his action of deceit told the truth or not, the rights of the stockholder are not affected, and the inspection is sought for improper purpose. *Schondelmeyer v. Columbia Fireproofing Co.*, 219 Pa. 610, 69 Atl. 49. And see *In re De Vengoechea*, 86 N. J. L. 35, 91 Atl. 314; *Taylor v. Citizens' Nat. Bank of Saratoga Springs*, 117 N. Y. App. Div. 348, 101 N. Y. Supp. 1039.

⁹⁷Where a petitioner alleged that the purpose in inspecting the records was to judge the value of the stock, and defendant contended that petitioner's real purpose was to find out the stock owned by former husband, so that information might be obtained on a petition for alimony, and similar facts, the court would not hold that under the broad right given by the statute the purpose was vexatious, improper or unlawful. *White v. Manner*, 109 Me. 408, 42 L. R. A. (N. S.) 332, 84 Atl. 890.

⁹⁸*State v. Jessup & Moore Paper Co.*, 27 Del. 248, 88 Atl. 449, 24 Del. 379, 77 Atl. 16; *Lawshe v. Royal Baking Powder Co.*, 54 N. Y. Misc. 220,

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and a demand for inspection for such purpose is not improper.⁹⁹

The fact that a stockholder fails to vote at a stockholders' meeting does not suggest bad faith in seeking information as to the value of his stock.¹

§ 2821. Inspection of by-laws and minutes. An application for inspection of the by-laws rests on a different footing than inspection of books and papers. The by-laws constitute a part of the contract between the stockholder and corporation and are binding upon both, and it must be a strong case which would prevent a stockholder from an opportunity to examine the by-laws so that he may be informed as to the terms of the contract into which he has entered.² And some decisions indicate a tendency to take the same view of the stockholder's right to examine the minutes of the corporation,³ although there are decisions to the contrary.⁴

§ 2822. Improper or unlawful purposes. The right of inspection will not be enforced for the gratification of mere idle curiosity or for speculative purposes or for purposes hostile to the interests of the corporation⁵ and if it appears that the right of inspection is not sought

104 N. Y. Supp. 361; *Neubert v. Armstrong Water Co.*, 211 Pa. 582, 61 Atl. 123.

⁹⁹ A demand for inspection is apparently in good faith and for the purpose of obtaining information to which a stockholder is entitled, where the applicant states that he desires to sell his stock, and has offered to sell it to other stockholders, and seeks information so that he may determine value and further offer it for sale. *Garcin v. Trenton Rubber Mfg. Co.* (N. J. L.), 60 Atl. 1098.

A proper purpose for the examination of the books is shown where the stockholders alleged that other stockholders in control of the corporation had tried to compel them to sell their stock at less than its value and had refused information whereby the minority stockholders could determine the value of their stock. *Neubert v. Armstrong Water Co.*, 211 Pa. 582, 61 Atl. 123.

¹ *State v. Jessup & Moore Paper Co.*, 27 Del. 248, 88 Atl. 449.

² *In re Coats*, 75 N. Y. App. Div. 567, 78 N. Y. Supp. 429.

³ Officers ought not to deny to stockholders an opportunity, properly applied for, to examine the minutes. *Streit v. Citizens Fire Ins. Co.*, 29 N. J. Eq. 21. And see *Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222, aff'g 62 Ill. App. 444.

⁴ *Reg. v. Mariquita & N. G. Min. Co.*, 1 E. & E. 289; *Birmingham, etc., Ry. Co. v. White*, 1 Q. B. 282. See also *Colwell v. Colwell Lead Co.*, 76 N. Y. App. Div. 615, 78 N. Y. Supp. 607, where right to examine books and minutes was denied, and *Alabama, etc., R. Co. v. Rowley*, 9 Fla. 508.

⁵ *United States. Guthrie v. Harkness*, 199 U. S. 148, 50 L. Ed. 130, 4 Ann. Cas. 433.

Alabama. Foster v. White, 86 Ala. 467, 6 So. 88.

In stating the foregoing general rule thus broadly, due regard must be had to the effect of statutory provisions on the subject, as well as to the tendency of the courts to make the right of inspection absolute.

Under the later decisions, there is also a distinction with respect to an improper purpose, and an unlawful purpose, and the right of inspection will be refused where the purpose is such as levying blackmail,¹³ or effecting some crime.¹⁴

Inspection will not be allowed where information is to be obtained and furnished to a competing company,¹⁵ but the mere fact that a stockholder is interested in a rival business concern does not justify refusal of the right.¹⁶

In view of the well-known fact that men are often shareholders in different companies, and even officers of the different companies,

tion on that ground, it assumes the burden to prove such improper or illegitimate purpose. *Pease v. Chicago Crayon Co.*, 167 Ill. App. 31.

¹³*Pepple v. Chicago City Ry. Co.*, 183 Ill. App. 283.

¹⁴*Schmidt v. Anderson*, 29 N. D. 262, 150 N. W. 871. See also *State v. Lazarus*, 127 Mo. App. 401, 105 S. W. 780.

¹⁵*Meysenburg v. People*, 88 Ill. App. 328; *State v. German Mut. Life Ins. Co.*, 169 Mo. App. 354, 152 S. W. 618; *Bevier v. United States Wood Preserving Co. (N. J. L.)*, 69 Atl. 1008; *People v. Consolidated Fire Alarm Co.*, 142 N. Y. App. Div. 753, 127 N. Y. Supp. 348.

Mandamus will be denied where declared object of examination, sought by executors of deceased stockholder, is to enable the county treasurer to ascertain the value of the stock for taxation, since such information may be obtained by other means, it also appearing that the real object is to obtain information for benefit of business rival. *In re Kennedy*, 75 N. Y. App. Div. 188, 77 N. Y. Supp. 714.

A stockholder or director who uses a letter file for the benefit of a rival company is misusing his power and betraying his trust as a director.

Heminway v. Heminway, 58 Conn. 443, 19 Atl. 766.

¹⁶*Alabama. Cobb v. Lagarde*, 129 Ala. 488, 30 So. 326.

Illinois. Furst v. Rawleigh, 154 Ill. App. 522. See also *Laughlin v. Chicago Ry. Equipment Co.*, 185 Ill. App. 132.

Maine. White v. Manter, 109 Me. 408, 42 L. R. A. (N. S.) 332, 84 Atl. 890.

Maryland. Weißenmayer v. Bitner, 88 Md. 325, 45 L. R. A. 446, 42 Atl. 245.

Missouri. State v. German Mut. Life Ins. Co., 169 Mo. App. 354, 152 S. W. 618.

New York. People v. Ludwig & Co., 126 App. Div. 696, 111 N. Y. Supp. 94.

Pennsylvania. Hodder v. George Hogg Co., 223 Pa. 196, 72 Atl. 553; *Kuhbach v. Irving Cut Glass Co.*, 220 Pa. 427, 28 L. R. A. (N. S.) 185, 69 Atl. 981.

Washington. State v. Bucklin, 83 Wash. 23, L. R. A. 1915 D 285, 145 Pac. 58.

Where statute is mandatory it is immaterial that stockholder acts in interest of rival corporation. *Schmidt v. Anderson*, 29 N. D. 262, 150 N. W. 871.

manifestly it cannot be held good ground for refusing inspection of the records of a particular corporation, that the person who requests the privilege is a shareholder and officer in another company, even if the other be a competitor in business.¹⁷

To justify a refusal of the right of inspection on the ground that the information is to be furnished to a competing company, it must clearly appear that such is the case.¹⁸

§ 2823. Statement of purpose. In some of the earlier decisions it was held that where an application for inspection of books was made, and the motive of the stockholder was questioned, the applicant was bound to make his motive known, and, if he refused, an improper motive might be inferred.¹⁹ This is in accordance with the common-law rule, and, as has already been noted, frequently resulted in the officers sitting in trial on the motives of the stockholder who desired to inspect the books.²⁰ The effect of the statutes and the later decisions is to make the right of inspection absolute,²¹ and the decisions mentioned have been overruled, or are contrary to the great weight of authority.²²

It is not the province of the corporation or its officers to determine how much of the records and affairs of the company the stockholders may legitimately know; ²³ the officers have no right to assume that a

¹⁷ So the fact that the stockholder seeking the inspection is also an officer and stockholder in an illegal monopoly does not deprive him of his right of inspection. *State v. Lazarus*, 127 Mo. App. 401, 105 S. W. 780, in which case it was further held that the proof did not show that the inspection was sought to aid an enterprise carried on contrary to law.

¹⁸ An averment in general terms that respondents are advised that one of the purposes of the relator is to obtain knowledge for the purpose of communicating it to competing concerns, unsupported by any allegations of facts indicating the source of such information, the identity of the concerns or the relator's connection therewith, is too indefinite as defense. *State v. Ice*, 75 W. Va. 476, 84 S. E. 181.

¹⁹ *Henry v. Babcock & Wilcox Co.*, 125 N. Y. App. Div. 538, 109 N. Y.

Supp. 853. And see *State v. St. Louis Transit Co.*, 124 Mo. App. 111, 100 S. W. 1126, where a statement of purpose was held waived.

Directors are clearly entitled to assurance that the information sought is not for the purpose of injuring their business or building up a rival or competitive concern. *State v. Jessup & Moore Paper Co.*, 7 Pennw. (Del.) 397, 72 Atl. 1057.

²⁰ *Schmidt v. Anderson*, 29 N. D. 262, 150 N. W. 871.

See also § 2814, *supra*.

²¹ See § 2815, *supra*.

²² See *In re Steinway*, 159 N. Y. 250, 45 L. R. A. 461, 53 N. E. 1103, holding that the right of inspection is absolute.

²³ *Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222, *aff'd* 62 Ill. App. 444; *Clawson v. Clayton*, 33 Utah 266, 93 Pac. 729.

stockholder is acting under an improper purpose,²⁴ and they have no right to pass upon the motives of stockholders in seeking information.²⁵

III. CORPORATIONS SUBJECT TO RIGHT

§ 2824. **In general.** Under the Constitution of California the right of inspection is broadly conferred, but exceptions are made as to religious, educational and benevolent corporations.²⁶

In other states the right may be enforced against public, quasi public and private corporations.²⁷ But usually the statutes provide for the inspection of books of any private corporation.²⁸ And in accordance with the usual rule, members of an incorporated political organization have been held entitled to inspect the list of members, when the information was sought for a proper purpose.²⁹ In addition it has been held that books of a joint stock association are subject of inspection.³⁰ Also, there is no distinction in this country as to the right of inspection when the corporation does the banking business.³¹ The right of inspection of books of such a corporation exists at common law, and under the statutes.³² It has been said, however, that

²⁴ *Stone v. Kellogg*, 62 Ill. App. 444, *aff'd* 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222; *Clawson v. Clayton*, 33 Utah 266, 93 Pac. 729.

²⁵ *Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222, *aff'g* 62 Ill. App. 444; *Pease v. Chicago Crayon Co.*, 167 Ill. App. 31; *Clawson v. Clayton*, 33 Utah 266, 93 Pac. 729.

²⁶ California Const. art. 12, § 14. *Gavin v. Pacific Coast Marine Firemen's Union of San Francisco*, 2 Cal. App. 638, 84 Pac. 270.

²⁷ Thus under Wyoming Rev. St. 1899, § 4194, as to the remedy of mandamus commanding persons and corporation to perform duties, the word "corporation" is not restricted, but is a generic term and includes public, quasi public and private corporations. *Wyoming Coal Min. Co. v. State*, 15 Wyo. 97, 123 Am. St. Rep. 1014, 87 Pac. 337, 984.

Rev. St. c. 32, § 13, as to corporate books and records and provid-

ing for inspection applies to the Chicago City Railway Company. *Venner v. Chicago City R. Co.*, 246 Ill. 170, 138 Am. St. Rep. 229, 20 Ann. Cas. 607, 92 N. E. 643.

²⁸ See § 2811, *supra*.

²⁹ *McClintock v. Young Republicans of Philadelphia*, 210 Pa. 115, 68 L. B. A. 459, 105 Am. St. Rep. 784, 59 Atl. 691.

³⁰ *In re Hatt*, 57 N. Y. Misc. 320, 108 N. Y. Supp. 468.

³¹ *Guthrie v. Harkness*, 199 U. S. 148, 50 L. Ed. 130, 4 Ann. Cas. 433.

³² *Harkness v. Guthrie*, 27 Utah 248, 107 Am. St. Rep. 576, 1 Ann. Cas. 129, 75 Pac. 624.

U. S. Rev. St. §§ 5211, 5240, 5 Fed. St. Ann. pp. 152, 187, as to appointment of examiners to investigate national banks, do not deprive stockholders in such corporations of common-law right. *Guthrie v. Harkness*, 199 U. S. 148, 50 L. Ed. 130, 4 Ann. Cas. 433.

U. S. Rev. St. § 5241, 5 Fed. St.

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it was customary for banking companies in England to insert in their constitutions a provision for forbidding the inspection of customer's accounts by shareholders or creditors,³⁴ and it seems that the right of a stockholder or other person should not be so extensive as to permit examination of the depositor's accounts, their credit, or anything connected with the private matters of depositors.³⁵

Where a corporation owns approximately no property except the shares of stock of a number of subsidiary corporations which are merely agents or instrumentalities of the holding company, the legal fiction of distinct, corporate entities may be disregarded, and the books, papers and documents of all the corporations may be required to be produced for examination.³⁶

§ 2825. Foreign corporations. This right of inspection is not limited to persons holding stock in domestic corporations, but when a foreign corporation is doing business within the state, and its books are located there, a stockholder of such corporation has the right to inspect such books.³⁷ And foreign corporations by coming into the state to do business, so far subject themselves to the jurisdiction of

Ann. p. 188, providing that banking associations shall not be subject to visitatorial powers other than are authorized by title, or are vested in courts of justice, does not by term "visitatorial powers," include common-law right of stockholder to inspect books of corporation. *Guthrie v. Harkness*, 199 U. S. 148, 50 L. Ed. 130, 4 Ann. Cas. 433.

A general statute giving stockholders in "all private corporations" the right to inspect and examine the books and papers of the corporation applies to national banks to the same extent as other corporations, at least in the absence of conflicting legislation by congress. *Winter v. Baldwin*, 89 Ala. 483, 7 So. 734.

Under U. S. Rev. St. § 5210, 5 Fed. St. Ann. p. 152, a stockholder in good faith in a national bank is entitled to inspect the list of stockholders. *Murray v. Walker*, 156 Ky. 536, Ann. Cas. 1915 C 363, 161 S. W. 512.

Under Act of Legislature of Feb-

ruary 24th, 1842, a stockholder has the right to examine the stock ledger of the bank. *Cockburn v. Union Bank*, 13 La. Ann. 289.

³⁴*Guthrie v. Harkness*, 199 U. S. 148, 50 L. Ed. 130, 4 Ann. Cas. 433.

³⁵*State v. Citizens' Bank of Jennings*, 51 La. Ann. 426, 25 So. 318.

³⁶*Martin v. D. B. Martin Co.* (Del. Ch.), 88 Atl. 612.

³⁷*Klotz v. Pan-American Match Co.*, 221 Mass. 38, 108 N. E. 764; *Andrews v. Mines Corporation*, 205 Mass. 121, 137 Am. St. Rep. 428, 91 N. E. 122; *State v. Lazarus*, 127 Mo. App. 401, 105 S. W. 780.

Under Wisconsin St. § 1770b, subd. 10, providing that foreign corporations shall be subjected to all liabilities imposed upon domestic corporations of same character, word "liability" includes legal responsibility and legal duty and such corporation must grant right of inspection under § 1757. *State v. Thompson's Malted Food Co.*, 160 Wis. 671, 152 N. W. 458.

the domestic courts that those courts may compel them to grant this right,³⁸ the enforcement of the right not constituting interference with the internal affairs of the foreign corporation.³⁹ The remedy is properly sought in the forum where the records are kept,⁴⁰ since otherwise the right would be unenforceable.⁴¹

In New York, a penal statute has been enacted providing for the inspection of stock books of a foreign corporation having an office for the transaction of business in the state.⁴² Such a statute has been

³⁸ *Nettles v. McConnell* (Ala.), 43 So. 838; *Swift v. State*, 7 Houst. (Del.) 338, 40 Am. St. Rep. 127, 32 Atl. 143, 6 Atl. 856; *State v. Lazarus*, 127 Mo. App. 401, 105 S. W. 780. See also *Klotz v. Pan-American Match Co.*, 221 Mass. 38, 108 N. E. 764, where the court was presumably inclined to hold that the statutory right of inspection was applicable only to domestic corporations.

³⁹ *State v. Lazarus*, 127 Mo. App. 401, 105 S. W. 780; *Machen v. Machen & Meyer Elec. Mfg. Co.*, 237 Pa. 212, 42 L. R. A. (N. S.) 1079, Ann. Cas. 1914 B 420, 85 Atl. 100.

"It has often been decided that this court will not take jurisdiction, in ordinary cases, to regulate the internal affairs of a foreign corporation which ought to be managed under the laws and by the direction of the courts of the state or country where it is organized. * * * But the right which is sought to be enforced here is one of general, if not universal, recognition from early times. It is referred to in different cases as a right existing at common law. In order to enforce it, the court is not called upon to investigate the internal affairs of the corporation, or to make any order that affects it in the management of its business, or in the relations of stockholders to one another. By virtue of the laws which permit the corporation to do business in this commonwealth and subject it to the jurisdiction of our courts, any proper jurisdiction may be exercised, which

concerns its dealings with third parties here whereby their rights are affected. Rights of third parties, whether they happen to be stockholders or not, if the rights are such as are recognized by our laws, may be enforced by our courts, unless they relate to such internal affairs of the corporation as ought to be regulated only by the courts of the state or country to which it owes its existence. Where all that is desired is an examination of books, and the corporation has a usual place of business in this commonwealth, and the books and their custodian are here, there is every reason of policy and convenience why our courts should enforce a stockholder's right to examine them." *Andrews v. Mines Corporation*, 205 Mass. 121, 137 Am. St. Rep. 428, 91 N. E. 122.

⁴⁰ *State v. Lazarus*, 127 Mo. App. 401, 105 S. W. 780.

⁴¹ *Nettles v. McConnell* (Ala.), 43 So. 838; *Mitchell v. Northern Security Oil & Transportation Co.*, 44 N. Y. Misc. 514, 90 N. Y. Supp. 60.

⁴² *Stock Corp. Law*, § 33 (Consol. L. c. 59; L. 1909, c. 61). *Hovey v. Proctor & Gamble Co.*, 139 N. Y. App. Div. 521, 124 N. Y. Supp. 128; *Fuller v. O'Connor*, 61 N. Y. Misc. 279, 113 N. Y. Supp. 684; *Henry v. Babcock & Wilcox Co.*, 125 N. Y. App. Div. 538, 109 N. Y. Supp. 853; *Althaus v. Guaranty Trust Co.*, 78 N. Y. Misc. 181, 137 N. Y. Supp. 945.

This statute applies to all foreign stock corporations having an office

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held to impose an absolute duty to keep the stock book open for inspection,⁴³ when an office for the transaction of business is maintained in the state, without regard to whether the corporation engages in, or is licensed to engage in business in the state,⁴⁴ though the statute is not applicable where the only office maintained by the corporation in the state is a transfer office.⁴⁵ The corporation cannot evade liability for the statutory penalty by failing to keep a stock book.⁴⁶ The person seeking inspection is merely required to show

for the transaction of business in the state, except moneyed and railroad corporations. *Wadsworth v. Equitable Trust Co.*, 153 N. Y. App. Div. 737, 138 N. Y. Supp. 842.

⁴³ *Henry v. Babcock & Wilcox Co.*, 196 N. Y. 302, 134 Am. St. Rep. 835, 89 N. E. 942; *Hovey v. Proctor & Gamble Co.*, 139 N. Y. App. Div. 521, 124 N. Y. Supp. 128.

Stockholder of record has right to inspect stock book and may recover penalty in case of refusal. *Lawshe v. Royal Baking Powder Co.*, 54 N. Y. Misc. 220, 104 N. Y. Supp. 361.

⁴⁴ A foreign corporation having an office in the state is liable for the penalty under this act, though not actually doing business or licensed. *Hovey v. De Long Hook & Eye Co.*, 147 N. Y. App. Div. 881, 133 N. Y. Supp. 25.

The act is not to be construed in connection with other statutes requiring such corporations to obtain a certificate to do business and to pay a tax for doing business. *Hovey v. De Long Hook & Eye Co.*, 147 N. Y. App. Div. 881, 133 N. Y. Supp. 25.

The statute as thus construed is not in conflict with the Federal Constitution, since there is no attempt to regulate the business of the corporation nor to restrict its business, whether interstate or not. *Hovey v. De Long Hook & Eye Co.*, 147 N. Y. App. Div. 881, 133 N. Y. Supp. 25.

Where a corporation had ceased doing business, gave up its office and

deposited its books in a brokerage office, and the officers were not unwilling to allow inspection, recovery of the penalty was improper. *Fuller v. O'Connor*, 61 N. Y. Misc. 279, 113 N. Y. Supp. 684.

⁴⁵ *Althause v. Guaranty Trust Co.*, 78 N. Y. Misc. 181, 137 N. Y. Supp. 945. Contra, *People v. Montreal & B. Copper Co.*, 40 N. Y. Misc. 282, 81 N. Y. Supp. 974.

Maintenance of a transfer office for the convenience of the stockholders and for sale of stock does not constitute maintaining an office for the "transaction of business" within the meaning of the statute, but the distinction between such offices is recognized by the statute. *Wadsworth v. Equitable Trust Co.*, 153 N. Y. App. Div. 737, 138 N. Y. Supp. 842.

In the absence of a statute requiring foreign corporations maintaining transfer agents within the state to keep with them stock books open for inspection, no liability attaches for refusal to permit such inspection. *Wadsworth v. Equitable Trust Co.*, 153 N. Y. App. Div. 737, 138 N. Y. Supp. 842.

⁴⁶ *Hovey v. Proctor & Gamble Co.*, 139 N. Y. App. Div. 521, 124 N. Y. Supp. 128; *Hovey v. Eiswald*, 139 N. Y. App. Div. 433, 124 N. Y. Supp. 130.

The corporation cannot refuse to allow inspection of its stock book because the book does not comply with every specific requirement of

that he is a stockholder, and to prefer his request during business hours.⁴⁷

Under the statute, agents of the corporation are also liable to the penalty.⁴⁸ The fact that an action for the penalty has been commenced does not prevent a second action based on another refusal occurring after the commencement of the first action.⁴⁹

IV. DEMAND AND REFUSAL OF INSPECTION

§ 2826. Demand. Usually a demand for inspection of books should be made at the office where the books are kept or at the principal place of business of the corporation,⁵⁰ but a demand upon officers of a corporation is a circumstance tending to show an effort to secure examination.⁵¹ And it has been held that a demand was sufficient which was made upon the officers of the company personally, and not at the offices of the company.⁵²

If inspection is sought from the officers of a corporation, and the books and records are taken from the stockholder by force when he

law. *Tyng v. Corporation Trust Co.*, 104 N. Y. App. Div. 486, 93 N. Y. Supp. 928.

⁴⁷ *Henry v. Babcock & Wilcox Co.*, 196 N. Y. 302, 134 Am. St. Rep. 835, 89 N. E. 942.

⁴⁸ The New York Stock Corp. Law, § 33, providing that corporation or "officer or agent" refusing inspection of stock book shall be liable for penalty, does not apply to a selling agent of the corporation, but the word "agent" refers to the transfer agent by whom the stock book should be kept. *Hovey v. Eiswald*, 139 N. Y. App. Div. 433, 124 N. Y. Supp. 130.

Such a selling agent with no power to procure a stock book, no knowledge of the stockholders and nothing that he could allow to be inspected, should not be held liable. *Hovey v. Eiswald*, 139 N. Y. App. Div. 433, 124 N. Y. Supp. 130.

An officer of the corporation is not liable to the statutory penalty for failure to exhibit a book which is not in his possession. *Gould v. Olympic Min. Co.*, 49 N. Y. Misc. 612, 96 N. Y. Supp. 455.

⁴⁹ *Gould v. Olympic Min. Co.*, 49 N. Y. Misc. 612, 96 N. Y. Supp. 455.

⁵⁰ *Bay State Gas Co. v. State*, 4 Pennw. (Del.) 238, 56 Atl. 1114.

⁵¹ A demand upon the president as custodian of the books in another state, is not necessary but is a circumstance to show exhaustion of efforts to secure examination. *Bay State Gas Co. v. State*, 4 Pennw. (Del.) 238, 56 Atl. 1114.

A demand for inspection of corporate books and papers of a bank served upon the directors, and renewed at three o'clock in the afternoon of a certain day, to continue during such hours of the day and evening as would not interfere with the proper conduct of the business of the bank, was made at a proper time and place. *Woodworth v. Old Second Nat. Bank*, 154 Mich. 459, 15 Det. L. N. 773, 117 N. W. 893.

⁵² *State v. Monida & Y. Stage Co.*, 110 Minn. 193, 125 N. W. 676, 124 N. W. 971.

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commences to examine them, it cannot be said as a matter of law that the stockholder did not make a sufficient effort to examine the books.⁵³

A demand may be held to have reached the proper persons though the stockholder is passed along from person to person, and is unable to learn definitely who has custody of the books.⁵⁴

Unsuccessful efforts for several consecutive days to gain admission to an office where the books should be kept will operate to relieve the stockholder from making a demand for inspection.⁵⁵ And if a stockholder makes an oral demand for inspection, and also a formal demand in writing, and both are refused, it is useless for him to make further demand.⁵⁶

Where a letter demanding inspection of books is properly addressed and it is deposited in the post office, postage paid, there is a natural presumption that it will reach its destination by due course of mail.⁵⁷ This presumption may be rebutted, however, by evidence that the letter was not received.⁵⁸

The sufficiency of a demand is frequently a question of fact, to be determined from the evidence.⁵⁹ Also a sufficient demand may be admitted by the pleadings.⁶⁰

Unreasonable delay in making a demand may operate to bar a suit to enforce the right of inspection.⁶¹ It may also be mentioned that

⁵³ So where a stockholder inquired of the president of a foreign corporation and the treasurer and custodian of the books, as well as one or two other stockholders, and the books and records were taken from his possession by force on one occasion, after he had begun to examine them, it cannot be said as a matter of law that the stockholder did not make a sufficient effort to obtain the books for examination before bringing a suit for mandamus. *Andrews v. Mines Corporation*, 205 Mass. 121, 137 Am. St. Rep. 428, 91 N. E. 122.

⁵⁴ *Eldred v. Elliott*, 161 Mich. 262, 126 N. W. 219.

⁵⁵ *Bay State Gas Co. v. State*, 4 Pennw. (Del.) 238, 56 Atl. 1114.

⁵⁶ *Pease v. Chicago Crayon Co.*, 167 Ill. App. 31; *State v. New Orleans Gaslight Co.*, 49 La. Ann. 1556, 22 So. 815.

⁵⁷ *Neubert v. Armstrong Water Co.*, 211 Pa. 582, 61 Atl. 123.

⁵⁸ *Neubert v. Armstrong Water Co.*, 211 Pa. 582, 61 Atl. 123.

⁵⁹ *Neubert v. Armstrong Water Co.*, 211 Pa. 582, 61 Atl. 123.

The question of the receipt of the letter containing the demand for an inspection of books held a question of fact. *Neubert v. Armstrong Water Co.*, 211 Pa. 582, 61 Atl. 123.

⁶⁰ Where the answer to a petition by a stockholder for a writ of mandamus to compel inspection of the books of the corporation admits a general demand to inspect by the petitioner and asserts the right and intention of the respondents to ignore and refuse such demand, the demand sufficiently appears. *People v. Chicago City Ry. Co.*, 183 Ill. App. 283.

⁶¹ *Foss v. People's Gas Light & Coke Co.*, 241 Ill. 238, 89 N. E. 351.

a demand may be too broad according to the circumstances,⁶³ and it would seem that a stockholder should be specific in stating what books he wishes to examine.

§ 2827. Refusal. Compliance with a statutory requirement is excused when prevented by an exercise of governmental authority,⁶⁴ and it has been held, in accordance with this rule, that a corporation could not be required to produce its books for inspection when they were in the custody of the federal courts, having been taken under a subpoena duces tecum.⁶⁴

Also, when a corporation relies upon a decision of a superior court, and refuses to allow inspection, it cannot be held liable for a statutory penalty because of such refusal, even though the decision in question is afterwards reversed by a higher court.⁶⁵ But a corporation cannot avoid inspection by claiming that to allow it would cause great inconvenience and pecuniary loss, and by offering to permit such inspection at some time in the future.⁶⁶ Neither can it offer to give extracts or copies from its books, or offer to have them inspected by another person, such as an expert.⁶⁷ Also, an offer to purchase the stockholder's shares is of no avail,⁶⁸ and even the fact that it is contended that the stock of the stockholder has been sold, there being an action pending to compel its transfer, will not operate to justify the denial of the right of inspection.⁶⁹

The fact that a stockholder was not present at a meeting, where an opportunity was afforded to stockholders generally to inspect certain books, does not operate as an estoppel of further insistence, and the corporation cannot avoid inspection on such ground.⁷⁰

§ 2828. Sufficiency of refusal. The sufficiency of a refusal to allow inspection is frequently to be determined from the evidence.⁷¹

In seeking to avoid inspection, officers have adopted various dila-

⁶³ *Eldred v. Elliott*, 161 Mich. 262, 126 N. W. 219, 17 Det. L. N. 283.

⁶⁴ *Otto v. Franklin's, Inc.*, 90 N. Y. Misc. 311, 153 N. Y. Supp. 107.

⁶⁵ *Otto v. Franklin's, Inc.*, 90 N. Y. Misc. 311, 153 N. Y. Supp. 107.

⁶⁶ *Hollaman v. El Arco Mines Co.*, 137 N. Y. App. Div. 862, 122 N. Y. Supp. 852.

⁶⁷ *Home Guano Co. v. State (Ala.)*, 69 So. 419.

⁶⁸ *Kuhbach v. Irving Cut Glass Co.*,

220 Pa. 427, 28 L. R. A. (N. S.) 185, 69 Atl. 981.

⁶⁹ *Kuhbach v. Irving Cut Glass Co.*, 220 Pa. 427, 28 L. R. A. (N. S.) 185, 69 Atl. 981.

⁷⁰ *Baumrucker v. Jones*, 173 Ill. App. 188.

⁷¹ *State v. Jessup & Moore Paper Co.*, 27 Del. 248, 88 Atl. 449.

⁷² *State v. Monida & Y. Stage Co.*, 110 Minn. 193, 125 N. W. 676, 124 N. W. 971.

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tory practices rather than definitely refusing the right. Thus cases have arisen where there has been a reluctance in stating what person has custody of the books, or where they are kept.⁷³ In regard to such practices it may be stated that "indefinite delay in according this right of inspection is equivalent to a denial of it."⁷³

V. BY WHOM INSPECTION MADE

§ 2829. In general. The various statutes and constitutional provisions differ as to the persons entitled to inspection, and the right is sometimes conferred upon stockholders alone, sometimes upon stockholders, creditors and their personal representatives,⁷⁴ and in some cases upon the public.⁷⁵

Under a constitutional provision providing that certain books of the corporation "shall be kept for public inspection," any shareholder or other person with a laudable object to accomplish, or a real or actual interest upon which to predicate his request for information, is given the right of inspection.⁷⁶

§ 2830. Stockholders and agents—In general. The statutory right of inspection, when granted to stockholders may be regarded as personal,⁷⁷ but this does not mean that the right is a mere personal

⁷³ See *Eldred v. Elliott*, 161 Mich. 262, 126 N. W. 219.

⁷⁴ *Cobb v. Lagarde*, 129 Ala. 488, 30 So. 326.

Refusal exists where stockholder is not accorded the privilege of inspecting the books but is met by evasive statements as to the location of them. *People v. Montreal & B. Copper Co.*, 40 N. Y. Misc. 282, 81 N. Y. Supp. 974.

⁷⁵ See § 2811, *supra*.

North Dakota Comp. Laws 1913, § 4560, confers the right upon stockholders or creditors. *Schmidt v. Anderson*, 29 N. D. 262, 150 N. W. 871.

Under *Mills' Colorado Ann. St.* § 508, only stockholders and creditors and their personal representatives are entitled to inspection. *Butterfly-Terrible Gold Min. Co. v. Brind*, 41 Colo. 29, 91 Pac. 1101, judgment reversed *Butterfield v. Sullivan*, 41 Colo. 155, 92 Pac. 235.

⁷⁶ *Iowa Code*, §§ 1076, 1077, providing that the corporation keep posted and subject to public inspection, a copy of the by-laws, a statement of the capital stock subscribed, etc., are primarily for benefit of the public. *Boardman v. Marshalltown Grocery Co.*, 105 Iowa 445, 75 N. W. 343.

⁷⁷ *Louisiana Const.* 1879, art. 245 (*Const.* 1898, art. 273). *State v. Citizens' Bank of Jennings*, 51 La. Ann. 426, 25 So. 318; *State v. New Orleans Gaslight Co.*, 49 La. Ann. 1556, 22 So. 815.

⁷⁷ *Foster v. White*, 86 Ala. 467, 6 So. 88; *Boardman v. Marshalltown Grocery Co.*, 105 Iowa 445, 75 N. W. 343; *Clawson v. Clayton*, 33 Utah 266, 93 Pac. 729.

Under *Maryland Code*, art. 23, § 5, a stockholder has a right to the information contained in the accounts of the transactions of the corporation, by his own personal inspection, and

privilege to be exercised by the stockholder alone. The actual inspection may be made by another person, such as the stockholder's agent or attorney.⁷⁸

In order to obtain inspection, it must appear that the person seeking the right is in truth a stockholder⁷⁹ at the time when inspection is sought,⁸⁰ and it has been held that the agents of the corporation are entitled to reasonable evidence as to the stockholder's ownership of shares.⁸¹ Also if a suit is brought to enforce the right, the

he is not required to accept anything else in lieu of such personal examination. *Weißenmayer v. Bitner*, 88 Md. 325, 45 L. R. A. 446, 42 Atl. 245.

⁷⁸ *Alabama*. *Foster v. White*, 86 Ala. 467, 6 So. 88.

Iowa. *Ellsworth v. Dorwart*, 95 Iowa 108, 58 Am. St. Rep. 427, 63 N. W. 588.

Louisiana. *State v. Bienville Oil Works Co.*, 28 La. Ann. 204.

New Jersey. *Mitchell v. Rubber Reclaiming Co.* (N. J. Eq.), 2 Atl. 407.

New York. *People v. Nassau Ferry Co.*, 86 Hun 128, 33 N. Y. Supp. 244. Compare *People v. United States Mercantile Reporting Co.*, 20 Abb. N. Cas. 192.

Ohio. *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 48 L. R. A. 732, 78 Am. St. Rep. 707, 56 N. E. 1038.

Utah. *Clawson v. Clayton*, 33 Utah 266, 93 Pac. 729.

The right of the plaintiff to be represented by a duly authorized attorney as incidental to the right of inspection has not been questioned. *Powelson v. Tennessee Eastern Elec. Co.*, 220 Mass. 380, Ann. Cas. 1917 A 102, 107 N. E. 997.

⁷⁹ Under U. S. Rev. St. § 5210, a person who is not in truth a stockholder in a national bank has no right to demand an inspection of the list of stockholders. *Murray v. Walker*, 156 Ky. 536, Ann. Cas. 1915 C 363, 161 S. W. 512.

⁸⁰ *Meysenburg v. People*, 88 Ill. App.

328; *Ellsworth v. Dorwart*, 95 Iowa 108, 58 Am. St. Rep. 427, 63 N. W. 588; *Huyler v. Cragin Cattle Co.*, 40 N. J. Eq. 392, 2 Atl. 274.

Where stockholders sold their stock under an agreement which provided that the certificates and the notes given in payment should be placed in the hands of a third person, to be by him delivered when the parties should fully comply with their obligations, and afterwards, while the stock and notes were thus held in escrow, the sellers made a demand on the corporation to be permitted to inspect its books, and, on its refusal, applied for a writ of mandamus, it was held that the transaction was not a mere agreement to sell, but a completed sale, passing the title to the stock, and the writ was therefore denied. *State v. Whited & Wheelers*, 104 La. 125, 28 So. 922.

⁸¹ Officers and agents of a corporation are not required to exhibit the stock book to persons who demand to see them, where such persons are unknown to them, without first exacting reasonable proof of the identity of such demandants and that they are in fact the persons who are the stockholders. *Theile v. Merlis*, 85 N. Y. Misc. 351, 147 N. Y. Supp. 405.

Mere production of a certificate of stock and the demand, does not establish that the man who produced them is the person therein named. *Theile v. Merlis*, 85 N. Y. Misc. 351, 147 N. Y. Supp. 405.

right of the applicant as a stockholder must appear.⁸² But the fact that the stockholder has not exchanged his certificate of stock for a new issue after the par value has been changed does not make him any the less a stockholder, so as to deprive him of his rights.⁸³ Also, an equitable owner of stock has been held to have an equitable right to examine books,⁸⁴ and where a corporation is a mere instrumentality of another corporation, in which all the stockholders of the holding company have an equitable interest, and one stockholder is made director and president of the subsidiary corporation, he is entitled to inspect the books. In such case, other stockholders are not in the position to deny his rights.⁸⁵

§ 2831. — Public accountants and stenographers. In making extracts, or in inspecting books, the stockholder is entitled to have the aid of experts,⁸⁶ accountants or stenographers,⁸⁷ attorneys, or

⁸² In a bill by a stockholder against a corporation for accounting and relief, an averment that "in or about 1857 the complainant became, ever since has been and now is a stockholder" of defendant corporation "and the owner of 1500 shares, of the par value of \$50 each, of the original capital stock of said defendant corporation," is a sufficient statement of complainant's relationship as a stockholder to require the defendant to answer. *Foss v. People's Gas Light & Coke Co.*, 241 Ill. 238, 89 N. E. 351.

Granting of mandamus upon affidavit of person that he has power of attorney authorizing examination is improper where such power of attorney is not produced, and no facts are stated inferring authority. *Latimer v. Herzog Teleseme Co.*, 75 N. Y. App. Div. 522, 78 N. Y. Supp. 314, 12 N. Y. Ann. Cas. 9.

⁸³ The fact that a stockholder has not exchanged his certificates of stock for a new issue after the corporation has changed the par value of its stock pursuant to statute, does not make him any less a stockholder so as to deprive him of the right to enforce the right of inspection of corporate

books under the statute. *Laughlin v. Chicago Ry. Equipment Co.*, 185 Ill. App. 132.

⁸⁴ A stockholder who is the owner of an equitable interest of nearly one-third of the preferred stock of a corporation has an equitable right to examination of the books to determine her interests. *McGeary v. Brown*, 23 S. D. 573, 122 N. W. 605.

⁸⁵ Where a corporation was a mere instrumentality of a bank, in which all of the stockholders of the bank had at least an equitable interest, and the directors of the bank made relator a stockholder, director and president of such corporation, he having the same interest in it that any of them had, and none of them having paid value for their stock, they were not in a position to deny the relator's rights as a stockholder of that corporation. *Woodworth v. Old Second Nat. Bank*, 154 Mich. 459, 118 N. W. 581, 117 N. W. 893, 15 Det. L. N. 773.

⁸⁶ *Varney v. Baker*, 194 Mass. 239, 10 Ann. Cas. 989, 80 N. E. 524; *Hodder v. George Hogg Co.*, 223 Pa. 196, 72 Atl. 553.

⁸⁷ *Elsworth v. Dorwort*, 95 Iowa 108, 58 Am. St. Rep. 427, 63 N. W. 588;

other persons.⁸⁸ To deny that use of a stenographer would be equivalent to granting a right and then denying the most convenient mode of exercising it.⁸⁹ Also the use of an accountant is obviously necessary when it is sought to inspect the books of a corporation conducting an extensive business,⁹⁰ although the facts may be such that an accountant is not necessary.⁹¹

§ 2832. Personal representatives. Personal representatives of a deceased stockholder are usually entitled to inspect the books of a corporation inasmuch as they stand in the shoes of the stockholders,⁹² and under some statutes they are expressly awarded the right.⁹³

§ 2833. Pledgor or pledgee of shares. Under statutory provisions whereby the pledgor of shares retains ownership of the same, subject to the pledgee's lien, such pledgor is entitled to inspection of the corporate books.⁹⁴ On the other hand, it has elsewhere been held

State v. German Mut. Life Ins. Co., 169 Mo. App. 354, 152 S. W. 618; *State v. St. Louis Transit Co.*, 124 Mo. App. 111, 100 S. W. 1126.

⁸⁸ *State v. Ice*, 75 W. Va. 476, 84 S. E. 181.

⁸⁹ *State v. St. Louis Transit Co.*, 124 Mo. App. 111, 100 S. W. 1126.

⁹⁰ See *State v. St. Louis Transit Co.*, 124 Mo. App. 111, 100 S. W. 1126.

⁹¹ Where a relator had been manager of the corporation and was familiar with the manner of keeping the books, it was not necessary to order examination by a certified public accountant, but mandamus would be allowed to relator personally with right reserved for appointment of accountant if necessary. *Garcin v. Trenton Rubber Mfg. Co.* (N. J. L.), 60 Atl. 1098.

⁹² An executrix is entitled, under Const. 1879, art. 245 (Const. 1898, art. 273), to inspect the books of a bank in which her testator held stock. *State v. Citizens' Bank of Jennings*, 51 La. Ann. 426, 25 So. 318.

Where an executor owns one-half of the entire stock of a corporation and as sole residuary legatee is personally

interested in the stock, he is entitled to an examination of the corporate books. In *re Hastings*, 128 N. Y. App. Div. 516, 112 N. Y. Supp. 800.

A temporary administrator has not the same right, in this regard, as a permanent administrator. In *re Hastings*, 120 N. Y. App. Div. 756, 105 N. Y. Supp. 834.

⁹³ As, for example, *Mills' Colo. Ann. St.* § 480.

⁹⁴ Under N. Y. Stock Corporation Law, § 29 (L. 1890, c. 564, as amended by L. 1892, c. 688, L. 1900, c. 128, and L. 1901, c. 354), requiring corporation stock books to be kept open for inspection of stockholders and judgment creditors, and imposing a penalty for neglect or refusal to exhibit the same, the pledgor of shares of stock is entitled to the information which the law provides that stockholders may demand on inspection of the books. *Booth v. Consolidated Fruit Jar Co.*, 62 N. Y. Misc. 252, 114 N. Y. Supp. 1000.

A pledgor of shares retains the ownership of the same subject to the pledgee's lien, since his right to the stock is recognized by Gen. Corp.

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that a person holding stock transferred to him as collateral was entitled to inspection, even though the stock was not transferred on the books.⁸⁵

§ 2834. Directors. Directors, as trustees for the stockholders, are entitled to full and complete information as to the corporation's affairs, and they have the unqualified right to inspect the books and records⁸⁶ at all reasonable times.⁸⁷ In fact this inspection is not merely a right, but a duty.⁸⁸

In case of refusal, all that a director need show to enforce his right, is that he is a director, that he has demanded inspection, and that the right has been refused.⁸⁹

§ 2835. State, municipality or public officers. This chapter is concerned mainly with the inspection of corporate books by stockholders and officers of corporations, and their representatives. But the books and records of companies are subject to inspection also by public officials, as representatives of the state, or some municipality. Thus, if a proceeding is brought by the state to enjoin or prevent an illegal monopoly, the attorney general may obtain an order for the inspection and discovery of books and papers. In such case there is no presumption that the official is acting in bad faith, and wide

Law (L. of 1890, c. 567, as amended by L. 1892, c. 687, and L. 1901, c. 355), and since he is subject to stockholder's liability as provided by § 54 of Stock Corporation Law (L. 1890, c. 564, as amended by L. 1892, c. 688, and L. 1901, c. 354). *Booth v. Consolidated Fruit Jar Co.*, 62 N. Y. Misc. 252, 114 N. Y. Supp. 1000.

⁸⁵ Thus where an insolvent trust company organized under Wis. St. 1911, §§ 2024-77i to 2024-77o, is in the hands of commissioner of banking for liquidation, it is proper for circuit court to order examination of books, accounts, etc., by person holding stock in corporation transferred to him by indorsement in blank as collateral security, although stock has not been transferred on books of corporation. *In re Citizens' Savings & Trust Co.*, 156 Wis. 277, 145 N. W. 646.

⁸⁶ *Connecticut. Heminway v. Hemin-*

way, 58 Conn. 443, 19 Atl. 766.

Illinois. Stone v. Kellogg, 62 Ill. App. 444, aff'd 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222.

New Jersey. Lawton v. Bedell (N. J. Ch.), 71 Atl. 490.

Pennsylvania. Machen v. Machen & Mayer Elec. Mfg. Co., 237 Pa. 212, 42 L. R. A. (N. S.) 1079, Ann. Cas. 1914 B 420, 85 Atl. 100.

West Virginia. State v. Lee, 75 W. Va. 476, 84 S. E. 181.

⁸⁷ *Machen v. Machen & Meyer Elec. Mfg. Co.*, 237 Pa. 212, 42 L. R. A. (N. S.) 1079, Ann. Cas. 1914 B 420, 85 Atl. 100.

⁸⁸ *Stone v. Kellogg*, 62 Ill. App. 444, aff'd 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222.

⁸⁹ *Machen v. Machen & Meyer Elec. Mfg. Co.*, 237 Pa. 212, 42 L. R. A. (N. S.) 1079, Ann. Cas. 1914 B 420, 85 Atl. 100.

latitude must be allowed, not only for the purposes of preparation, but to facilitate the presentation of proofs at the trial. The position of the attorney general in such a case is analogous to that of one who has a right before commencement of an action to inspection of books and papers.¹

Also the Interstate Commerce Commission has power under the federal statutes to prescribe "accounts, records and memoranda" to be kept by carriers, and such records are subject to examination by that body.² The primary object of this provision was to establish a uniform system of accounting and bookkeeping by carriers and to have an inspection thereof,³ and the statute is broad enough to allow inspection of records made before the passage of the act.⁴ The inspection provided for by this act has been held not to include allowance of examination of general correspondence, but the inspection of such correspondence may be secured by a subpoena.⁵

In addition, it may be mentioned, that under the statutes of some states, municipal corporations may secure the inspection of books of water companies, when it is desired to acquire such companies.⁶ The inspection in such cases, like that of stockholders, may be secured by mandamus,⁷ and it has been held that it is only in cases where

¹ *People v. American Ice Co.*, 54 N. Y. Misc. 67, 105 N. Y. Supp. 650.

² Under Interstate Commerce Act, § 20 (as amended by Hepburn Act of June 29, 1906, c. 3591, 34 St. 584, 593). *United States v. Nashville, C. & St. L. Ry. Co.*, 217 Fed. 254.

Under this provision of the Interstate Commerce Act, the commission is given authority to employ special agents or examiners who shall have authority under order of the commission to inspect and examine any and all accounts, records and memoranda kept by such carrier. *United States v. Louisville & N. R. Co.*, 236 U. S. 318, 59 L. Ed. 598.

The Interstate Commerce Commission does not derive any authority as to the inspection of carriers, by virtue of a resolution of the United States Senate, since such resolution is passed by only one branch of the legislative body. *United States v. Louisville & N. R. Co.*, 236 U. S. 318, 59 L. Ed. 598.

³ *United States v. Louisville & N. R. Co.*, 236 U. S. 318, 59 L. Ed. 598.

⁴ *United States v. Louisville & N. R. Co.*, 236 U. S. 318, 59 L. Ed. 598.

⁵ *United States v. Louisville & N. R. Co.*, 236 U. S. 318, 59 L. Ed. 598; *United States v. Nashville, C. & St. L. Ry. Co.*, 217 Fed. 254.

Interstate Commerce Act, § 12, deals with the production of evidence in certain cases and does not provide for inspection by examiners duly authorized by the commission. *United States v. Louisville & N. R. Co.*, 236 U. S. 318, 59 L. Ed. 598.

⁶ Act of April 29, 1874, P. L. 73, § 34, cl. 7, is sufficient to give a city such special interest that it has the right to investigate the books and plant of a water company. *New Brighton Borough v. New Brighton Water Co.*, 247 Pa. 232, 93 Atl. 327.

⁷ Where a municipality desiring to acquire the property of a water company and in accordance with a statute

lack of financial capacity on the part of the municipality is shown that inspection will be denied.⁸

§ 2836. Persons not owning stock. Inspection may be properly refused where the applicant has no pecuniary interest in the corporation,⁹ and it is proper to deny examination of books to a person acting for another corporation not shown to have legal authority to own stock.¹⁰ But where stockholders representing a portion of the subscribed stock of the corporation appoint a committee to inspect the books and records, it has been held that such committee need not be a stockholder.¹¹

In some states, the statutes provided for examination of the corporate books by creditors, and the tendency is to recognize such right as absolute.¹²

Policyholders of a mutual life insurance company occupy a position analogous to that of stockholders, but in a strict sense of the term they are not stockholders, there being no stock in the technical sense.¹³ It has been held that such policyholders are not entitled to inspect a list of policyholders where there is no statute requiring the keeping of such a list.¹⁴

(Act April 29, 1874, P. L. 73), requests examination of the books and records of the company to ascertain the cost of erecting and maintaining the company's plant, and such examination is refused, mandamus will be awarded to enforce right. *Reynoldsville Borough v. Reynoldsville Water Co.*, 247 Pa. 26, 92 Atl. 1082.

⁸ Where a municipality desires to acquire waterworks and proceedings for that purpose are correctly instituted, it is only in instances where lack of sufficient financial capacity to effect purchase primarily appears that mandamus will not be granted to compel the company to permit examination of its records. *New Brighton Borough v. New Brighton Water Co.*, 247 Pa. 232, 93 Atl. 327.

⁹ *Richmond v. Hill*, 148 Ill. App. 179.

The rule may be different where discovery is sought. See *Post v. Toledo, C. & St. L. R. Co.*, 144 Mass. 341, 59 Am. Rep. 86, 11 N. E. 540, holding

that a foreign corporation may maintain a bill for discovery of books of a debtor corporation in the state.

¹⁰ *Richmond v. Hill*, 148 Ill. App. 179.

¹¹ The committee of one, appointed by stockholders representing one-tenth of all the subscribed stock of the corporation, to inspect the books, records and papers of such corporation under statute (Florida Gen. St. § 2672), is not required to be stockholder. *Merchant's Broom Co. v. Butler*, 70 Fla. 397, 70 So. 383.

Stockholders representing one-tenth are real parties in interest and properly made relators in mandamus proceedings to compel inspection under the statute. *Merchant's Broom Co. v. Butler*, 70 Fla. 397, 70 So. 383.

¹² *Hub Const. Co. v. New England Breeders' Club*, 74 N. H. 282, 67 Atl. 574.

¹³ *State v. German Mut. Life Ins. Co.*, 169 Mo. App. 354, 152 S. W. 618.

¹⁴ *People v. New York Life Ins. Co.*,

VI. EXTENT AND METHOD

§ 2837. *In general.* In general, the right of inspection should be allowed fully, freely and at all times when such inspection will not unreasonably inconvenience others,¹⁵ and under the usual statutes, the right is continuous, and as an incident to ownership of the stock may be exercised at any reasonable time.¹⁶ Also the right of the stockholder extends to all books, papers, contracts, minutes books or other instruments from which he can derive any information that will enable him to better protect his interests.¹⁷ And stock registers and stock transfer books have been held to be a part of the "records of the corporation" within the meaning of the statute granting the right of inspection.¹⁸

Similar decisions have been rendered conferring the right to inspect a list of stockholders,¹⁹ but it will be remembered that some statutes are limited in their scope, and only confer the right of inspection as to certain books such as a stock book.²⁰

Where a statute or by-law gives stockholders a right to examine books and papers of a corporation to a specified extent or at specified times only, they can only claim, under the statute or by-law, such rights as it expressly confers.²¹

Where a statute requires a corporation to keep books showing certain matters for inspection of stockholders, a stockholder cannot be deprived of the right to inspect them because they are kept in a particular way, or because they contain, besides the information to which he is entitled, other information which he has no right to demand.²²

§ 2838. *By-law regulation.* Under some statutes, it is provided that the right of inspection shall be subject to such regulations as the

111 N. Y. App. Div. 183, 97 N. Y. Supp. 465.

¹⁵ Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189, 48 L. B. A. 732, 78 Am. St. Rep. 707, 56 N. E. 1033.

¹⁶ Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189, 48 L. B. A. 732, 78 Am. St. Rep. 707, 56 N. E. 1033.

¹⁷ Stone v. Kellogg, 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222, aff'g 62 Ill. App. 444; People v. Weber Co., 159 Ill. App. 588; Lewis v. Brainerd, 53 Vt. 519.

¹⁸ Maremont v. Old Colony Life Ins. Co., 189 Ill. App. 231.

¹⁹ Where a list of stockholders is prepared by order of the board of directors, such directors are trustees of the stockholders and cannot secure to themselves advantages not common to other stockholders. In such case the stockholders are entitled to inspection of the list. Poor v. Yarnell, 28 Cal. App. 714, 153 Pac. 976.

²⁰ See § 2811, supra.

²¹ Lyon v. American Screw Co., 16 B. L. 472, 17 Atl. 61; State v. Berghenthal, 72 Wis. 314, 39 N. W. 566.

²² People v. Pacific Mail Steamship Co., 50 Barb. (N. Y.) 280.

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corporation may provide,²³ and in some cases the right of inspection exists by virtue of by-laws authorizing examination.²⁴ It has been seen heretofore that the power of a corporation to regulate by by-law the inspection of the corporate books by stockholders is limited to the imposition of reasonable restrictions which are not in conflict with statutory or charter provisions.²⁵ Thus, as a general rule, a corporation may make reasonable regulations as to the time and manner of the inspection of its books by stockholders, but it cannot make a by-law which denies or unreasonably obstructs the right.²⁶ To provide that the right of inspection shall rest in the discretion of the directors is unreasonable and unlawful,²⁷ as is also a provision depriving stockholders of the right to make extracts.²⁸

A by-law providing for a resolution of directors concerning inspection is not operative where no resolution is passed.²⁹ Such a by-law will not be construed as preventing an examination.³⁰ With regard to the extent of such right, it has been held that a by-law, providing that the treasurer shall keep full books of account of the business of the corporation, "which books shall at all times be open to the inspection of any of the stockholders," does not apply to the stock ledger.³¹

§ 2839. Books outside of state. A corporation cannot usually evade the duty to allow inspection by claiming that the books are in

²³ Missouri Rev. St. 1909, § 3349. *State v. Doe Run Lead Co.* (Mo. App.), 178 S. W. 298.

²⁴ See § 2813, *supra*.

²⁵ See § 519.

²⁶ *Klotz v. Pan-American Match Co.*, 221 Mass. 38, 108 N. E. 764; *State v. Laughlin*, 53 Mo. App. 542.

²⁷ *State v. Jessup & Moore Paper Co.*, 7 Pennw. (Del.) 397, 72 Atl. 1057; *Klotz v. Pan-American Match Co.*, 221 Mass. 38, 108 N. E. 764.

A by-law declaring that no stockholder or other person shall have the right to inspect books without special authority from the board of directors is of no avail to prevent inspection, being subordinate to the general law. *State v. Citizens' Bank of Jennings*, 51 La. Ann. 426, 25 So. 318.

²⁸ *State v. Jessup & Moore Paper Co.*, 7 Pennw. (Del.) 397, 72 Atl. 1057.

²⁹ Where a by-law provides for a resolution of the directors providing for inspection and no resolution is passed there is nothing to conflict with the common-law right and the by-law is not operative. *Hodgens v. United Copper Co.* (N. J. L.), 67 Atl. 756.

³⁰ The fair intent of such a by-law is that the directors will make some provision for inspection at proper times and places and under proper regulations. *Hodgens v. United Copper Co.* (N. J. L.), 67 Atl. 756.

A by-law which is construed to prevent a stockholder from examining the books unless the directors permit is unreasonable and oppressive. *Hodgens v. United Copper Co.* (N. J. L.), 67 Atl. 756.

³¹ *Lyon v. American Screw Co.*, 16 R. I. 472, 17 Atl. 61.

a foreign state,³³ although there are some decisions to the contrary.³³

Under some statutes it is provided that the court may, upon proper cause shown, summarily order books of a corporation to be forthwith brought into the state for inspection.³⁴ Such a statute is to be construed liberally,³⁵ in accordance with its declared objects,³⁶ but it does

³³ *State v. Jessup & Moore Paper Co.*, 7 Pennw. (Del.) 397, 72 Atl. 1057.

The court may compel a domestic corporation to bring its books and papers into the state for an inspection, where they are kept in another state. *Huylar v. Cragin Cattle Co.*, 40 N. J. Eq. 392, 2 Atl. 274; *Mitchell v. Rubber Reclaiming Co.* (N. J. Ch.), 24 Atl. 407.

On a petition for mandamus, an averment of the defendant that the books and papers are in another state, is of no avail, since if inspection is necessary, the court will order their production. *State v. Jessup & Moore Paper Co.*, 7 Pennw. (Del.) 397, 72 Atl. 1057.

³³ *Mitchell v. Northern Security Oil & Transportation Co.*, 44 N. Y. Misc. 514, 90 N. Y. Supp. 60. See also *Nettles v. McConnell* (Ala.), 43 So. 838.

³⁴ Under the New Jersey General Corporation Act, § 44, the Court of Chancery or the Supreme Court or any justice thereof, may upon proper cause shown, summarily, order any or all of the books of said corporation to be forthwith brought within the state, and kept therein at such place and for such time as may be designated in such order, and the charter of any corporation failing to comply with such order may be declared forfeited by the court making such order, and it shall thereupon cease to be a corporation, and all its directors and officers shall be liable to be punished for contempt of court for disobedience of such order. *Fuller v. Alexander Hollander & Co.*, 61 N. J. Eq. 648, 88 Am. St. Rep. 456, 47 Atl. 646.

Statute impliedly gives power to order inspection after books have been brought into state. *Huylar v. Cragin Cattle Co.*, 40 N. J. Eq. 392, 2 Atl. 274.

³⁵ The statute is remedial and should be construed liberally even though of penal character. *Huylar v. Cragin Cattle Co.*, 40 N. J. Eq. 392, 2 Atl. 274.

³⁶ Statute was intended to secure to stockholders and others interested the means of compelling a domestic corporation to bring its books into the state to answer any legitimate purpose which would be defeated by the keeping of the books out of the state and to promote any lawful object in the pursuit of which the persons interested might be unduly impaired or prejudiced by the keeping of the books out of the state. *Huylar v. Cragin Cattle Co.*, 40 N. J. Eq. 392, 2 Atl. 274.

The purpose of New Jersey Corporation Act, § 44 (P. L. 1896, p. 292, c. 185), requiring the keeping of the books in the state and authorizing the court to order the books to be brought within the state, was to give the stockholder under an order of court, or to give the court for its own purposes, power to require the books to be produced within the state for examination. *Hodgens v. United Copper Co.* (N. J. L.), 67 Atl. 756.

The power conferred by the General Corporation Act of New Jersey (P. L. 1896, p. 292, § 44) summarily to order the books of a corporation to be brought within the state "on proper cause shown," can be exercised only when the judicial authority whose action is invoked can exercise

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not enlarge the jurisdiction of the court to compel the production of books.³⁷

It will be noted that the power is conferred upon the court only "upon proper cause shown."³⁸

§ 2840. Copying from books. The right of a stockholder to make copies, abstracts, and memoranda of documents, books and papers is an incident to the right of inspection,³⁹ being recognized at the common law.⁴⁰ Also, a statute giving a stockholder the right to inspect and examine books and papers of the corporation gives him

control over the books after compliance with the order. *Fuller v. Alexander Hollander & Co.*, 61 N. J. Eq. 648, 88 Am. St. Rep. 456, 47 Atl. 646.

³⁷ Under General Corporation Act, § 44, there is no legislative purpose to enlarge jurisdiction with regard to the compulsory production of books for inspection. *Fuller v. Alexander Hollander & Co.*, 61 N. J. Eq. 648, 88 Am. St. Rep. 456, 47 Atl. 646.

Power to order the examination of books under New Jersey Corporation Act, § 44 (P. L. 1896, p. 292, c. 185), existed outside of the statute, by mandamus, and the same is proper remedy, even where a summary order of the justice might answer the purpose. *Hodgens v. United Copper Co.* (N. J. L.), 67 Atl. 756.

³⁸ Under New Jersey Corporation Act, § 44 (P. L. 1896, p. 292), providing that the court may "upon proper cause shown" summarily order the books to be forthwith brought into the state and kept at the place ordered, the quoted words mean a cause, the propriety of which is made to appear to the court. *National Packing Co. v. Garven*, 79 N. J. L. 266, 78 Atl. 703.

Where it appears that the right of inspection was deliberately refused a stockholder and that the capital stock has depreciated in value within a short time, and other facts warranting inspection are shown, the corpora-

tion will be ordered to bring its books into the state for inspection by the stockholder seeking it. *Huyler v. Cragin Cattle Co.*, 40 N. J. Eq. 392, 2 Atl. 274.

New Jersey General Corporation Act, § 44 (P. L. 1896, p. 292), providing for the bringing into the state of corporate books upon proper cause shown, does not authorize the bringing of a suit in equity for such purpose when the stockholder merely desires examination of the books or to have access to them. *Maeder v. Buffalo Bill's Wild West Co.*, 132 Fed. 280.

³⁹ *State v. Jessup & Moore Paper Co.*, 7 Pennw. (Del.) 397, 72 Atl. 1057; *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 48 L. R. A. 732, 78 Am. St. Rep. 707, 56 N. E. 1033.

"The right to make copies, and to make abstracts and memoranda, of documents, books, and papers, by a stockholder in an incorporated company, is as full and complete as the right of inspection thereof." *Swift v. State*, 7 Houst. (Del.) 338, 49 Am. St. Rep. 127, 32 Atl. 143, 6 Atl. 856; *Nelson v. Anglo-American Land Mortg. Agency Co.*, [1897] 1 Ch. 130.

⁴⁰ At common law it was frequently held that the right to make copies and minutes was necessarily incidental to right to inspect. *Withington v. Bradley*, 111 Me. 384, 89 Atl. 201.

the right to make abstracts, memoranda or copies thereof.⁴¹ The right rests, as does the similar right to examination, upon the broad ground that the business of the corporation is not the business of the officers exclusively, but is the business of the stockholders.⁴²

Under some statutes the right to take copies is limited to such part as concerns the stockholders' interests.⁴³

§ 2841. Restrictions. The rule that inspection must be exercised at a reasonable and proper time and place, means that the right must be exercised in such a manner as not to interfere with the business of the corporation⁴⁴ and business hours have been held to be "reasonable hours" in which to inspect books.⁴⁵

⁴¹ *Powelson v. Tennessee Eastern Elec. Co.*, 220 Mass. 380, Ann. Cas. 1917 A 102, 107 N. E. 997; *Henry v. Babcock & Wilcox Co.*, 196 N. Y. 302, 134 Am. St. Rep. 835, 89 N. E. 942; *In re Martin*, 62 Hun (N. Y.) 557, 17 N. Y. Supp. 133; *Althause v. Giroux*, 56 N. Y. Misc. 508, 107 N. Y. Supp. 191; *Fay v. Coughlin-Sandford Switch Co.*, 47 N. Y. Misc. 687, 94 N. Y. Supp. 628; *Cotheal v. Brower*, 5 N. Y. Leg. O. 175, aff'g 5 N. Y. 562, 10 Barb. (N. Y.) 216; *Com. v. Phoenix Iron Co.*, 105 Pa. St. 111, 51 Am. Rep. 184. See also *Com. v. Empire Passenger Ry. Co.*, 134 Pa. St. 237, 19 Atl. 629.

The New York statute (Laws 1892, c. 688, p. 1840, § 53, as amended by Laws 1897, c. 384, p. 314) requiring that foreign corporations keep a stock book and that such book shall be open daily during business hours "for the inspection" of its stockholders and prescribing a penalty for failure to comply therewith does not render such a corporation liable to the penalty for refusing to permit a stockholder to inspect the stock book and take a list of the stockholders therefrom. *Henry v. Babcock & Wilcox Co.*, 125 N. Y. App. Div. 538, 109 N. Y. Supp. 853; *People v. Giroux Consol. Mines Co.*, 122 N. Y. App. Div. 617, 107 N. Y. Supp. 188; *Althause v. Giroux*, 56 N. Y. Misc. 508, 107 N. Y. Supp. 191.

⁴² *Cincinnati Volksblatt Co. v. Hoff-*

meister, 62 Ohio St. 189, 48 L. R. A. 732, 78 Am. St. Rep. 707, 56 N. E. 1033.

⁴³ Under the statute (Maine Rev. St. c. 47, § 20), the right "to take copies and minutes therefrom" is limited to such parts "as concern their interests." *Withington v. Bradley*, 111 Me. 384, 89 Atl. 201; *White v. Manter*, 109 Me. 408, 42 L. R. A. (N. S.) 332, 84 Atl. 890.

⁴⁴ *State v. St. Louis Transit Co.*, 124 Mo. App. 111, 100 S. W. 1126; *Kuhbach v. Irving Cut Glass Co.*, 220 Pa. 427, 28 L. R. A. (N. S.) 185, 69 Atl. 981.

Under the common law, a stockholder of a corporation has a right to examine its books and records at reasonable times; that is, at such hours as will not needlessly annoy the officials of the company or interfere with the conduct of its business. *State v. Donnell Mfg. Co.*, 129 Mo. App. 206, 107 S. W. 1112.

The right of inspection and examination must be exercised at reasonable and proper times. *State v. Jessup & Moore Paper Co.*, 7 Pennw. (Del.) 397, 72 Atl. 1057; *Richmond v. Hill*, 148 Ill. App. 179; *Weihenmayer v. Bitner*, 88 Md. 325, 45 L. R. A. 446, 42 Atl. 245.

⁴⁵ *Clawson v. Clayton*, 33 Utah 266, 93 Pac. 729.

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When an examination of books is desired, it is not unreasonable to insist that the books be not removed from the office, but such examination should be made at the place where the books are ordinarily kept.⁴⁶

In some of the decisions it will be found that objections as to the time and place of inspection were mere pretexts put forward to avoid granting of the right of inspection.⁴⁷

§ 2842. Abuse of right. In cases dealing with the right of inspection, and the propriety of the purpose of the stockholder, dicta will be found to the effect that a corporation is not remediless if a stockholder or director abuses the right of inspection, or seeks to make improper use of the information which he obtains.⁴⁸ But a bill for an injunction to prevent inspection which merely states that the examination and the publicity incident thereto are not desirable, and that the business of the corporation will be injured if the profits from the manufacture and sale of its articles are made known to business competitors or purchasers, does not show such irreparable injury as to justify the court of chancery in entertaining jurisdiction.⁴⁹

§ 2843. Assault on one using books improperly. Where a director or stockholder uses books for an improper purpose, and a secretary forcibly takes such books from him, using no more force than is necessary, he is not liable for the assault. This is a case of justifiable assault.⁵⁰

VII. ENFORCEMENT OF RIGHT

§ 2844. Mandamus—In general. By the great weight of authority, mandamus is the proper remedy to enforce the right of inspection unless statutes operate to exclude the writ,⁵¹ and there

⁴⁶ *G. W. Jones Lumber Co. v. Wisconsin Lumber Co.*, — Ark. —, 187 S. W. 1068.

⁴⁷ See *State v. Pacific Brewing & Malting Co.*, 21 Wash. 451, 47 L. R. A. 208, 58 Pac. 584.

⁴⁸ See *Stone v. Kellogg*, 62 Ill. App. 444, aff'd 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222.

⁴⁹ *Rodger Ballast Car Co. v. Perrin*, 88 Ill. App. 323.

⁵⁰ *Heminway v. Heminway*, 58 Conn. 443, 19 Atl. 766.

⁵¹ *United States v. Maeder v. Buffalo Bill's Wild West Co.*, 132 Fed. 280.

Alabama. *Winter v. Baldwin*, 89 Ala. 483, 7 So. 734; *Foster v. White*, 86 Ala. 467, 6 So. 88.

California. *Johnson v. Langdon*, 135 Cal. 624, 87 Am. St. Rep. 156, 67 Pac. 1050; *Gavin v. Pacific Coast*

is no difference in principle between cases where the right of inspec-

Marine Firemen's Union of San Francisco, 2 Cal. App. 638, 84 Pac. 270.

Delaware. *Swift v. State*, 7 Houst. 338, 40 Am. St. Rep. 127, 32 Atl. 143, 6 Atl. 856.

Illinois. *Coquard v. National Linseed-Oil Co.*, 171 Ill. 480, 49 N. E. 563, aff'g 67 Ill. App. 20; *People v. Weber Co.*, 159 Ill. App. 588; *Heitkamp v. American Pigment & Chemical Co.*, 158 Ill. App. 587; *Rodger Ballast Car Co. v. Perrin*, 88 Ill. App. 323; *Stone v. Kellogg*, 62 Ill. App. 444, aff'd 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222.

Iowa. *Boardman v. Marshalltown Grocery Co.*, 105 Iowa 445, 75 N. W. 343.

Louisiana. *State v. New Orleans Gaslight Co.*, 49 La. Ann. 1556, 22 So. 515; *Legendre v. New Orleans Brewing Ass'n*, 45 La. Ann. 669, 40 Am. St. Rep. 243, 12 So. 837; *State v. Bienville Oil Works Co.*, 28 La. Ann. 204; *Cockburn v. Union Bank*, 13 La. Ann. 289.

Maryland. *Wight v. Heublein*, 111 Md. 649, 75 Atl. 507; *Weihenmayer v. Bitner*, 88 Md. 325, 45 L. R. A. 446, 42 Atl. 245.

Massachusetts. *Klotz v. Pan-American Match Co.*, 221 Mass. 38, 108 N. E. 764; *Andrews v. Mines Corporation*, 205 Mass. 121, 137 Am. St. Rep. 428, 91 N. E. 122.

Michigan. See *Woodworth v. Old Second Nat. Bank*, 154 Mich. 459, 15 Det. L. N. 773, 118 N. W. 581, 117 N. W. 893; *People v. Walker*, 9 Mich. 328.

Missouri. *State v. Donnell Mfg. Co.*, 129 Mo. App. 206, 107 S. W. 1112; *State v. St. Louis Transit Co.*, 124 Mo. App. 111, 100 S. W. 1126.

New Hampshire. *Hub Const. Co. v. New England Breeders' Club*, 74 N. H. 282, 67 Atl. 574.

New Jersey. *Fuller v. Alexander Hollander & Co.*, 61 N. J. Eq. 648, 88

Am. St. Rep. 456, 47 Atl. 646; *Huyilar v. Cragin Cattle Co.*, 40 N. J. Eq. 392, 2 Atl. 274; *Trimble v. American Sugar-Refining Co.* (N. J. Ch.), 48 Atl. 912.

New York. In re *Steinway*, 159 N. Y. 250, 45 L. R. A. 461, 53 N. E. 1103; *Hitchcock v. Union Ferry Co. of New York & Brooklyn*, 157 App. Div. 328, 142 N. Y. Supp. 247; *People v. Consolidated Fire Alarm Co.*, 142 App. Div. 753, 127 N. Y. Supp. 348; *Paper v. Utah Gold & Copper Mines Co.*, 135 App. Div. 418, 119 N. Y. Supp. 852; *People v. National Park Bank*, 122 App. Div. 635, 107 N. Y. Supp. 369; In re *Hastings*, 120 App. Div. 756, 105 N. Y. Supp. 834; *Taylor v. Citizens' Nat. Bank of Saratoga Springs*, 117 App. Div. 348, 101 N. Y. Supp. 1039; In re *Steinway*, 31 App. Div. 70, 52 N. Y. Supp. 343; *People v. Eadie*, 63 Hun 320, 18 N. Y. Supp. 53, aff'd 133 N. Y. 573, 30 N. E. 1147; In re *O'Neill*, 47 Misc. 495, 95 N. Y. Supp. 964; *People v. Throop*, 12 Wend. 183.

Oregon. *Davidson v. Almeda Mines Co.*, 66 Ore. 412, 48 L. R. A. (N. S.) 847, 134 Pac. 782.

Pennsylvania. *Kuhbach v. Irving Cut Glass Co.*, 220 Pa. 427, 28 L. R. A. (N. S.) 185, 69 Atl. 981; *Phoenix Iron Co. v. Com.*, 113 Pa. St. 563, 6 Atl. 75; *Com. v. Phoenix Iron Co.*, 105 Pa. St. 111, 51 Am. Rep. 184.

Rhode Island. *Lyon v. American Screw Co.*, 16 R. I. 472, 17 Atl. 61.

Tennessee. *Brown v. Crystal Ice Co.*, 122 Tenn. 239, 19 Ann. Cas. 308, 122 S. W. 84.

Utah. *Kimball v. Dern*, 39 Utah 181, 35 L. R. A. (N. S.) 134, Ann. Cas. 1913 E 166, 116 Pac. 28.

Wisconsin. *State v. Thompson's Malted Food Co.*, 160 Wis. 671, 152 N. W. 458; *State v. Bergenthal*, 72 Wis. 314, 39 N. W. 566.

tion is statutory and those in which mandamus is awarded to perform a duty enjoined by the charter or by-law of a corporation.⁵³

Mandamus does not supersede legal remedies.⁵⁴ Nor is the power to grant the writ affected by the existence of a possible equitable remedy.⁵⁵ But usually the remedy by injunction is held to be inadequate,⁵⁶ and the same reason applies to the remedy by bringing an action for damages.⁵⁷

In Ohio, and it may be in other states, the statutes are such that mandamus will not lie as at common law. In that jurisdiction, where the statute declares that the writ of mandamus "must not be issued in a case where there is a plain and adequate remedy in the ordinary course of the law," it has been held that mandamus will not lie to compel a corporation or its officers to allow an inspection of its books and papers, as there is an adequate remedy by injunction.⁵⁸

§ 2845. — Nature of proceeding; jurisdiction; parties. Without entering into an extended discussion as to matters of procedure when a petition for mandamus is brought, it may be stated that mandamus is a civil remedy,⁵⁹ and a common-law proceeding.⁶⁰

The petition is addressed to the court or judge,⁶¹ and the remedy is

England. *Rex v. Merchant Tailors' Co.*, 2 B. & Ad. 115; *Nelson v. Anglo-American Land Mortg. Agency Co.*, 1 Ch. 130.

Gen. Corp. Act § 33 (Pamph. L. 1898, p. 409), does not restrict the stockholder's power as it is customarily accorded to them at common law and affords no ground for the claim that the discretionary nature of a mandamus proceeding has been in any way abrogated. *O'Hara v. National Biscuit Co.*, 69 N. J. L. 198, 54 Atl. 241.

It will be found that where production for inspection has been ordered in an independent proceeding, not strictly mandamus, it has been in states where the jurisdiction of the courts of law and equity has been blended and the line of demarcation between remedies has become indistinct. *Fuller v. Alexander Hollander & Co.*, 61 N. J. Eq. 648, 88 Am. St. Rep. 456, 47 Atl. 646.

⁵³ *Wyoming Coal Min. Co. v. State*, 15 Wyo. 97, 123 Am. St. Rep. 1014, 87 Pac. 337, 984.

⁵⁴ *Merchants Broom Co. v. Butler*, 70 Fla. 397, 70 So. 383.

⁵⁵ *State v. Donnell Mfg. Co.*, 129 Mo. App. 206, 107 S. W. 1112.

⁵⁶ See § 2849, *infra*.

⁵⁷ See § 2850, *infra*.

⁵⁸ *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 48 L. R. A. 732, 78 Am. St. Rep. 707, 56 N. E. 1033. See also *Wyoming Coal Min. Co. v. State*, 15 Wyo. 97, 123 Am. St. Rep. 1014, 87 Pac. 337, 984, as to effect of the Ohio decision.

⁵⁹ *Home Guano Co. v. State (Ala.)*, 69 So. 419; *Merrill v. Saffa*, 42 Colo. 195, 93 Pac. 1099.

⁶⁰ *Rodger Ballast Car Co. v. Perrin*, 88 Ill. App. 323.

⁶¹ Mandamus is prosecuted by a petition addressed to the court or judge, and is not affected by the statutes (Alabama Code, § 5296 et

properly enforceable in the forum where the records and custodians are located.⁶³

Usually state courts have jurisdiction where inspection of the records of national banks is sought,⁶³ while federal courts have power to issue mandamus only in the exercise of jurisdiction to which it is an ancillary proceeding.⁶⁴

When a secretary of several corporations refuses to allow inspection and one action of mandamus is brought, there is an improper joinder of causes of action. In such case there are as many torts as there are corporations involved.⁶⁵

The proceedings should be brought by the real parties in interest,⁶⁶ in the name of the state.⁶⁷

The corporation is a proper, if not a necessary party,⁶⁸ and the writ may issue against the corporation, or against both the corporation and the officer having the custody of the books or papers.⁶⁹ Or

seq.), as to the commencement of civil actions by service of summons. *Home Guano Co. v. State* (Ala.), 69 So. 419.

⁶³ *Machen v. Machen & Meyer Elec. Mfg. Co.*, 237 Pa. 212, 42 L. R. A. (N. S.) 1079, Ann. Cas. 1914 B 420, 85 Atl. 100.

The Supreme Court of New York may enforce a right by mandamus, and such power is part of its general jurisdiction as successor of the courts of the colony of New York. In *re Steinway*, 159 N. Y. 250, 45 L. R. A. 461, 53 N. E. 1108.

Under the Pennsylvania Act of June 8, 1893 (P. L. 345), and the Act of March 19, 1903 (P. L. 32), courts in counties where chief place of business is located or where corporation transacts business have right to proceed by mandamus to compel performance of an act or duty to be performed within such county. *Neubert v. Armstrong Water Co.*, 211 Pa. 582, 61 Atl. 123.

⁶⁴ *Woodworth v. Old Second Nat. Bank*, 154 Mich. 459, 118 N. W. 581, 117 N. W. 893, 15 Det. L. N. 773.

⁶⁵ *Large v. Consolidated Nat. Bank*, 137 Fed. 168.

⁶⁶ *Merrill v. Suffa*, 42 Colo. 195, 93 Pac. 1099.

⁶⁷ *Merrill v. Suffa*, 42 Colo. 195, 93 Pac. 1099; *Boardman v. Marshalltown Grocery Co.*, 105 Iowa 445, 75 N. W. 343.

⁶⁸ Mandamus is in the nature of a prerogative writ, and the bill should be presented in the name of the state. (*Brown v. Crystal Ice Co.*, 122 Tenn. 239, 19 Ann. Cas. 308, 122 S. W. 84), or on relation of party beneficially interested. *State v. Pacific Brewing & Malting Co.*, 21 Wash. 451, 47 L. R. A. 208, 58 Pac. 584.

⁶⁹ *State v. Thompson's Malted Food Co.*, 160 Wis. 671, 152 N. W. 458.

⁷⁰ *Louisiana. Cockburn v. Union Bank*, 13 La. Ann. 289.

New Jersey. Huyler v. Cragin Cattle Co., 40 N. J. Eq. 392, 2 Atl. 274.

Pennsylvania. Phoenix Iron Co. v. Com., 113 Pa. St. 563, 6 Atl. 75.

Rhode Island. Lyon v. American Screw Co., 16 R. I. 472, 17 Atl. 61.

England. Rex v. Merchant Tailors' Co., 2 B. & Ad. 115; *Reg. v. Mariquita & N. G. Min. Co.*, 1 E. & E. 289.

Mandamus should be issued against the person or persons having the power to perform the duty commanded. *State v. Pan American Co.*, 5 Pennw. (Del.) 391, 63 Atl. 1118, 61 Atl. 398. But the joining of some

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it may issue against the officer alone, without making the corporation a party.⁷⁰ In Louisiana, however, it has been held that, in mandamus proceedings to enforce the right to inspect the books of a corporation, the citation should be addressed to the corporation, and not to its manager.⁷¹

§ 2846. — Pleading. In accordance with the rules mentioned hereinbefore,⁷² it is held that the stockholder⁷³ seeking information must allege the refusal of his demand for inspection,⁷⁴ or conduct

other party will not invalidate the writ. *State v. Pan American Co.*, 5 Pennw. (Del.) 391, 63 Atl. 1118, 61 Atl. 398.

On petition for mandamus, the joinder of the president as a party defendant is not improper or fatal to writ. *Bay State Gas Co. v. State*, 4 Pennw. (Del.) 238, 36 Atl. 1114.

A director and treasurer of the company has been held a proper party. *People v. Weber Co.*, 159 Ill. App. 588.

An order for peremptory process against the corporation and its general manager amounts to no more than an order for process against the general manager. *Home Guano Co. v. State* (Ala.), 69 So. 419.

⁷⁰ *Alabama*. *Foster v. White*, 86 Ala. 467, 6 So. 88.

In order to enforce the right of inspection, it is not necessary to make the corporation a party but merely the officer upon whom the statutory duty is devolved. See the following decisions:

Colorado. *Merrill v. Suffa*, 42 Colo. 195, 93 Pac. 1099.

Delaware. *Swift v. State*, 7 Houst. 338, 40 Am. St. Rep. 127, 32 Atl. 143, 6 Atl. 856.

Illinois. *Stone v. Kellogg*, 62 Ill. App. 444, aff'd 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222.

New York. *People v. Throop*, 12 Wend. 183.

West Virginia. *State v. Ice*, 75 W. Va. 476, 84 S. E. 181.

Wisconsin. *State v. Bergenthal*, 72 Wis. 314, 39 N. W. 566.

Evidence showing that a certain officer has the actual custody and control of the books is sufficient to authorize a direction of the writ to him, even though he is not the nominal custodian of them. *Cobb v. Lagarde*, 129 Ala. 488, 30 So. 326.

⁷¹ *State v. North American Land & Timber Co.*, 105 La. 379, 29 So. 910.

⁷² See §§ 2826-2828, *supra*.

⁷³ To be entitled to the writ, the relator must be a stockholder at the time it is to be issued. It will not be issued if he has sold his stock. *State v. Whited & Wheless*, 104 La. 125, 28 So. 922.

⁷⁴ *Latimer v. Herzog Telesame Co.*, 75 N. Y. App. Div. 522, 78 N. Y. Supp. 314, 12 N. Y. Ann. Cas. 9.

Before a court will be justified in issuing a writ of mandamus to enforce the right of a stockholder to examine the records, papers and books of a corporation, there must have been some refusal or obstruction interposed to the enjoyment of such right by the party against whom the writ is sought. *Mathews v. McClaghry*, 83 Ill. App. 224. See also § 2828, *supra*.

When the right to examine books is claimed and refused, a stockholder is entitled to mandamus on the averments that he is a stockholder, that he has demanded inspection, that the time was reasonable and that the right was denied. *Home Guano Co. v. State*,

equivalent to a refusal,⁷⁵ that the information is necessary to protect his interests,⁷⁶ and is sought for a proper purpose.⁷⁷

The relator must disclose a state of facts establishing a legal right to the remedy sought⁷⁸ and that the remedy is sought within a proper time.⁷⁹ The same rules apply where a creditor seeks relief.⁸⁰

Usually a liberal policy as to amendments is adopted,⁸¹ and formal

193 Ala. 548, 69 So. 419; *Cobb v. Lagarde*, 129 Ala. 488, 30 So. 326; *Foster v. White*, 86 Ala. 467, 6 So. 88.

⁷⁵ *Bay State Gas Co. v. State*, 4 Pennw. (Del.) 238, 56 Atl. 1114.

Petition held sufficient where it averred that defendant was a corporation, that plaintiffs were stockholders, that there was proper demand by plaintiffs and refusal by defendants, or conduct equivalent thereto, and that defendants had failed to perform a duty imposed by law. *Bay State Gas Co. v. State*, 4 Pennw. (Del.) 238, 56 Atl. 1114.

On petition for a writ of mandamus, an averment that the president, one of the defendants, was the custodian of the books is not relevant to the question whether the books were open to inspection of the stockholders at the proper time and place. *Bay State Gas Co. v. State*, 4 Pennw. (Del.) 238, 56 Atl. 1114.

⁷⁶ *Latimer v. Herzog Teleseme Co.*, 75 N. Y. App. Div. 522, 78 N. Y. Supp. 314, 12 N. Y. Ann. Cas. 9.

⁷⁷ *Davidson v. Almeda Mines Co.*, 66 Ore. 412, 48 L. R. A. (N. S.) 847, 134 Pac. 782.

Mandamus will be denied where the petitioners do not show a proper purpose, merely stating vaguely that they wish to be acquainted with the information contained in the books in order that they may use such information for the benefit of the company and its stockholders. *In re Hatt*, 57 N. Y. Misc. 320, 108 N. Y. Supp. 468.

Allegations showing that the purpose of the relator is to ascertain value of stock of company, its prop-

erty, whether stock issued had been paid for, and whether representations by the president of the company were true or false are sufficient to entitle him to the writ. *State v. Pan American Co.*, 5 Pennw. (Del.) 391, 63 Atl. 1118, 61 Atl. 398.

But it has been held that on petition for mandamus under statute, petitioner need not allege and prove purpose of inspection. *White v. Manter*, 109 Me. 408, 42 L. R. A. (N. S.) 332, 84 Atl. 890.

While the facts that inspection is desired with a bad motive, or at unreasonable times, or in such manner as to interfere with the work of officers would constitute abuse of right and would not be permitted by court, such facts are matters of defense and not matters that the stockholders must negative in first instance. *Clawson v. Clayton*, 33 Utah 266, 93 Pac. 729.

⁷⁸ *State v. Jessup & Moore Paper Co.*, 27 Del. 248, 88 Atl. 449; *Merchants Broom Co. v. Butler*, 70 Fla. 397, 70 So. 383.

A stockholder who invokes the power of a court of equity to obtain access to the books must show that its intervention is necessary and that his rights have been denied. *Coquard v. National Linseed-Oil Co.*, 171 Ill. 480, 49 N. E. 563, aff'g 67 Ill. App. 20.

⁷⁹ *Foss v. People's Gas Light & Coke Co.*, 241 Ill. 238, 89 N. E. 351.

⁸⁰ *Hub Const. Co. v. New England Breeders' Club*, 74 N. H. 282, 67 Atl. 574.

⁸¹ It is proper to amend the alterna-

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objections as to indefiniteness may be obviated by an amendment.⁸²

Defenses existing and warranting denial of inspection must be set up in the answer,⁸³ but it is not sufficient to allege on information and belief that the petitioner is fully acquainted with the facts sought,⁸⁴ or that the defendant will furnish all "necessary" information.⁸⁵

When the answer is insufficient it is subject to demurrer,⁸⁶ as where the answer is argumentative in its denial.⁸⁷

The demurrer in a proceeding of this character stands on the same footing as in other actions,⁸⁸ and is available where there is an improper joinder of causes of action.⁸⁹

tive writ in order that it may not in terms go beyond the relief warranted, and so that the peremptory writ may properly follow it. *State v. Doe Run Lead Co.* (Mo. App.), 178 S. W. 298.

An amendment of an alternative writ so as to command inspection of books, and to bring the writ within the confines of the statute (Rev. St. 1909, § 3349), is proper. *State v. Doe Run Lead Co.* (Mo. App.), 178 S. W. 298.

⁸² *Hub Const. Co. v. New England Breeders' Club*, 74 N. H. 282, 67 Atl. 574.

⁸³ *State v. Silver King Consol. Min. Co. of Utah*, 37 Utah 62, 106 Pac. 520.

⁸⁴ On a petition for mandamus the court is called upon to consider the petitioner's right to see the records of a company of which he is a director and stockholder, and an answer which sets forth the information and belief of the defendant that the petitioner is fully acquainted with the facts he desired to ascertain is of no consequence. *Stone v. Kellogg*, 62 Ill. App. 444, *aff'd* 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222.

⁸⁵ Averments of a defendant that he will furnish all information "essential and sufficient," and averments that certain books and statements are not essential for determining the value of the shares of stock are conclusions which cannot be pleaded alone in de-

nial of the right of inspection of certain books and statements. *State v. Jessup & Moore Paper Co.*, 27 Del. 248, 88 Atl. 449.

⁸⁶ *Meysenburg v. People*, 88 Ill. App. 328.

⁸⁷ An allegation in an answer to a stockholder's petition for mandamus to compel officers of a corporation to permit him to examine its books and papers, that the stockholder has not been denied the right to examine any record or book to which he was lawfully entitled, is argumentative, and obnoxious to demurrer. *Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222, *aff'g* 62 Ill. App. 444.

⁸⁸ Thus a demurrer admits matters of fact which are sufficiently stated. *Merchants Broom Co. v. Butler*, 70 Fla. 397, 70 So. 383. And the facts of a return well pleaded are confessed by demurrer. *State v. Doe Run Lead Co.* (Mo. App.), 178 S. W. 298. But it does not admit conclusions of law. *Merchants Broom Co. v. Butler*, 70 Fla. 397, 70 So. 383.

Alternative writ showing a *prima facie* case is not demurrable. *Merchants Broom Co. v. Butler*, 70 Fla. 397, 70 So. 383.

⁸⁹ Where several distinct causes of action are improperly commingled, the proper remedy is by a motion to compel a separate statement, but where the causes cannot be joined at all, de-

If the right to inspect is admitted and tendered by the defendants by pleading the plaintiff has the burden of showing that the right would be denied in the future.⁸⁰

§ 2847. — **Awarding relief.** The issuance of the writ is not a matter of right but is discretionary,⁸¹ although some later decisions incline to the view that the writ will issue as a matter of course, and that very little, if anything, is left to the discretion of the court.⁸²

In general courts have aimed at the exercise of the right under reasonable conditions, rather than its denial⁸³ and the tendency is to grant the writ where formerly it would have been refused.⁸⁴ A clear legal right to the performance of the duty must be shown,⁸⁵

murrer is the proper remedy. *Merrill v. Sutta*, 42 Colo. 195, 93 Pac. 1099.

Where a secretary of eight distinct corporations commits a wrong upon the same person by refusing inspection, the same act constitutes eight separate and distinct torts. *Merrill v. Sutta*, 42 Colo. 195, 93 Pac. 1099.

⁸⁰ He cannot rest his case upon mere suspicion or surmise. *Boardman v. Marshalltown Grocery Co.*, 105 Iowa 445, 75 N. W. 343.

⁸¹ *Connecticut*. *State v. Middlesex Banking Co.*, 87 Conn. 483, 88 Atl. 861.

Delaware. *State v. Jessup & Moore Paper Co.*, 24 Del. 379, 77 Atl. 16.

Maryland. *Wight v. Heublein*, 111 Md. 649, 75 Atl. 507.

Massachusetts. *Butler v. Martin*, 220 Mass. 224, 107 N. E. 999.

Missouri. *State v. Doe Run Lead Co.* (Mo. App.), 178 S. W. 298; *State v. Donnell Mfg. Co.*, 129 Mo. App. 206, 107 S. W. 1112.

New York. *Hitchcock v. Union Ferry Co. of New York & Brooklyn*, 157 App. Div. 328, 142 N. Y. Supp. 247; *People v. National Park Bank*, 122 App. Div. 635, 107 N. Y. Supp. 369; *People v. Giroux Consol. Mines Co.*, 122 App. Div. 617, 107 N. Y. Supp. 188; *People v. New York Life Ins. Co.*, 111 App. Div. 183, 97 N. Y. Supp. 465; *In re Coats*, 75 App. Div. 567, 78 N. Y. Supp. 429.

It is not compulsory upon the court

to enforce the stockholder's right by granting mandamus, since the statute, although conferring an unlimited right, does not abridge the power of the court in mandamus. *Wight v. Heublein*, 111 Md. 649, 75 Atl. 507.

⁸² To the extent that an absolute right is conferred by statute, nothing is left to the discretion of the court and the writ should issue as a matter of course, although even then, doubtless, cognizance may be taken of the time and place, so as to prevent interruption of business or any other serious inconvenience. *In re Steinway*, 159 N. Y. 250, 45 L. R. A. 461, 53 N. E. 1103. See also § 2815, *supra*.

⁸³ *Eldred v. Elliott*, 161 Mich. 262, 126 N. W. 219.

While mandamus is an extraordinary remedy, the awarding of which is within the discretion of the court, when the relator shows a clear legal right to the relief sought and there appears no other adequate remedy therefor, the court should exercise a sound discretion in accord with the rules of law and award the writ rather than arbitrarily withhold its issuance. *State v. Donnell Mfg. Co.*, 129 Mo. App. 206, 107 S. W. 1112.

⁸⁴ *Com. v. Phoenix Iron Co.*, 105 Pa. St. 111, 51 Am. Rep. 184.

⁸⁵ *Merchants Broom Co. v. Butler*, 70 Fla. 397, 70 So. 383.

Thus where stockholder is refused

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and a peremptory writ will issue only when the facts are undisputed.⁹⁶

The right to relief may be presented on the pleadings alone, in which case only undisputed facts may be considered.⁹⁷

If a statute gives a stockholder a particular remedy within the corporation, he must resort to that remedy before he can resort to mandamus.⁹⁸

Mandamus may be refused if it is established that the relator is not entitled to the writ, as where a corporation is involved which is not required to allow inspection,⁹⁹ or where another proceeding is pending in which the relief sought may be granted.¹

information as to conduct of business of corporation, and is refused inspection of books, he is entitled to mandamus. *Com. v. Phoenix Iron Co.*, 105 Pa. St. 111, 51 Am. Rep. 184. Likewise, where petition shows written application for inspection of membership list for political organization, and inspection is refused, mandamus will issue. *McClintock v. Young Republicans of Philadelphia*, 210 Pa. 115, 68 L. R. A. 459, 105 Am. St. Rep. 784, 59 Atl. 691.

⁹⁶ *Hitchcock v. Union Ferry Co. of New York & Brooklyn*, 157 N. Y. App. Div. 328, 142 N. Y. Supp. 247.

⁹⁷ And each statement of fact contained in the answering papers must be assumed to be true. In re Kennedy, 75 N. Y. App. Div. 188, 77 N. Y. Supp. 714.

⁹⁸ *People v. Nassau Ferry Co.*, 86 Hun (N. Y.) 128, 33 N. Y. Supp. 244.

⁹⁹ On petition for mandamus where it is alleged that the plaintiff is not entitled to inspection of the books of benevolent or charitable corporations, the defendant so alleging must state facts bringing his case within exceptions to the general rule. *Gavin v. Pacific Coast Marine Firemen's Union of San Francisco*, 2 Cal. App. 638, 84 Pac. 270.

Under California Const. art. 12, § 14, benevolent corporations are excepted from the duty of keeping cer-

tain books and allowing their inspection by stockholders. *Gavin v. Pacific Coast Marine Firemen's Union of San Francisco*, 2 Cal. App. 638, 84 Pac. 270.

¹ Thus when a proceeding in equity is pending between the same parties at the time of the application for mandamus, in which suit the relief sought by mandamus could be fully administered, it is entirely proper for the court to decline to issue the writ. In such cases the familiar principle obtains that as between courts of coordinate powers, the one first acquiring jurisdiction of the cause, being fully empowered to afford complete relief, will not be disturbed nor interfered with, but will be allowed to retain jurisdiction and determine the controversy. *State v. Donnell Mfg. Co.*, 129 Mo. App. 206, 107 S. W. 1112.

In these circumstances, however, it is essential, in order to defeat the right of mandamus, that the court possessed of the prior equitable suit between the parties shall be empowered to grant the full measure of relief to which the party is entitled. In other words, the court must be possessed of the power to grant the identical relief and all of the relief, to which the relator has a clear legal right, and if full and adequate relief may not be granted in the prior pro-

The fact that a suit in the state courts is discontinued and is recommenced in the federal courts does not affect a stockholder's right to the writ, since the reason for it still remains.³

§ 2848. — Writ; costs. In awarding mandamus, suitable safeguards to protect the interests of all concerned will be considered,⁴ and the rights of the corporation, especially as to trade secrets, will be protected.⁴

The relief awarded will not usually be so broad as to warrant the inspection of all books,⁵ or an audit of such books.⁶

Ordinarily the writ is directed to certain officers⁷ commanding the

ceeding, then its pendency in no manner precludes the right of mandamus. *State v. Donnell Mfg. Co.*, 129 Mo. App. 206, 107 S. W. 1112.

³ *Woodworth v. Old Second Nat. Bank*, 154 Mich. 459, 118 N. W. 581, 117 N. W. 893, 15 Det. L. N. 773.

⁴ *State v. Monida & Y. Stage Co.*, 110 Minn. 193, 125 N. W. 676, 124 N. W. 971.

⁵ *Klotz v. Pan-American Match Co.*, 221 Mass. 38, 108 N. E. 764; *State v. Lazarus*, 127 Mo. App. 401, 105 S. W. 780.

⁶ Where stockholder sues to set aside transfer of valuable patents and asks for discovery and inspection of books, he is entitled to an inspection of the contracts or transfers and the resolutions as to the transfer of the patents, but not of all the books. *Snyder v. De Forest Wireless Tel. Co.*, 113 N. Y. App. Div. 840, 99 N. Y. Supp. 644.

The stockholder must show what specific books are to be inspected, and the corporation cannot be required, on his unsupported allegation, to open all of its books to general inspection. *Snyder v. De Forest Wireless Tel. Co.*, 113 N. Y. App. Div. 840, 99 N. Y. Supp. 644.

An order allowing inspection to ascertain if there was an agreement between plaintiff's intestate and other defendants as to the equal control of the corporation, and as to whether

an issue of stock putting the control of the corporation in defendants was authorized, should not be granted. *Brewster v. F. G. Brewster Co.*, 127 N. Y. App. Div. 729, 111 N. Y. Supp. 1026, in which case it was stated that the better practice would seem to be to examine the officers and ascertain what books contain information as to the agreement and the issue of stock, and then obtain an order for their inspection.

⁷ An alternative writ requiring the corporation to permit an audit was held erroneous especially when the court was not in a position, on the showing of the relators, to determine that such audit was necessary. *Merchants Broom Co. v. Butler*, 70 Fla. 397, 70 So. 383.

Florida Gen. St. § 2672, does not confer on court authority to require corporation to permit committee of one appointed by stockholders representing one-tenth of stock, to make audit of books and records of corporation. *Merchants Broom Co. v. Butler*, 70 Fla. 397, 70 So. 383.

⁸ Mandamus to compel inspection of books does not run against the corporation as such, but against the officers of the corporation having custody and control of its books. *Home Guano Co. v. State (Ala.)*, 69 So. 419.

However, it is too late to urge on review for the first time that a writ of mandamus requiring an inspection

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performance of the duty,⁸ and stating the right to the relief.⁹ The defendant should then show performance of the duty or deny the right to the remedy¹⁰ within a certain time.¹¹

On exceptions to a writ, its form cannot be modified,¹² and a decree which is otherwise proper and which follows the language of the statute cannot be held erroneous for the failure to define a statutory word or term susceptible of more than one meaning.¹³

of corporate records to be accorded to a stockholder runs only against the corporation. *Pease v. Chicago Crayon Co.*, 167 Ill. App. 31.

⁸ Where the court, in making the order, erroneously used the word "issued" instead of "awarded," and the prothonotary, instead of issuing the writ, prepared a certified copy of the petition and order of court, which was served upon the president, the procedure was irregular, since the prothonotary should have issued a writ commanding respondents to do the things ordered by court. *Kuhbach v. Irving Cut Glass Co.*, 220 Pa. 427, 28 L. R. A. (N. S.) 185, 69 Atl. 981.

⁹ The writ should allege all essential facts showing the duty and imposing the legal obligation to perform acts demanded as well as the facts entitling the relator to invoke the aid of the court. *Merchants Broom Co. v. Butler*, 70 Fla. 397, 70 So. 383.

An alternative writ of mandamus is not vitiated by a recital of relator's dual status as stockholder and director, he being entitled to clear right of inspection in one of two capacities shown by recitals. *State v. Ice*, 75 W. Va. 476, 84 S. E. 181.

¹⁰ When an alternative writ issues, defendant by its return must either show that it has obeyed the command of the writ, or, in the alternative, deny the averments of the petition upon which the writ was awarded, and show the relator to be without right to the remedy. *State v. Jessup & Moore Paper Co.*, 27 Del. 248, 88 Atl. 449.

The opening of a ledger to stockholders assembled at a general meeting is not part compliance by a corporation with the mandate of an alternative writ commanding inspection. *State v. Jessup & Moore Paper Co.*, 27 Del. 248, 88 Atl. 449, in which it was further held that an offer to exhibit for inspection only a part of the books and documents named in the writ and to permit only a limited and conditional inspection was not a sufficient compliance with the mandate.

¹¹ The fixing of a return day of a rule nisi rests in the discretion of the judge, unless otherwise provided by statute. *Home Guano Co. v. State (Ala.)*, 69 So. 419.

The allowance of ten days to prepare for hearing on a rule nisi is not unreasonable. *Home Guano Co. v. State (Ala.)*, 69 So. 419.

When an application is made in vacation, the rule must be made returnable to the next term of court. *Home Guano Co. v. State (Ala.)*, 69 So. 419.

Where there is no statutory provision otherwise, a rule nisi is returnable before the court, not the judge, and the case must be heard and determined by the court according to the course of the common law. *Home Guano Co. v. State (Ala.)*, 69 So. 419.

¹² On such a proceeding the court can only sustain or overrule the exceptions. *White v. Manter*, 109 Me. 408, 42 L. R. A. (N. S.) 332, 84 Atl. 890.

¹³ *White v. Manter*, 109 Me. 408, 42 L. R. A. (N. S.) 332, 84 Atl. 890.

The costs of an expert to assist in examination should be borne by the plaintiff,¹⁴ and if inspection is tendered, subsequent costs will be taxed to the plaintiff.¹⁵

§ 2849. Remedies in equity. There is no similarity between the remedy of mandamus and that of injunction, and they are not interchangeable,¹⁶ and usually the remedy of injunction is held inadequate to compel inspection,¹⁷ mandamus being a more direct remedy.¹⁸ Under the statutory provisions in some jurisdictions, it has been held that a suit for an injunction will lie.¹⁹

¹⁴ Where a court grants a prayer for an expert to assist in the examination of books which the plaintiff has the right to inspect, the cost of such expense cannot be reckoned as part of the costs of litigation, and being for the benefit of the plaintiff, should be borne by the plaintiff. *State v. Citizens' Bank of Jennings*, 51 La. Ann. 426, 25 So. 318.

¹⁵ Where defendants tendered inspection of books with an offer to pay costs up to that time, after commencement of suit, the trial court was right in taxing subsequent costs to plaintiff, unless it was shown that he was entitled to damages for denial of right prior to tender. *Boardman v. Marshalltown Grocery Co.*, 105 Iowa 445, 75 N. W. 343.

¹⁶ *Brown v. Crystal Ice Co.*, 122 Tenn. 239, 19 Ann. Cas. 308, 122 S. W. 84.

¹⁷ *Wyoming Coal Min. Co. v. State*, 15 Wyo. 97, 123 Am. St. Rep. 1014, 87 Pac. 337, 984.

On petition for inspection of books and posting of information as required by statute, it may well be doubted whether a court can grant such relief by process of injunction. *Boardman v. Marshalltown Grocery Co.*, 105 Iowa 445, 75 N. W. 343.

¹⁸ "It is true that the mandatory injunction might be made effectual in securing for a stockholder an examination of the books by forbidding the officers and agents of the cor-

poration from interfering with him in such examination; but the mandamus is a much more direct remedy, and can be conditioned by such restrictions as the court may deem necessary or proper to prevent injury to the books or undue inconvenience to the officers and agents of the corporation in the discharge of their duties." *Brown v. Crystal Ice Co.*, 122 Tenn. 239, 19 Ann. Cas. 308, 122 S. W. 84, distinguishing *Hawkins v. Kercheval*, 78 Tenn. 535, on the ground that relief was granted under an amended bill construed as an application for mandamus after it had been denied under the bill asking an injunction.

¹⁹ The Ohio statute (Rev. St. § 6741) defines mandamus as a writ issued to "a corporation, board, or person, commanding the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station." It further provides (Rev. St. § 6744) that the writ "must not be issued in a case where there is a plain and adequate remedy for the wrong." In view of these provisions it is held that mandamus is not the proper remedy of a stockholder seeking an inspection of the corporate books, as the granting of the right of inspection is not the performance of an act which the law specifically enjoins and furthermore as the granting of the inspection is an act which may be compelled by injunction in the common and ordinary

Courts of equity have inherent jurisdiction to compel the production of books and papers for inspection, but such jurisdiction is usually confined to cases where the books and papers are evidential in a cause pending in the court,²⁰ and cases arising under a bill filed for relief as well as discovery, or under a bill filed for discovery only, in aid of a prosecution or defense, in litigation pending or contemplated.²¹

The fact that directors refuse to allow stockholders to examine books constitutes no valid ground for the appointment of a receiver,²² but on an application for such an appointment, the court may order an examination of the books, upon proper cause shown.²³ Similarly, inspection may be ordered on motion, in other equitable actions.²⁴

In nearly all states, statutes have been enacted taking the place of the equitable action for discovery.²⁵ Such an order has been held not

exercise of that power, an equity proceeding being one "in the ordinary course of the law," within the meaning of the statute. *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 48 L. R. A. 732, 78 Am. St. Rep. 707, 56 N. E. 1033. See also *Murray v. Walker*, 156 Ky. 536, Ann. Cas. 1915 C 363, 161 S. W. 512; *Nelson v. Anglo-American Land Mortg. Agency Co.*, [1897] 1 Ch. 130.

A petition for a mandatory injunction to compel inspection of a list of the stockholders in a national bank (under U. S. Rev. St. § 5210, 5 Fed. St. Ann. p. 152) must be brought by the real parties in interest. *Murray v. Walker*, 156 Ky. 536, Ann. Cas. 1915 C 363, 161 S. W. 512.

²⁰ *Fuller v. Alexander Hollander & Co.*, 61 N. J. Eq. 648, 88 Am. St. Rep. 456, 47 Atl. 646.

²¹ *Fuller v. Alexander Hollander & Co.*, 61 N. J. Eq. 648, 88 Am. St. Rep. 456, 47 Atl. 646.

²² *Smith v. Birmingham Disinfectant Co. (Ala.)*, 56 So. 721. See also *Bidpath v. Sans Poil & C. R. Ferry Transp. Co.*, 26 Wash. 427, 67 Pac. 229.

²³ *McGeary v. Brown*, 23 S. D. 573, 122 N. W. 605.

²⁴ *Ranger v. Champion Cotton-Press Co.*, 51 Fed. 61.

While a court of equity may, in its discretion, order the officers of a corporation to allow a stockholder to inspect its books at any stage of the proceedings, it will not do so upon the mere filing of the bill, or after service and before answer, "except under the most pressing necessity," since the defendants may deny that the complainant is a shareholder, or may set up that the charter or by-laws modify his right to such inspection. *Ranger v. Champion Cotton-Press Co.*, 51 Fed. 61.

²⁵ These statutes usually provide, in substance, that the court in which an action is pending, or a judge thereof, may in its or his discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy of any books, papers and documents in his possession or under his control containing evidence relative to the merits of the action or defense, and upon failure to comply with the order, the court may exclude the paper from being given in evidence, or punish the party refusing, or both. See *McGeary v. Brown*, 23 S. D. 573, 122 N. W. 605.

to be an infringement of the constitutional guaranty securing persons against unreasonable searches.²⁶

The statutory authority is also sufficient to enable the court to enforce inspection incidental and essential to the merits of a pending controversy,²⁷ the power of the court being similar to that on a bill for discovery which is incidental to a pending action.²⁸

On a bill for discovery, the stockholder must usually show a denial of the right of inspection,²⁹ and facts and circumstances must be stated sufficient to satisfy the court that the books and papers sought to be examined do in fact contain material evidence for the party.³⁰

The old chancery bill of discovery is no longer allowed in Missouri, since statute has provided a more convenient mode by which the purpose of such bills can be attained (Missouri Rev. St. 1899, §§ 737-741; Missouri Ann. St. §§ 737-741). *State v. Donnell Mfg. Co.*, 129 Mo. App. 206, 107 S. W. 1112.

In a petition for an appointment of a receiver the court may order inspection of corporate books without notice and formal application. *McGeary v. Brown*, 23 S. D. 573, 122 N. W. 605.

²⁶ On application for the appointment of a receiver, an order of court claiming the right to examination of the books, in order that the complainant owning an equitable interest in stock may determine her interest, is not an infringement of the constitutional provision guaranteeing security against unreasonable searches. *McGeary v. Brown*, 23 S. D. 573, 122 N. W. 605.

²⁷ *State v. Donnell Mfg. Co.*, 129 Mo. App. 206, 107 S. W. 1112.

²⁸ Where an application for discovery is sought, it is incidental to the prosecution of the pending action and has reference only to claims involved in that action, and its allowance must be determined according to the law applicable to such proceedings. *Walsh v. Press Co.*, 48 N. Y. App. Div. 333, 62 N. Y. Supp. 833.

²⁹ *Coquard v. National Linseed-Oil*

Co., 171 Ill. 480, 49 N. E. 563, *aff'd* 67 Ill. App. 20.

Where a bill for discovery of the financial condition of a corporation does not allege refusal of the information, or that the complainant has been refused inspection of the books, there is no reason for interference by the court, since the stockholder has not the unlimited right of inquiring at all times into the details of the business carried on by the corporation. *Trimble v. American Sugar Refining Co.*, 61 N. J. Eq. 340, 48 Atl. 912.

³⁰ *Walsh v. Press Co.*, 48 N. Y. App. Div. 333, 62 N. Y. Supp. 833.

A *prima facie* case, or at least facts leading directly to that result, must be shown before a discovery will be ordered. *Walsh v. Press Co.*, 48 N. Y. App. Div. 333, 62 N. Y. Supp. 833.

Discovery will not be ordered to enable a party to find out whether he has a cause of action, or whether there may not be some entries or papers that will be pertinent. *Walsh v. Press Co.*, 48 N. Y. App. Div. 333, 62 N. Y. Supp. 833.

On application for discovery under N. Y. Code, §§ 803-809, the party applying must show the materiality and necessity of the inspection sought, the particular information required and that there are entries in the books as to the matter of which he seeks discovery. *Walsh v. Press Co.*, 48 N. Y. App. Div. 333, 62 N. Y. Supp. 833.

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A denial that books contain matters showing the truth of allegations sought to be proved does not bar an order for their production by compulsory process.³¹

In some states statutes have been enacted providing for the production of books and papers as evidence in a cause. Such statutes differ from those providing for discovery.³²

VIII. DAMAGES AND PENALTIES

§ 2850. Damages for injury from refusal. Recovery may be had against the corporation by a stockholder who is improperly refused the right of inspecting the corporate books and records,³³ if the corporation can be regarded as in default in the matter, as where the inspection is refused by or by order of the board of directors or the majority stockholders as a body. It has been held, however, that a stockholder cannot hold his co-stockholders or the corporation liable in damages on account of the refusal by a subordinate officer of an informal request to be allowed to inspect books or papers of the corporation, although he would have ascertained that the affairs of the corporation were being improperly managed, and might have taken steps to avoid loss. Upon such a refusal, he should apply for a writ of mandamus, or else apply to the directors, so as to put the company in default. "If mandamus had issued immediately after the refusal," said the Louisiana court in such a case, "the action would have been maintained against the company only. It would have had the right to repudiate the refusal and permit the inspection. The act of the secretary is not absolutely binding upon the company in

³¹ Where books or documents contain matters relevant to the issues of a cause and their production is sought by compulsory process, a denial that the documents if produced will show the truth of the allegations sought to be proved thereby, will not be a bar to an order to production. *Martin v. D. B. Martin Co.* (Del. Ch.), 88 Atl. 612.

³² New York Code Civ. Proc. § 872, subd. 7, providing for taking of deposition of an adverse party or witness, and stating that where the party to be examined is a corporation, books and papers may be directed to be produced, does not provide for inspection as is permissible under §§ 803-809 as

to discovery. *Manthey v. Wyoming County Co-op. Fire Ins. Co.*, 76 N. Y. App. Div. 579, 78 N. Y. Supp. 596.

³³ When the statutory right of inspection (Iowa Code, § 1078) is denied, any one injured thereby may have his action for damages, or performance may be required by appropriate action. *Boardman v. Marshalltown Grocery Co.*, 105 Iowa 445, 75 N. W. 848.

With regard to the remedy of an action for damages, it may be stated that such remedy is generally inadequate and imperfect. See *Weihe-mayer v. Bitner*, 88 Md. 325, 45 L. R. A. 446, 42 Atl. 245.

matter of inspection of the books. He cannot stand in judgment, nor can he, as agent of the stockholders, occasion damages by refusing the books, for which the company will be liable to one stockholder to the loss of the others, who are not parties and have not given the least sanction to the refusal. * * * An error of an officer in a subordinate position in refusing to permit books to be examined is not per se such an error as will expose the company to the payment of damages."³⁴

As a general rule the right to recover damages is enforceable against the particular officer who refuses to allow inspection.³⁵

The damages which the stockholder may recover are such as naturally and proximately result from the refusal, and not those which are remote, uncertain, collateral and speculative.³⁶ In such case the violation of the legal right of the stockholder authorizes the recovery of nominal damages without proof of actual damages,³⁷ but a decision will not be reversed on appeal because of the failure to allow nominal damages.³⁸ Where no actual damages are sustained, punitive damages cannot be assessed.³⁹

§ 2851. Statutory penalties. When the right of a stockholder to inspect the books and papers of the corporation is regulated by statute, a specific penalty is sometimes imposed upon the corporation, or upon

³⁴ *Legendre v. New Orleans Brewing Ass'n*, 45 La. Ann. 669, 40 Am. St. Rep. 243, 12 So. 837. See also *Fuller v. Alexander Hollander & Co.*, 61 N. J. Eq. 648, 88 Am. St. Rep. 456, 47 Atl. 646.

³⁵ If an officer of corporation, having custody of its books and papers, wrongfully refuses to allow a stockholder to inspect the same, he is guilty of a wrong against the stockholder, and is liable in an action for damages. *Legendre v. New Orleans Brewing Ass'n*, 45 La. Ann. 669, 40 Am. St. Rep. 243, 12 So. 837.

It seems that in an action consideration will be given to whether the officer had absolute control of the books and whether, in refusing, he acted with bad faith. *Bourdette v. Sieward*, 107 La. 258, 31 So. 630.

³⁶ *Bourdette v. Sieward*, 107 La. 258, 31 So. 630.

Where an officer of a corporation in charge of the books denies the right of inspection to a stockholder, he should not be held liable in damages for the subsequent depreciation in value of the stockholder's shares from collateral causes not due to something which the inspection of the books of the corporation would have disclosed. *Bourdette v. Sieward*, 107 La. 258, 31 So. 630.

He cannot recover as actual damages, expenses incurred in prosecution of action to compel inspection, such as attorney's fees, etc. *Boardman v. Marshalltown Grocery Co.*, 105 Iowa 445, 75 N. W. 343.

³⁷ *Bourdette v. Sieward*, 107 La. 258, 31 So. 630.

³⁸ *Boardman v. Marshalltown Grocery Co.*, 105 Iowa 445, 75 N. W. 343.

³⁹ *Boardman v. Marshalltown Grocery Co.*, 105 Iowa 445, 75 N. W. 343.

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the officer denying him the right, to be recovered in an action by the stockholder or by the state. And the penalty may be recovered without showing any actual pecuniary damage. All that is necessary is to show a wrongful denial of the right.⁴⁰ These penal statutes are strictly construed,⁴¹ and usually there is no recovery of the penalty unless there is a direct refusal to allow inspection.⁴²

There is no wilful refusal to allow inspection where the corporation tenders the only book that it has,⁴³ but the corporation cannot

⁴⁰ *Kelsey v. Pfaudler Process Fermentation Co.*, 51 Hun (N. Y.) 636, 3 N. Y. Supp. 723.

Under Stock Corp. Law, § 29 (L. 1890, c. 564, as amended by L. 1892, c. 688), there are two classes of penalties, one for the failure to keep certain books including a stock book, for which the corporation is made liable to a penalty in a suit by the people (*Billingham v. E. P. Gleason Mfg. Co.*, 43 N. Y. Misc. 681, 88 N. Y. Supp. 398), the other imposing a penalty for failure to allow inspection of books by stockholders. *Lozier v. Saratoga Gas, Elec. Light & Power Co.*, 59 N. Y. App. Div. 390, 69 N. Y. Supp. 247. The penalty for refusal to exhibit the stock book is recoverable only in case of wilful refusal or neglect. *Lozier v. Saratoga Gas, Elec. Light & Power Co.*, 59 N. Y. App. Div. 390, 69 N. Y. Supp. 247.

In order to impose a statutory penalty, there must be a demand for inspection of the book named in the statute or a paper placed on file and kept by the corporation and pertaining to its business, and the party making the demand must have an interest in inspecting the paper, and there must be a refusal to comply with the demand (*Ballinger's Ann. Code & St. Wash.* §§ 4269, 4270; *Pierce's Code*, §§ 7070, 7071). *Brown v. Kildea*, 58 Wash. 184, 108 Pac. 452.

⁴¹ *Hub Const. Co. v. New England Breeders' Club*, 74 N. H. 282, 67 Atl. 574; *Moore v. Institute of Educational Travel*, 89 N. Y. Misc. 369, 151

N. Y. Supp. 929; *Brown v. Kildea*, 58 Wash. 184, 108 Pac. 452.

A penalty for refusing to permit the inspection of the corporate books cannot be recovered under a statutory provision rendering an officer of a corporation liable to a penalty for refusing to furnish a certified copy of any document which the person demanding such copy is entitled to inspect. *Hub Const. Co. v. New England Breeders' Club*, 74 N. H. 282, 67 Atl. 574.

The same rule of strict construction applies to statutes regulating the examination of the books of foreign corporations. *Otto v. Franklin's, Inc.*, 90 N. Y. Misc. 311, 153 N. Y. Supp. 107.

⁴² *Moore v. Institute of Educational Travel*, 89 N. Y. Misc. 369, 151 N. Y. Supp. 929; *Brown v. Kildea*, 58 Wash. 184, 108 Pac. 452.

Where corporation advises stockholder through its agent, that the book is not in the office, but that he may examine same at the office of the president of the corporation only a short distance away, there is neither a refusal nor neglect to exhibit the book within the meaning of the statute. *Stock Corp. Law*, § 29 (L. 1890, c. 564, as amended by L. 1892, c. 688). *Lozier v. Saratoga Gas, Elec. Light & Power Co.*, 59 N. Y. App. Div. 390, 69 N. Y. Supp. 247.

⁴³ Thus under N. Y. Stock Corp. Law, § 32, as to penalties for refusal to allow examination of stock book, there is no wilful refusal where a corporation has no stock book, but gives

fail to keep books and thus avoid the statutory penalty. And usually a separate penalty is provided for the failure to keep books.⁴⁴

Reasonable or unavoidable delay in allowing an inspection, as because the books are locked up in the safe, and the only officer who knows the combination is absent, does not subject the corporation or its officers to a penalty, but such an excuse cannot be made in bad faith, and for the purpose of defeating the stockholder's right.⁴⁵ Of course a corporation is not subject to the statutory penalty when it acts in accordance with a decision of the court in refusing to allow inspection.⁴⁶ When the corporation or an officer has wrongfully denied to a stockholder the right to examine the books, the stockholder's right to sue for the statutory penalty is fixed, and is not affected by the fact that he was allowed to make the examination upon a subsequent application.⁴⁷

Where a statute imposes upon the custodian of the books and papers of a corporation the duty to allow stockholders to inspect the same, the duty is an incident of his office, and he cannot be relieved therefrom by a by-law of the corporation, or by any resolution or orders of the directors, so long as he continues in office and has the legal custody of the books and papers.⁴⁸ But an officer is not liable to the penalty if the books and papers have been taken from his custody by the directors, so that it is not within his power to allow an inspection, provided, at least, he has not participated in putting them beyond his control for the very purpose of shirking his duty and defeating the right of inspection.⁴⁹ If the books and papers come back into his custody after he has refused a request to be allowed to inspect them, it is his duty to notify the stockholder and give him an opportunity to inspect them.⁵⁰

access to a stock certificate book, which is the only book that it has, there being no stock certificates issued. *Moore v. Institute of Educational Travel*, 89 N. Y. Misc. 369, 151 N. Y. Supp. 929.

Officers are not liable for such penalty where a stock book was not kept by corporation. *Billingham v. E. P. Gleason Mfg. Co.*, 43 N. Y. Misc. 681, 88 N. Y. Supp. 398.

⁴⁴ *Moore v. Institute of Educational Travel*, 89 N. Y. Misc. 369, 151 N. Y. Supp. 929.

⁴⁵ *Kelsey v. Pfaudler Process Fermentation Co.*, 51 Hun (N. Y.) 636, 3 N. Y. Supp. 723, 41 Hun (N. Y.) 20.

⁴⁶ *Hollaman v. El Arco Mines Co.*, 137 N. Y. App. Div. 862, 122 N. Y. Supp. 852.

⁴⁷ *Kelsey v. Pfaudler Process Fermentation Co.*, 51 Hun (N. Y.) 636, 3 N. Y. Supp. 723.

⁴⁸ *Lewis v. Brainerd*, 53 Vt. 519.

⁴⁹ *Lewis v. Brainerd*, 53 Vt. 519.

⁵⁰ *Lewis v. Brainerd*, 53 Vt. 519.

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The amount of the penalty cannot be increased by repeated requests where there is really but one demand for inspection.⁵¹

⁵¹ *Cox v. Paul*, 175 N. Y. 328, 67 N. E. 586.

Under N. Y. Stock Corp. Law, § 58, imposing a penalty upon each officer, and upon the corporation for refusal to exhibit the stock book, but one penalty is recoverable when inspection is refused. This is on the theory that the statute was not passed to enable parties to make money by accumulating penalties, but to compel the performance of a duty, and, therefore, penalties cannot be accumulated by

making daily demands, and by repeating demands upon various officers of corporation. *Cox v. Paul*, 175 N. Y. 328, 67 N. E. 586.

Three separate refusals to allow inspection held to subject defendant to only one penalty, it being admitted that demands of stockholder were for purpose of getting certain information sought once for all. *Walcott v. Little*, 46 N. Y. Misc. 96, 91 N. Y. Supp. 411.

CHAPTER 46

REPORTS BY CORPORATE OFFICERS

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- § 2913. — Sufficiency of complaint.
- § 2914. — Amended complaints.
- § 2915. — Complaints as to false reports.
- § 2916. — Indictments for making false reports.
- § 2917. — Answer; defenses.
- § 2918. Variance.
- § 2919. Presumptions.
- § 2920. Burden of proof.
- § 2921. Admissibility of evidence.
- § 2922. Questions of law and fact.
- § 2923. Contribution.

I. STATUTORY PROVISIONS

§ 2852. In general. Statutes have been enacted in the majority, if not all, of the states requiring the making and filing of reports

by corporations. These statutes, while, in the main, of the same general type, vary in their specific provisions and in the liabilities and penalties imposed for noncompliance. As a general rule, they require corporations to report, at specified times, the amount of their capital, their assets and liabilities and other facts necessary to render the status and condition of the corporation ascertainable. In addition to these statutes applicable to corporations generally, there are also enactments made specially with reference to particular classes of corporations, such as banks, building and loan companies, insurance companies and corporations operating public utilities. These regulations of particular classes of corporations are considered in their proper connection herein with exception of public utility regulations which, by reason of the nature and scope of recent legislation, are treated in a subsequent chapter.

As a general rule it is required that these reports be made by a specified officer, or specified officers, of the corporation, and where there is a failure to comply with the requirements, the directors, trustees or other officers are made personally liable for debts of the corporation, or for damages sustained by reason of the omission and, under some statutes, for a penalty.

In addition to the provisions of the above character, many of the states have provisions regulating the liability of officers and corporations for making false reports. Akin to these statutes is the recent type of legislation known as the "Blue Sky Law" which is considered at length in the subsequent chapter on governmental regulation.

§ 2853. Object and purpose of statutes. The general object of the statutory provisions as to reports is to give information as to the financial status and pecuniary condition of the corporation and to secure a public record of its financial affairs.¹ Primarily, the duty under the statutes is one which the corporation or its officers owe to the public.² Since corporate bodies speak and act only through their

¹ *Breitzke v. Bank of Grand Prairie*, 124 Ark. 495, 187 S. W. 660; *Stafford v. St. John*, 164 Ind. 277, 73 N. E. 596; *Continental & Commercial Nat. Bank v. Emery*, 178 Mich. 612, 146 N. W. 303; *Shaler & Hall Quarry Co. v. Bliss*, 27 N. Y. 297.

The object of the Arkansas statute (Kirby's Dig. §§ 848, 859) was to give publicity to the financial standing of corporation and the names of

the stockholders. *Procter-Gamble Co. v. Warren Cotton Oil Co.*, 180 Fed. 543.

² *Breitzke v. Bank of Grand Prairie*, 124 Ark. 495, 187 S. W. 660; *Githers v. Clarke*, 158 Pa. St. 616, 28 Atl. 232.

Under Iowa Code, §§ 1714, 1715, 1720, a statement of the condition of fire insurance companies required to be filed with auditor is not alone for the auditor's information but for giv-

directors, "it is not unreasonable nor unfair that these, in return for and in consideration of the special privileges which they hold from the public, should be held to a strict account where the law imposes upon them specific duties and obligations for the protection of their creditors, and in the interest of the public generally."³ And the report required is given to the public generally, not only to protect existing creditors of corporations but to afford information to those who are expected to do business or to enter into contractual relations with the corporation.⁴

The object of the penal provisions is to secure an enforcement of the law by making the defaulting officers personally liable for the debts of the corporation to the creditors of such company.⁵ One of the purposes of the Illinois statute, which is of a different type from the usual statutes on the subject, is to facilitate the taxation of corporations, and to provide information for the tax officers in reference to the existence and location of corporations organized under the laws of the state and owning property in the state. Another purpose is to require evidence once each year that the corporation is exercising the powers granted.⁶

The California statute as to mining companies is intended for the

ing information to the public. *Warfield v. Clark*, 118 Iowa 69, 91 N. W. 833.

³ *Thatcher v. Salomon*, 16 Colo. App. 150, 64 Pac. 368.

⁴ *United States*. *Providence Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 25 L. Ed. 786.

Arkansas. *Bailey v. O'Neal*, 92 Ark. 327, 135 Am. St. Rep. 185, 122 S. W. 503.

Colorado. *Thatcher v. Salomon*, 16 Colo. App. 150, 64 Pac. 368; *Bradford v. Gulley*, 10 Colo. App. 146, 50 Pac. 314.

Indiana. *Stafford v. St. John*, 164 Ind. 277, 73 N. E. 596.

Massachusetts. *Felker v. Standard Yarn Co.*, 148 Mass. 226, 19 N. E. 220. See also *Heard v. Pictorial Press*, 182 Mass. 530, 65 N. E. 901; *Thayer v. New England Lithographic Steam Printing Co.*, 108 Mass. 523.

Michigan. *Bank of Saginaw v. Pierson*, 112 Mich. 410, 70 N. W. 901.

Montana. *First Nat. Bank of Missoula v. Cottonwood Land Co.*, 51 Mont. 544, 154 Pac. 582.

New York. *Manhattan Co. v. Kaldenberg*, 165 N. Y. 1, 58 N. E. 790, rev'g 27 App. Div. 31, 50 N. Y. Supp. 265; *Whitney v. Cammann*, 137 N. Y. 342, 33 N. E. 305; *Wallace & Sons v. Walsh*, 125 N. Y. 26, 11 L. R. A. 166, 25 N. E. 1076; *Cincinnati Cooperage Co. v. O'Keeffe*, 120 N. Y. 603, 24 N. E. 993, aff'g 44 Hun 64; *Shaler & Hall Quarry Co. v. Bliss*, 27 N. Y. 297; *Bagley & Sewall Co. v. Lennig*, 61 App. Div. 26, 70 N. Y. Supp. 242.

⁵ *Breitzke v. Bank of Grand Prairie*, 124 Ark. 495, 187 S. W. 660; *Bailey v. O'Neal*, 92 Ark. 327, 135 Am. St. Rep. 185, 122 S. W. 503; *Credit Men's Adjustment Co. v. Vickery*, — Colo. —, 161 Pac. 297; *Nickerson v. Wheeler*, 118 Mass. 295.

⁶ L. 1901, p. 125, §§ 2, 7 (*J. & A. Ann. St.* ¶¶ 2668, 2673). *People v. Rose*, 207 Ill. 352, 69 N. E. 762.

benefit of stockholders.⁷ At the time of the enactment of such statute it was a matter of common report that concealments and false reports were resorted to to affect the value of mining stocks, and it was charged that superintendents for purposes of private gain made false reports of receipts and expenses, carried "dummies" on their pay rolls, obtained rebates upon supplies purchased and otherwise misappropriated the funds of corporations, wherefore the statute was required.⁸

§ 2854. Validity of statutes. The power of the legislature to require annual reports exists in some states by virtue of being reserved in the charter of the corporation, as where a company is incorporated under a statute providing that the legislature may prescribe such regulations and provisions as are deemed advisable.⁹

If the statute which is enacted applies to all corporations of a certain class, it is not unconstitutional as a special law¹⁰ or as violating the "due process of law" clause of the federal constitution.¹¹

It has been contended that statutes requiring reports were unconstitutional in that they imposed burdens or restrictions upon the business of domestic corporations from which foreign corporations were relieved. But it was held that in view of the purpose of the statute, such contention was untenable, as the statute did not relate to the business of the company but to its management and the duty involved was in fact imposed upon the officers.¹²

⁷ Act of April 23, 1880 (St. 1880, p. 134). *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076; *Shanklin v. Gray*, 111 Cal. 88, 43 Pac. 399.

⁸ *Shanklin v. Gray*, 111 Cal. 88, 43 Pac. 399.

⁹ *People v. Rose*, 207 Ill. 352, 69 N. E. 762.

¹⁰ Thus the California Act of April 23, 1880 (St. 1880, p. 400), for the better protection of stockholders in mining companies, and requiring directors to make, post and file weekly reports of superintendents, is not unconstitutional as special law, since it imposes such duties upon all mining corporations. *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076.

¹¹ *Reuter Hub & Spoke Co. v. Hicks*, 181 Mich. 259, 148 N. W. 339.

¹² *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076, holding the California Act of April 23, 1880, valid as pertaining to corporate management exclusively, designed to protect the stockholders and having no relation to the corporate business.

Montana Rev. Code, § 3850, as to annual reports is not unconstitutional as violating Mont. Const. art. XV, § 11, in that it imposes burdens upon domestic corporations from which foreign corporations are exempt. *Daily v. Marshall*, 47 Mont. 377, 133 Pac. 681. The duty of filing an annual report, while imposed in terms upon corporation by that provision, is, in fact, imposed upon the officers and directors. *Daily v. Marshall*, 47 Mont. 377, 133 Pac. 681.

The constitutional provisions as to cruel and unusual punishments and excessive fines cannot be invoked to render such statutes invalid, since those provisions are designed to apply to criminal offenses and not to penal statutes.¹³ The validity of a statute imposing a penalty has been upheld against the objection that it creates an indebtedness and is retrospective in operation.¹⁴ Nor does such a statute change the status of parties to a contract.¹⁵

Frequently provisions as to reports are included in general statutes dealing with corporations of a certain class. And in some cases it has been contended that the requirements as to reports were unconstitutional in that the title was not sufficiently broad and comprehensive to include such requirements. But if the title refers to corporations, it must necessarily refer to the officers who conduct the corporate business. And in this way, a general title merely referring to the incorporation of companies, may be held sufficient.¹⁶

§ 2855. **Nature and construction of statutes.** Statutes imposing liability for corporate debts upon the directors or other officers of a corporation for the failure to file or publish a report of the company's condition are not penal statutes in the same strict sense applied to statutes imposing punishment for offenses against the state.¹⁷ But since such statutes impose burdensome liabilities upon the officers, not by reason of any agreement or contract on their part, but as a penalty for their neglect or misconduct, they are in this sense penal in their nature as respects the officers, and not contractual.¹⁸ Accordingly

¹³ *Daily v. Marshall*, 47 Mont. 377, 133 Pac. 681.

¹⁴ *Stieffel v. Tolhurst*, 67 N. Y. App. Div. 521, 73 N. Y. Supp. 1034.

¹⁵ *Stieffel v. Tolhurst*, 67 N. Y. App. Div. 521, 73 N. Y. Supp. 1034.

¹⁶ *Francais v. Soms*, 92 Cal. 503, 28 Pac. 592; *Reuter Hub & Spoke Co. v. Hicks*, 181 Mich. 250, 148 N. W. 339.

¹⁷ *Huntington v. Attrill*, 146 U. S. 657, 36 L. Ed. 1123; *Davis v. Mills*, 99 Fed. 39; *Fitzgerald v. Weidenbeck*, 76 Fed. 695.

The words "penal" and "penalty" strictly and primarily denote punishment whether corporal or pecuniary, imposed and enforced by the state for a crime or offense against its laws. Such words are commonly used as in-

cluding an extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to damages suffered. *Huntington v. Attrill*, 146 U. S. 657, 36 L. Ed. 1123.

The statute of New York (St. 1875, c. 611, §§ 21, 37, 38) as to false reports is not a criminal or quasi criminal law. *Huntington v. Attrill*, 146 U. S. 657, 36 L. Ed. 1123.

Not having been known to the common law, statutes of this type share with penal statutes the attribute of strict construction. *Daily v. Marshall*, 47 Mont. 377, 133 Pac. 681.

¹⁸ *United States. Laws of New York 1875*, c. 510, § 12 (amending L. 1848, c. 40, § 12, as amended by L.

such statutes are subject to the general rule that penal statutes are to be strictly construed; and an officer cannot be held liable unless the

1871, c. 657), is penal in character. *Chase v. Curtis*, 113 U. S. 452, 28 L. Ed. 1038. Connecticut Rev. St. §§ 404, 413, pp. 172, 174, is penal. *Providence Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 25 L. Ed. 786. See also *Patterson v. Thompson*, 86 Fed. 85; *Boston & M. R. R. v. Graves*, 80 Fed. 588; *Union Iron Co. v. Pierce*, 4 Biss. 327, Fed. Cas. No. 14,367.

California. Act of 1880 (St. 1880, p. 134). *Loveland v. Garner*, 71 Cal. 541, 12 Pac. 616; *Irvine v. McKeon*, 23 Cal. 472.

Colorado. Credit Men's Adjustment Co. v. Vickery, 161 Pac. 297; *Steck v. Prentice*, 43 Colo. 17, 95 Pac. 552; *Clough v. Rocky Mountain Oil Co.*, 25 Colo. 520, 55 Pac. 809; *Gregory v. German Bank*, 3 Colo. 332, 25 Am. Rep. 760; *Bovee v. Boyle*, 25 Colo. App. 165, 136 Pac. 467; *Colorado Fuel & Iron Co. v. Lenhart*, 6 Colo. App. 511, 41 Pac. 834.

Connecticut. *Mitchell v. Hotchkiss*, 48 Conn. 9, 40 Am. Rep. 146.

District of Columbia. *Jackson v. Clifford*, 5 App. Cas. 312.

Maryland. *Attrill v. Huntington*, 70 Md. 191, 2 L. R. A. 779, 14 Am. St. Rep. 344, 16 Atl. 651, rev'd 146 U. S. 657, 36 L. Ed. 1123; *First Nat. Bank v. Price*, 33 Md. 487, 3 Am. Rep. 204.

Massachusetts. *Savage v. Shaw*, 195 Mass. 571, 122 Am. St. Rep. 272, 12 Ann. Cas. 806, 81 N. E. 303. See also *Halsey v. McLean*, 12 Allen 439, 90 Am. Dec. 157.

Michigan. *Bank of Saginaw v. Piereson*, 112 Mich. 410, 70 N. W. 901; *Gennert v. Ives*, 102 Mich. 547, 61 N. W. 9; *Breitung v. Lindauer*, 37 Mich. 217.

Minnesota. Merchants' Nat. Bank of Chicago v. Northwestern Manufacturing & Car Co., 48 Minn. 349, 51 N. W. 117.

Missouri. *Cary v. Schmeltz*, 141 Mo. App. 570, 125 S. W. 532.

Montana. *Giddings v. Holter*, 19 Mont. 263, 48 Pac. 8; *Gans v. Switzer*, 9 Mont. 408, 24 Pac. 18. See also *State Sav. Bank of Butte City v. Johnson*, 18 Mont. 440, 33 L. R. A. 552, 56 Am. St. Rep. 591, 45 Pac. 662.

Nebraska. *Coy v. Jones*, 30 Neb. 798, 10 L. R. A. 658, 47 N. W. 208. See also *Globe Pub. Co. v. State Bank of Nebraska*, 41 Neb. 175, 27 L. R. A. 854, 59 N. W. 683, overruling on this point *Howell v. Roberts*, 29 Neb. 483, 45 N. W. 923, and *Coy v. Jones*, 30 Neb. 798, 10 L. R. A. 658, 47 N. W. 208.

New Jersey. *Derrickson v. Smith*, 27 N. J. L. 166.

New York. *Manhattan Co. v. Kaldenberg*, 165 N. Y. 1, 58 N. E. 790, rev'g 27 App. Div. 31, 50 N. Y. Supp. 265; *Whitney v. Cammann*, 137 N. Y. 342, 33 N. E. 305; *Gold v. Clyne*, 134 N. Y. 262, 17 L. R. A. 767, 31 N. E. 980, aff'g 58 Hun 419, 12 N. Y. Supp. 531; *Carr v. Bischer*, 119 N. Y. 117, 23 N. E. 296; *Whitaker v. Masterton*, 106 N. Y. 277, 12 N. E. 604; *Brackett v. Griswold*, 103 N. Y. 425, 9 N. E. 438; *Stokes v. Stickney*, 96 N. Y. 323; *Knox v. Baldwin*, 80 N. Y. 610; *Bruce v. Platt*, 80 N. Y. 379; *Bonnell v. Griswold*, 80 N. Y. 128; *Cameron v. Seaman*, 69 N. Y. 396, 25 Am. Rep. 212; *Wiles v. Suydam*, 64 N. Y. 173; *Adams v. Mills*, 60 N. Y. 533; *Borke v. Thomas*, 56 N. Y. 559; *Miller v. White*, 50 N. Y. 137; *Merchants' Bank v. Bliss*, 35 N. Y. 412; *Garrison v. Howe*, 17 N. Y. 458; *Davidson v. Witthaus*, 106 App. Div. 182, 94 N. Y. Supp. 428; *Hoboken Beef Co. v. Hand*, 104 App. Div. 390, 93 N. Y. Supp. 834; *Emery v. De Peyster*, 77 App. Div. 65, 78 N. Y. Supp. 1056; *Bird v. Hayden*, 2 Abb. Pr. (N. S.) 61,

case comes clearly and strictly within the terms of the statute.¹⁹ This rule of strict construction is, of course, subject to the usual qualification that when the intent and object of the law is plain, this object cannot be defeated by overnice construction.²⁰ Also, these statutes as to reports are to receive a construction with reference to their benevolent objects as well as to their penal character,²¹ and when the liability of directors is clearly shown, the statute, as to creditors, is remedial in its character and is to be liberally construed in its enforcement.²² Thus it is held that the statute will be liberally con-

1 Rob. 383; Price v. Wilson, 67 Barb. 9.

Rhode Island. Starkweather & Shepley v. Brown, 25 R. I. 142, 55 Atl. 201; Wing v. Slater, 19 R. I. 597, 33 L. R. A. 566, 35 Atl. 302.

19 United States. Park Bank v. Remsen, 158 U. S. 337, 39 L. Ed. 1008; Chase v. Curtis, 113 U. S. 452, 28 L. Ed. 1038; Providence Steam-Engine Co. v. Hubbard, 101 U. S. 188, 25 L. Ed. 786. And see dictum of Mr. Justice Gray in Huntington v. Attrill, 146 U. S. 657, 36 L. Ed. 1123.

California. Loveland v. Garner, 71 Cal. 541, 12 Pac. 616; Irvine v. McKeon, 23 Cal. 472.

Colorado. Credit Men's Adjustment Co. v. Vickery, 161 Pac. 297; Clough v. Rocky Mountain Oil Co., 25 Colo. 520, 55 Pac. 809; Colorado Fuel & Iron Co. v. Lenhart, 6 Colo. App. 511, 41 Pac. 834.

District of Columbia. Jackson v. Clifford, 5 App. Cas. 312.

Illinois. Chicago, R. I. & P. R. Co. v. People, 217 Ill. 164, 75 N. E. 368; Hoyt v. Hasse, 80 Ill. App. 187.

Massachusetts. Savage v. Shaw, 195 Mass. 571, 122 Am. St. Rep. 272, 12 Ann. Cas. 806, 81 N. E. 303.

Michigan. Deloria v. Atkins, 158 Mich. 232, 122 N. W. 559, 16 Det. L. N. 583; Bank of Saginaw v. Pierson, 112 Mich. 410, 70 N. W. 901; Gennert v. Ives, 102 Mich. 547, 61 N. W. 9.

Montana. Daily v. Marshall, 47

Mont. 377, 133 Pac. 681; Gans v. Switzer, 9 Mont. 408, 24 Pac. 18.

New York. Manhattan Co. v. Kaldenberg, 165 N. Y. 1, 58 N. E. 790, rev'g 27 App. Div. 31, 50 N. Y. Supp. 265; Whitney v. Cammann, 137 N. Y. 342, 33 N. E. 305; Gold v. Clyne, 134 N. Y. 262, 17 L. R. A. 767, 31 N. E. 980, aff'g 58 Hun 419, 12 N. Y. Supp. 531; Whitaker v. Masterton, 106 N. Y. 277, 12 N. E. 604; Bruce v. Platt, 80 N. Y. 379; Bonnell v. Griswold, 80 N. Y. 128; Hoboken Beef Co. v. Hand, 104 App. Div. 390, 93 N. Y. Supp. 834; Uptegrove v. Schwarzwaelder, 46 App. Div. 20, 61 N. Y. Supp. 623, aff'd 167 N. Y. 587, 60 N. E. 1121; Winthrop Press v. Perkins, 47 Misc. 460, 95 N. Y. Supp. 931.

Rhode Island. Wing v. Slater, 19 R. I. 597, 33 L. R. A. 566, 35 Atl. 302.

²⁰ Eyre v. Harmon, 92 Cal. 580, 28 Pac. 779; Bovee v. Boyle, 25 Colo. App. 165, 136 Pac. 467.

Acts should not be construed as meaningless in order to shield officers from liability, but should not be extended to include cases clearly beyond the scope of legislative intent. Steck v. Prentice, 43 Colo. 17, 95 Pac. 552.

²¹ Ball v. Tolman, 119 Cal. 358, 51 Pac. 546.

²² Credit Men's Adjustment Co. v. Vickery, — Colo. —, 161 Pac. 297; Nickerson v. Wheeler, 118 Mass. 295; Matty v. Sampson, 64 N. Y. App. Div. 1, 71 N. Y. Supp. 731.

strued to embrace debts within its language.²³ And accordingly, it is usually held that this class of statutes is both penal and remedial.²⁴ On the other hand there are also some decisions holding that statutes as to reports are remedial and not penal,²⁵ and it has been held in the federal courts that a construction of a state supreme court that a statute is remedial and not penal, is conclusive on the federal courts.²⁶

The statutes as to false reports are generally held to be penal in the sense that they impose burdensome liabilities upon the officers of corporations for their wilful acts, and accordingly they are strictly

²³ *Matty v. Sampson*, 64 N. Y. App. Div. 1, 71 N. Y. Supp. 731.

²⁴ *Ball v. Tolman*, 119 Cal. 358, 51 Pac. 546; *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076; *Shanklin v. Gray*, 111 Cal. 88, 43 Pac. 399; *Eyre v. Harmon*, 92 Cal. 580, 28 Pac. 779.

²⁵ *Nebraska Nat. Bank v. Walsh*, 68 Ark. 433, 82 Am. St. Rep. 301, 59 S. W. 952.

In presenting its grounds for arriving at this conclusion the court stated that the object of the enforcement of a penal statute is to compel obedience to the law by the infliction of punishment upon its violators; that punishment under a penal statute is not based upon a contingency; that a violation of a penal statute will be presumed to injure the public; that a statute imposing liability upon officers for failure to file a report as required by statute conforms to none of these essential elements of a strictly penal statute, and cannot, therefore, be deemed penal in its nature. *Nebraska Nat. Bank v. Walsh*, 68 Ark. 433, 82 Am. St. Rep. 301, 59 S. W. 952.

In an Indiana case the court, while holding as remedial, not penal, a statute making directors personally liable for all damages resulting from their failure to file an annual report as required by statute, deemed a statute rendering directors personally liable, in the event of corporate insolvency,

for all debts incurred after their failure to file the report, to be penal in its nature on the ground that under such statute it is not incumbent upon a creditor to show that he has been imposed upon by the fraud of the directors or that the wrongdoing of the directors resulted in injury to him, the liability of the directors flowing from the mere violation of the statute. *Brown v. Clow*, 158 Ind. 403, 62 N. E. 1006. See also *American Credit-Indemnity Co. v. Ellis*, 156 Ind. 212, 59 N. E. 679; *St. John v. Stafford*, 26 Ind. App. 695, 59 N. E. 1075.

Under section 15 of the act relating to manufacturing and mining companies (1 G. & H. p. 425; 1 Rev. St. 1852, p. 358) as originally enacted, liability for debts was cast upon directors without regard to whether person dealing with corporation was misled or deceived by false report or by failure to make and publish report, and was drastic and penal in its character. *Stafford v. St. John*, 164 Ind. 277, 73 N. E. 596. See also *Audenried v. East Coast Milling Co.*, 68 N. J. Eq. 450, 59 Atl. 577; *Hutchinson v. Young*, 80 N. Y. App. Div. 246, 80 N. Y. Supp. 259; *Farr v. Briggs' Estate*, 72 Vt. 225, 82 Am. St. Rep. 930, 47 Atl. 793.

²⁶ *Kirby's Dig.* §§ 848, 859. *Proctor-Gamble Co. v. Warren Cotton Oil Co.*, 180 Fed. 543.

construed.²⁷ But with respect to creditors they are remedial,²⁸ and such statutes have been held not to be penal in the sense that they cannot be enforced in another state.²⁹ And such a statute has been held, in one case, not to be penal within the provisions of other statutes as to the place of trial of actions to recover a penalty.³⁰

In construing statutes as to reports, the proper course is to start out and follow the true intent of the legislature and to adopt that sense which harmonizes best with the context and promotes in the fullest manner the apparent policy and objects of the legislature.³¹ The original statute and all its amendments must be read together and viewed as one act, passed at the same time.³²

The transposition of words or sentences is permissible whenever necessary in order that each word may have a practical effect according to its appropriate meaning.³³ But no word is to be eliminated by the court if reasonable meaning can be given to it, unless by giving such word its meaning the real object of the statute would be defeated.³⁴

Under a statute providing that officers who make or publish a false report shall be guilty of a felony, the word "makes" has been held broad enough to cover the complete commission of the crime defined.³⁵

Where no penalty is imposed for noncompliance with the statute, the court cannot construe the statute so as to impose a penalty. And in the same manner the duties of the officers cannot be extended.³⁶ In general it may be said that these statutes as to reports are usually clear and unambiguous and leave little scope for judicial construction.³⁷

²⁷ N. Y. St. 1875, c. 611, §§ 21, 37, 38. *Huntington v. Attrill*, 146 U. S. 657, 36 L. Ed. 1123; *Stebbins v. Edmands*, 12 Gray (Mass.) 203.

²⁸ *Huntington v. Attrill*, 146 U. S. 657, 36 L. Ed. 1123.

²⁹ *Huntington v. Attrill*, 146 U. S. 657, 36 L. Ed. 1123. See § 2899, *infra*.

³⁰ Stock Corporation Law, § 31, as to liability of officers for false reports is not penal statute within provisions of Code Civ. Proc. § 983, as to the place of trial of actions to recover a penalty. *Hutchinson v. Young*, 80 N. Y. App. Div. 246, 80 N. Y. Supp. 259.

³¹ *Manhattan Co. v. Kaldenberg*, 165 N. Y. 1, 58 N. E. 790, rev'g 27 N. Y. App. Div. 31, 50 N. Y. Supp. 265.

³² *Morgan v. Hedstrom*, 164 N. Y. 224, 58 N. E. 26.

The whole statute should be construed as one. *Bank of Saginaw v. Pierson*, 112 Mich. 410, 70 N. W. 901.

³³ *Eyre v. Harmon*, 92 Cal. 580, 28 Pac. 779.

³⁴ *Shanklin v. Gray*, 111 Cal. 88, 43 Pac. 399; *Eyre v. Harmon*, 92 Cal. 580, 28 Pac. 779; *Quimby v. Waters*, 28 N. J. L. 533.

³⁵ *State v. O'Neil*, 24 Idaho 582, 135 Pac. 60.

³⁶ *Whitaker v. Masterton*, 106 N. Y. 277, 12 N. E. 604.

³⁷ *Nelson v. Bank of Fergus County*, 157 Fed. 161, 13 Ann. Cas. 811; Gre-

§ 2856. **Amendment or repeal of statutes.** Although the usual statutes as to reports give rise to a right of action in favor of creditors, they are penal in the sense that they may be repealed at any time, even after an action has been commenced by a creditor, without violating constitutional prohibitions against laws impairing the obligations of contracts or interfering with vested rights.³⁸ The right of the state to increase exemptions and make the same applicable to contracts previously entered into is unquestioned,³⁹ and a creditor has no vested right under such a statute against an officer until he has recovered a judgment against him.⁴⁰ It follows that the legislature may repeal a statute imposing upon directors or other officers a penal liability for corporate debts, not only as against existing creditors, but also as against creditors who have commenced an action, and after the repeal no judgment can be rendered.⁴¹ The repealing act, of course, may expressly save the rights of creditors to hold directors liable for debts contracted prior to the repeal,⁴² but if there is no saving clause, all inchoate rights arising under the statute are swept away.⁴³

Under some statutes it has been provided that the repealing statute should not affect the rights of creditors if an action was commenced within a certain period of time after the taking effect of the act. Such a provision is different from the ordinary statute of limitations

gory v. German Bank, 3 Colo. 332, 25 Am. Rep. 760.

³⁸ *Breitung v. Lindauer*, 37 Mich. 217. See also *Credit Men's Adjustment Co. v. Vickery*, — Colo. —, 161 Pac. 297.

³⁹ *Breitung v. Lindauer*, 37 Mich. 217.

It may be assumed that directors assent and agree to terms, conditions and liabilities imposed upon them by statute, but this assumption cannot be carried so far as to prevent legislature from relieving them from portion of liabilities. *Breitung v. Lindauer*, 37 Mich. 217.

⁴⁰ "There is no such thing as a vested interest in an unenforced penalty." *Gregory v. German Bank*, 3 Colo. 332, 25 Am. Rep. 760.

⁴¹ *Union Iron Co. v. Pierce*, 4 Biss. 327, Fed. Cas. No. 14,367; *Gregory v. German Bank*, 3 Colo. 332, 25 Am.

Rep. 760; *Breitung v. Lindauer*, 37 Mich. 217; *Victory Webb Printing & Folding Mach. Mfg. Co. v. Beecher*, 97 N. Y. 651; *Knox v. Baldwin*, 80 N. Y. 610.

Rev. St. 1868, p. 121, c. 18, § 15, was amended by *Sess. Laws 1876*, p. 41, whereby creditors no longer had the right to pursue trustees, and the liability to creditors was repealed. *Gregory v. German Bank*, 3 Colo. 332, 25 Am. Rep. 760.

⁴² *Thayer v. New England Lithographic Steam Printing Co.*, 108 Mass. 523; *Knox v. Baldwin*, 80 N. Y. 610.

⁴³ The repeal of *Colo. Rev. St. 1868*, p. 121, c. 18, § 15, without a saving clause swept away all inchoate rights arising under the statute, unless before repealed such right was carried into judgment. *Gregory v. German Bank*, 3 Colo. 332, 25 Am. Rep. 760.

and imposes a condition precedent to the action.⁴⁴ In some states, also, there are statutory provisions to the effect that penalties shall not be released unless the repealing act expressly so provides. Accordingly if a repealing act is silent as to the penalties incurred under the former act, it does not prevent a suit to recover such penalties.⁴⁵

Frequently only a portion of the statute is repealed, as in the case of revision.⁴⁶ When an alteration is made as to the requisites to fix personal liability upon the officers for neglect of duty, it does not affect the vested rights of the company nor deprive it of its privileges, but it does affect the relations of the officers towards creditors who may become such after the revision goes into effect.⁴⁷

A statute as to reports, like other statutes, may be repealed by implication,⁴⁸ but the usual rule that "repeals by implication are not favored," applies.⁴⁹ A mere change of the period within which reports were to be made cannot be held to operate as repeal of a provision imposing liability upon directors for failure to comply with the prior law.⁵⁰ The matter of amendment of statutes as to reports is closely allied to the matter of repeals. In case of amendment the last enacted law controls.⁵¹ In some states the original statutes have been amended by adding provisions whereby a specific penalty is imposed if the statute is not complied with.⁵² And in other states the

⁴⁴ See *Watertown Nat. Bank of Watertown v. Bagley*, 62 N. Y. Misc. 380, 116 N. Y. Supp. 772, referring to N. Y. Laws 1901, p. 961, c. 354.

⁴⁵ Colorado Laws 1901, p. 121, § 11, repealing 1 Mills' Ann. St. § 491, as to annual reports, but which is silent as to penalties incurred under former statute, does not prevent suit to recover such penalties, since L. 1891, p. 366, provides that penalties shall not be released unless repealing act expressly so provides. *Cavanaugh v. Patterson*, 41 Colo. 158, 91 Pac. 1117.

⁴⁶ New Jersey Act of March 2, 1849, §§ 19, 20, 21 (Nix. Dig. 534), as to certificates of stock paid in and the recording and publishing of them was repealed by the Act of 1875 (Rev. St. p. 175), for the purposes of revision merely. *Nassau Bank v. Brown*, 30 N. J. Eq. 478.

⁴⁷ *Nassau Bank v. Brown*, 30 N. J. Eq. 478.

⁴⁸ *Kipp v. Lichtenstein*, 79 Ill. 358.

See also *Bank of Metropolis v. Faber*, 38 N. Y. App. Div. 159, 56 N. Y. Supp. 542; *Bank of Metropolis v. Faber*, 1 N. Y. App. Div. 341, 37 N. Y. Supp. 423, aff'd 150 N. Y. 200, 44 N. E. 779.

⁴⁹ *Breitung v. Lindauer*, 37 Mich. 217.

⁵⁰ *Bank of Saginaw v. Pierson*, 112 Mich. 410, 70 N. W. 901.

⁵¹ *Ford River Lumber Co. v. Perron*, 148 Mich. 399, 111 N. W. 1074, 13 Det. L. N. 201.

⁵² *McDonald v. Mueller*, 123 Ark. 226, 183 S. W. 751.

Amendment of 1909 (Act No. 222, p. 643) to Kirby's Dig. § 859, does not change original statute in any respect as to holding that it is remedial, but adds penal provisions and therefore becomes both remedial and penal. *McDonald v. Mueller*, 123 Ark. 226, 183 S. W. 751.

time within which reports shall be filed has been changed. Such an amendment is not unconstitutional and the amended statute is but a continuation of the old law.⁵³

II. DUTY TO MAKE REPORTS

§ 2857. **In general.** The statutes as to the making and filing of reports are usually mandatory,⁵⁴ and must be complied with, regardless of the necessity of making a report.⁵⁵ This strict rule as to the necessity of a report has been carried to the extent of holding that if a report was made, the officers were not liable for debts contracted, even though it appeared that the report was false.⁵⁶

§ 2858. **Domestic corporations.** Frequently, if not generally, the statutes imposing personal liability upon officers for the failure to file reports apply in terms to a particular class of corporations, such as manufacturing corporations, insurance companies and the like. In other cases the statutes are general in terms and apply to all corporations for profit. A statute of this general character includes corporations of a private character engaged in manufacturing⁵⁷ but is not applicable to a mutual insurance company not for profit.⁵⁸ In other states, statutes as to reports have been held broad enough to include corporations not for pecuniary profit.⁵⁹

In some cases, the statute applies to all corporations "other than

⁵³ *Nelson v. Bank of Fergus County*, 157 Fed. 161, 13 Ann. Cas. 811.

Mont. Const. art. 15, § 13, prohibiting retrospective laws does not apply in such case. *Nelson v. Bank of Fergus County*, 157 Fed. 161, 13 Ann. Cas. 811.

⁵⁴ *Colorado Fuel & Iron Co. v. Lenhart*, 6 Colo. App. 511, 41 Pac. 834.

⁵⁵ So directors have been held bound to make and publish an annual statement to the stockholders as required by statute, whether there was actual convention of said stockholders or not. *Cooke & Co. v. Pearce*, 23 S. C. 239.

⁵⁶ *Matthews v. Patterson*, 16 Colo. 215, 26 Pac. 812; *Bonnell v. Griswold*, 68 N. Y. 294, 80 N. Y. 128; *Whitney Arms Co. v. Barlow*, 68 N. Y. 34; *Pier v. Hanmore*, 86 N. Y. 95.

⁵⁷ Thus Kan. Gen. St. 1897, c. 66, § 41, requiring the president and secretary of a corporation for profit to file annually a statement of the condition of company, applies to all corporations for profit including a corporation of a private character engaged in manufacturing sash, doors and woodwork. *State v. Fenn*, 60 Kan. 306, 56 Pac. 483.

⁵⁸ Colo. Sess. Laws 1901, p. 116, c. 52, § 11, as to the annual report to be filed with the secretary of state is not applicable to a mutual insurance company not for profit, it being the intention of the legislature to include only corporations organized for profit in this class of statutes. *Steck v. Prentice*, 43 Colo. 17, 95 Pac. 552.

⁵⁹ *People v. Rose*, 207 Ill. 352, 69 N. E. 762.

moneyed or railroad corporations,"⁶⁰ or to all corporations, joint stock companies and associations.⁶¹ The duty to make reports, imposed upon manufacturing companies, also applies and governs a real estate corporation, where the charter of such real estate company states that the corporation is subject to the statute as to manufacturing companies.⁶² In California the statute applies to mining companies, and it has been held applicable to all corporations conducting the business of mining,⁶³ and to corporations formed for the purpose of conducting such business whether it is actually carried on or not.⁶⁴ So a corporation engaged in the business of mining by means of a dredging boat in the bed of a navigable river is within the statute.⁶⁵ This statute was later amended so as to apply to corporations "whose stock is listed and offered for sale at public exchange."⁶⁶

When the duty to make reports is imposed by statute, it must be performed by every corporation in existence and within the statute, including corporations which have done no business and contracted no debts.⁶⁷ And a corporation organized under statutes requiring reports has been held subject to the same statutory duty, although such duty was imposed by subsequent statutes dealing generally with the subject of reports.⁶⁸ But the statutory duty does not exist where the corporation is not in existence, as where the evidence does not show even a *de facto* corporation.⁶⁹ The duty also terminates where the corporation ceases to exist.⁷⁰

§ 2859. Corporations doing business outside of United States. In New York, corporations doing business without the United States are excepted from the general statutes as to reports and are allowed additional time to make and file their report.⁷¹ Such a statute ap-

⁶⁰ *Union Bank of Buffalo v. Keim*, 52 N. Y. App. Div. 135, 64 N. Y. Supp. 1070, *aff'd* 169 N. Y. 587, 62 N. E. 1101.

⁶¹ *Credit Men's Adjustment Co. v. Vickery*, — Colo. —, 161 Pac. 297.

⁶² *Starkweather & Shepley v. Brown*, 25 E. I. 142, 55 Atl. 201.

⁶³ *Ball v. Tolman*, 119 Cal. 358, 51 Pac. 546.

⁶⁴ *Francis v. Somps*, 92 Cal. 503, 28 Pac. 592.

⁶⁵ *Ball v. Tolman*, 119 Cal. 358, 51 Pac. 546.

⁶⁶ *Ball v. Tolman*, 119 Cal. 358, 51 Pac. 546.

⁶⁷ *Bradford v. Gulley*, 10 Colo. App. 146, 50 Pac. 314.

⁶⁸ *Deloria v. Atkins*, 158 Mich. 232, 122 N. W. 559, 16 Det. L. N. 583.

⁶⁹ Thus the statute was held not applicable where the evidence did not show existence of a *de facto* corporation, there being no user of franchises or business transactions, but mere preparation for business. *Emery v. De Peyster*, 77 N. Y. App. Div. 65, 78 N. Y. Supp. 1056.

⁷⁰ See § 2896, *infra*.

⁷¹ *West v. Grosvenor*, 102 N. Y. App. Div. 266, 92 N. Y. Supp. 429. See also *Hoboken Beef Co. v. Hand*, 104 N. Y.

plies to a corporation engaged in foreign meat and poultry business,⁷² but does not apply to a corporation the product of which is manufactured in this country and which is not engaged in a foreign business, but is endeavoring to sell its stock in Europe.⁷³

§ 2860. Foreign corporations. The usual statutes as to reports apply only to certain classes of domestic corporations.⁷⁴ This has given rise to the contention that such domestic corporations were subjected to unreasonable burdens, and that foreign corporations were granted special privileges, a contention which, as has been noted, has been held untenable.⁷⁵ But in some states statutes have been enacted imposing the same duties on foreign corporations.⁷⁶ And in other states the statutes have been broadened by amendment so as to apply to both domestic and foreign corporations,⁷⁷ an enactment which has been held to be reasonable and proper.⁷⁸ There has been enacted recently a type of statute, known as "Blue Sky Laws," imposing certain requirements upon both domestic and foreign corporations as to reports, which will be considered in a subsequent chapter.⁷⁹

In the absence of specific legislation on the subject, a statute as to reports will not be extended by judicial construction so as to apply to foreign corporations. Thus it has been held that a statute requiring manufacturing corporations to make reports was not rendered applicable to foreign corporations by the provisions of another statute requiring such corporations to "conform to the laws of the state as to returns and taxation."⁸⁰ Nor could such duty be imposed by the provisions of a statute as to filing reports with the state library, the latter being intended to aid the state library in preserving printed financial reports.⁸¹ In this case, however, where it was sought to subject the foreign corporation to the terms of the statute governing

App. Div. 390, 93 N. Y. Supp. 834.

⁷² *Hoboken Beef Co. v. Hand*, 104 N. Y. App. Div. 390, 93 N. Y. Supp. 834.

⁷³ *West v. Grosvenor*, 102 N. Y. App. Div. 266, 92 N. Y. Supp. 429.

⁷⁴ See the preceding section.

⁷⁵ See § 2858, *supra*.

⁷⁶ *Heard v. Pictorial Press*, 182 Mass. 530, 65 N. E. 901.

⁷⁷ *Nelson v. Bank of Fergus County*, 157 Fed. 161, 13 Ann. Cas. 811.

⁷⁸ Since Mont. Const. art. 15, § 11, provides that no foreign corporation shall have greater rights or privileges

than domestic corporations, it was reasonable and proper for the legislature to change the law so as to subject directors of both domestic and foreign corporations alike to liability. *Nelson v. Bank of Fergus County*, 157 Fed. 161, 13 Ann. Cas. 811.

⁷⁹ See chapter on Governmental Regulation, *infra*.

⁸⁰ *Pierce & Galloway v. Yeaton, McDonald & Loring*, — N. H. —, 97 Atl. 876.

⁸¹ *Pierce & Galloway v. Yeaton, McDonald & Loring*, — N. H. —, 97 Atl. 876.

manufacturing corporations, the pleadings did not show that the foreign company involved was a manufacturing corporation.⁸²

§ 2861. Excuses for failure to make and file reports. Directors or other officers cannot escape liability for corporate debts because of the failure to file a report as required by the statute, by setting up mere irregularities in the formation of the corporation,⁸³ and persons who are elected and who act as directors cannot escape liability by showing that their election was illegal or that they were not eligible for the office.⁸⁴ The fact that the corporation never existed may be shown,⁸⁵ if the directors are not estopped from showing such fact.⁸⁶ But ignorance of the law constitutes no exculpation,⁸⁷ and it is no excuse that the directors lacked the information necessary to make and publish the required report.⁸⁸ Since the corporate powers, business and property of the corporation are exercised, conducted and controlled by the directors, they know or ought to know at all times the condition of the business and property under their con-

⁸² *Pierce & Galloway v. Yeaton, McDonald & Loring*, — N. H. —, 97 Atl. 876, holding that there is no statute requiring foreign corporations not engaged in manufacturing to make any returns, and where a declaration does not show that a certain company is a manufacturing corporation, it is demurrable.

⁸³ See § 349 and *Newcomb v. Reed*, 12 Allen (Mass.) 362.

⁸⁴ *Providence Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 25 L. Ed. 786; *Thayer v. New England Lithographic Steam Printing Co.*, 108 Mass. 523; *Easterly v. Barber*, 65 N. Y. 252; *Union Nat. Bank of Troy v. Scott*, 53 N. Y. App. Div. 65, 66 N. Y. Supp. 145; *St. George Vineyard Co. v. Fritz*, 48 N. Y. App. Div. 233, 62 N. Y. Supp. 775; *Halstead v. Dodge*, 19 Jones & S. (N. Y.) 169; *Craw v. Easterly*, 4 Lans. (N. Y.) 513, aff'd 54 N. Y. 679. See further § 1852.

Persons who act as directors and fail to file the annual report as required by law, cannot escape liability to creditors on the ground that they did not hold the number of shares re-

quired by statute to qualify them to be directors. *Donnelly v. Pancoast*, 15 N. Y. App. Div. 323, 44 N. Y. Supp. 104.

In an action against a director for failure to file annual reports (Rev. Code, § 3850), the director cannot avoid liability on the ground that he was not properly chosen as director. *Dally v. Marshall*, 47 Mont. 377, 133 Pac. 681.

⁸⁵ *De Witt v. Hastings*, 69 N. Y. 518.

⁸⁶ *De Witt v. Hastings*, 69 N. Y. 518. See also § 2874, *infra*.

⁸⁷ *Ball v. Tolman*, 119 Cal. 358, 51 Pac. 546; *Quimby v. Waters*, 28 N. J. L. 533.

⁸⁸ *Schenck v. Bandmann*, 81 Cal. 231, 22 Pac. 654; *State v. Fenn*, 60 Kan. 306, 56 Pac. 483.

An unexplained admission to the effect that the directors lacked the information necessary to enable them to make and post the account in time, seems to present simply a case of neglect or disregard of duty. *Schenck v. Bandmann*, 81 Cal. 231, 22 Pac. 654.

trol,⁸⁹ neither can the statutory duty be evaded by the claim that the corporation has no debts⁹⁰ nor by the contention that the report is not necessary.⁹¹ Nor is the failure of a public official to furnish blanks an excuse for the failure to make reports,⁹² and directors cannot relieve themselves from liability for failure to file and publish a report by making a report and intrusting it to the secretary of some other person to be filed and published. His neglect in this respect will render them liable unless the statute expressly provides that the neglect shall be intentional or wilful.⁹³

Directors are also liable for the corporation's failure to file the required report, though the failure was due to the neglect of other directors,⁹⁴ unless the statute limits the liability to cases of intentional or wilful neglect.⁹⁵ Under the California statute as to mining companies, while the directors have the power to direct the superintendent of the mine to make reports, in case of the failure of that officer to perform the duty intrusted to him, they are liable.⁹⁶ The fact that no penalty is imposed by the statute upon the superintendent does not prevent the enforcement of the statute,⁹⁷ and the statutory duty cannot be evaded by the fact that the mine is operated in a distant state or territory, so that it is difficult for the officer to comply with the statutory formalities necessary to making the report.⁹⁸ The existence of other duties requiring the time of the officer does not excuse the performance of the duty imposed by the statute,⁹⁹ and if there is no ambiguity in the statute with reference to the for-

⁸⁹ *Schenck v. Bandmann*, 81 Cal. 231, 22 Pac. 654. See generally, in this connection, Chap. 42, subdivisions xxvi, xxvii. *Githers v. Clarke*, 158 Pa. St. 616, 28 Atl. 232.

⁹⁰ Under Colo. Gen. St. § 252 (*Mills' Ann. St. § 491*), as to reports, the fact that the corporation had no debts prior to the time when the annual report was due under the provisions of statute is immaterial and cannot avail the directors as a defense in a suit to enforce their personal liability. *Thatcher v. Salomon*, 16 Colo. App. 150, 64 Pac. 368.

⁹¹ The fact that plaintiff had knowledge of acts and means of knowledge of noncompliance with the statute (Act of April 23, 1880; St. 1880, p. 400), does not excuse noncompliance

with the law, since there may have been other stockholders. *Ball v. Tolman*, 119 Cal. 358, 51 Pac. 546. See § 2858, *supra*.

⁹² *State v. Missouri Exploration & Land Co.*, 97 Mo. App. 226, 70 S. W. 1107. See § 2855, *supra*.

⁹³ *Whitney v. Cammann*, 137 N. Y. 342, 33 N. E. 305.

⁹⁴ *Van Etten v. Eaton*, 19 Mich. 187.

⁹⁵ *Gennert v. Ives*, 102 Mich. 547, 61 N. W. 9.

⁹⁶ *Eyre v. Harmon*, 92 Cal. 580, 28 Pac. 779.

⁹⁷ *Eyre v. Harmon*, 92 Cal. 580, 28 Pac. 779.

⁹⁸ *Eyre v. Harmon*, 92 Cal. 580, 28 Pac. 779.

⁹⁹ *Shanklin v. Gray*, 111 Cal. 88, 43 Pac. 399.

malities required in making the report, an opinion of counsel to the contrary does not relieve from the penalty imposed.¹

III. FORM AND REQUISITES

§ 2862. **In general.** In order that there may be exemption from liability, it is necessary that the report or statement which is filed or published shall comply with the requirements of the statute as to form and as to the matters or facts to be stated therein.² Substantial compliance with the statute is usually sufficient,³ or, in other words, the report must give all the information that the statute intends should be given.⁴ The report may be required to conform to certain conditions, or the form to be followed may be left to the commissioner of corporations.⁵

Under the California act as to mining companies, the necessary information must be given by reports of the superintendents, by ac-

¹Shanklin v. Gray, 111 Cal. 88, 43 Pac. 399.

²Witaker v. Masterton, 106 N. Y. 277, 12 N. E. 604; Bonnell v. Griswold, 80 N. Y. 128; Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504, 68 N. Y. 34; American Grocery Co. v. Pratt, 36 N. Y. App. Div. 152, 55 N. Y. Supp. 467; Glens Falls Paper Co. v. White, 18 Hun (N. Y.) 214; Pier v. George, 17 Hun (N. Y.) 207, 14 Hun 568; Lillienthal v. Yuengling, 33 N. Y. Misc. 619, 68 N. Y. Supp. 897, aff'd 61 N. Y. App. Div. 601, 70 N. Y. Supp. 920; Western Nat. Bank v. Faber, 29 N. Y. Misc. 467, 62 N. Y. Supp. 82; Wickens v. Foster, 22 Wkly. Dig. (N. Y.) 426.

³Manhattan Co. v. Kaldenberg, 165 N. Y. 1, 58 N. E. 790, rev'g 27 N. Y. App. Div. 31, 50 N. Y. Supp. 265.

When the information required in annual reports is published in good faith and in the manner and form provided by statute, the trustees have done all in their power to avoid penalty. Wallace & Sons v. Walsh, 125 N. Y. 26, 11 L. R. A. 166, 25 N. E. 1076.

⁴Dart v. Hughes, 49 Colo. 465, 109 Pac. 952.

Under N. Y. Laws 1892, p. 1832, c. 688, § 30, providing that a stock corporation shall make an annual report as to the capital stock paid in, the amount of debts and amount of assets, on the first day of January, where the report is not in the words of the statute, the sense and substance thereof must inferentially appear, if the report is to be held substantially sufficient. Winthrop Press v. Perkins, 47 N. Y. Misc. 460, 95 N. Y. Supp. 931.

Under Colo. Sess. Laws, 1911, c. 102, a purported annual report failing to contain material matter required by the plain provisions of the statute, is in law, no report. Moody v. Rhodes Ranch Egg Co., — Colo. —, 157 Pac. 1167.

⁵Steel v. Webster, 188 Mass. 478, 74 N. E. 686.

With respect to the definiteness of the annual report of a corporation under the laws of New York sufficient to protect the directors from personal liability, see Lillienthal v. Yuengling, 33 N. Y. Misc. 619, 68 N. Y. Supp. 897, aff'd 61 N. Y. App. Div. 601, 70 N. Y. Supp. 920.

count books which are to be left open for inspection, and by monthly balance sheets which are to be posted in the office of the company.⁶

§ 2863. Statement of debts. The statutes as to reports do not contemplate that the officers shall report a mere possibility of debt,⁷ an unliquidated demand founded on tort,⁸ or a liability on a covenant for title, which is contingent only.⁹ And the mere omission of certain liabilities of a company from a statement of its aggregate indebtedness has been held not to impose liability for a penalty under a statute as to false reports.¹⁰

§ 2864. Statement of assets. Under a statute requiring a report of the assets of the corporation, the actual value of the property must be given in good faith. The officers are bound to know that the report or certificate will be given that meaning.¹¹ And where a statute provides that the annual report of a corporation shall state the amount of its assets or the amount which its assets at least equal, a report that the assets "do not exceed" a specified sum does not comply with the law.¹²

§ 2865. Receipts and disbursements. Where, as is sometimes the case, the statute requires the annual statement to give in detail the receipts and disbursements of the corporation, a report which states that the accounts are not kept in such a way that a detailed statement can be given, is insufficient.¹³

§ 2866. Report as to capital stock. Under some statutes the report must state the amount of capital of the corporation and the proportion actually paid in.¹⁴

⁶ The statute (Act of April 23, 1880; St. 1880, p. 400), entitles stockholders to information as to manner in which the business of mining corporation is conducted, receipts and disbursements, wages paid, value of ore shipped and discoveries of ore. *Eyre v. Harmon*, 92 Cal. 580, 28 Pac. 779.

The balance sheet, which is usually different from an itemized account, is a paper which shows a "summation or general balance of all accounts" but in particular the items going to make up the several accounts. *Eyre v. Harmon*, 92 Cal. 580, 28 Pac. 779.

⁷ *Giddings v. Holter*, 19 Mont. 263, 48 Pac. 8.

⁸ *Giddings v. Holter*, 19 Mont. 263, 48 Pac. 8.

⁹ *Giddings v. Holter*, 19 Mont. 263, 48 Pac. 8.

¹⁰ *Butler v. Smalley*, 101 N. Y. 71, 4 N. E. 104.

¹¹ *Heard v. Pictorial Press*, 182 Mass. 530, 65 N. E. 901.

¹² *Lilienthal v. Betz*, 61 N. Y. App. Div. 601, 70 N. Y. Supp. 920, *aff'd* 172 N. Y. 643, 65 N. E. 1118.

¹³ *State v. Fenn*, 60 Kan. 306, 56 Pac. 483.

¹⁴ *Thatcher v. Salomon*, 16 Colo. App. 150, 64 Pac. 368.

Under the statutes as to false reports, it has been held that a report is not false where it states that the capital stock is paid in full, although land representing the consideration has become valueless.¹⁵

§ 2867. Signing and verification. The report or statement which is filed or published must conform to the requirements of the statute as to the particular officers and the number of them signing it,¹⁶ and as to the signing and verification.¹⁷ However a report signed

¹⁵ *Giddings v. Holter*, 19 Mont. 263, 48 Pac. 8.

Under Mass. Rev. Laws, c. 110, § 44, providing that a detailed statement of real or personal property received in payment for stock must be filed, a statement that stock was paid for in cash and invested in property was an evasion of the statute and rendered the directors liable under § 58, cl. 5, as to reports, it appearing that the stock was paid for by checks which were returned to the subscribers in exchange for their business which the corporation was organized to conduct. *Harvey-Watts Co. v. Worcester Umbrella Co.*, 193 Mass. 138, 78 N. E. 886. Furthermore, under this statute, a payment in cash which is returned to the subscriber by way of a loan on his note is equivalent to an acceptance of the note in the first instance, and is an evasion of the statute. *Harvey-Watts Co. v. Worcester Umbrella Co.*, 193 Mass. 138, 78 N. E. 886. But a director cannot be held chargeable with knowledge of the return of his subscription money to a subscriber by way of a loan merely because the by-laws provide that no loan shall be made except pursuant to a vote of the directors, where no vote on the loan in question is shown, since it cannot be assumed that vote was cast. *Harvey-Watts Co. v. Worcester Umbrella Co.*, 193 Mass. 138, 78 N. E. 886.

It seems that the directors will not be held liable on the ground that they knew that the certificate was false where they acted on advice of coun-

sel that the payment for stock subscribed constituted a cash payment, even though the counsel so advising had subscribed and paid in cash for two shares of the stock. *Harvey-Watts Co. v. Worcester Umbrella Co.*, 193 Mass. 138, 78 N. E. 886.

¹⁶ *International Bank of St. Louis v. Faber*, 86 Fed. 443; *International Bank of St. Louis v. Faber*, 79 Fed. 919; *Miller v. White*, 50 N. Y. 137; *Leonard v. Faber*, 52 N. Y. App. Div. 495, 65 N. Y. Supp. 391; *Glens Falls Paper Co. v. White*, 18 Hun (N. Y.) 214; *Westerfield v. Radde*, 67 How. Pr. (N. Y.) 204, 12 Daly (N. Y.) 450.

As to the provisions governing the execution of corporate instruments generally, see §§ 1441-1492.

Under N. Y. Laws 1848, p. 57, § 12 (2 Rev. St. 5th Ed. 661), requiring annual reports, if the president and a sufficient number of trustees fail to sign the report, or the officers fail to verify it, a trustee who attempts to comply with the statute is liable as well as those who refused to do their duty. *Miller v. White*, 50 N. Y. 137.

Under Colo. Gen. St. § 252, liability results from failure to perform the statutory duty, and it makes no difference whether the defaulting trustee did or did not sign the report. *Mathews v. Patterson*, 16 Colo. 215, 26 Pac. 812.

¹⁷ *International Bank of St. Louis v. Faber*, 86 Fed. 443; *International Bank of St. Louis v. Faber*, 79 Fed. 919; *Shanklin v. Gray*, 111 Cal. 88, 43 Pac. 399; *Colorado Fuel & Iron Co. v.*

by six trustees sufficiently complies with a statutory requirement that it be signed by a majority, even though the original by-laws provided for twelve trustees, where an amendment to the by-laws, acted under for a number of years without objection, had reduced the number to nine, notwithstanding there had been a failure to comply with statutory requirements as to filing a certificate of the fact of such reduction of the number of trustees.¹⁸

The lack of verification cannot be excused because inconvenience is imposed upon the officers,¹⁹ and if, in clear and unambiguous language, the statute requires verification, an opinion of counsel to the contrary does not relieve from the penalty imposed.²⁰

An annual statement verified by the president and vice-president does not relieve directors from liability where the statute requires verification by the secretary and treasurer.²¹ Where the law requires an annual report to be verified by the oath of "the president or vice-president and treasurer or secretary," the president or vice-president and treasurer or secretary must sign the report. Verification by the president alone is not sufficient.²² Verification may be

Lenhart, 6 Colo. App. 511, 41 Pac. 834; *Manhattan Co. v. Kaldenberg*, 165 N. Y. 1, 58 N. E. 790, rev'g 27 N. Y. App. Div. 31, 50 N. Y. Supp. 265; *Hardman v. Sage*, 124 N. Y. 25, 26 N. E. 354, aff'g 47 Hun (N. Y.) 230; *Bolen v. Crosby*, 49 N. Y. 183; *Leonard v. Faber*, 52 N. Y. App. Div. 495, 65 N. Y. Supp. 391; *Noble v. Euler*, 20 N. Y. App. Div. 548, 47 N. Y. Supp. 302; *Glens Falls Paper Co. v. White*, 18 Hun (N. Y.) 214; *Brown v. Smith*, 13 Hun (N. Y.) 408, aff'd 80 N. Y. 650; *Shultz v. Chatfield*, 17 N. Y. Misc. 264, 40 N. Y. Supp. 1081.

Under the New York Manufacturing Act (L. 1848, c. 40), §§ 10, 11, requiring certificates of the amount of capital paid in to be recorded, certificates not sworn to but simply acknowledged are insufficient. *Hardman v. Sage*, 124 N. Y. 25, 26 N. E. 354, aff'g 47 Hun (N. Y.) 230.

¹⁸ *Wallace & Sons v. Walsh*, 125 N. Y. 26, 11 L. E. A. 166, 25 N. E. 1076.

¹⁹ *Shanklin v. Gray*, 111 Cal. 88, 43 Pac. 399.

²⁰ *Shanklin v. Gray*, 111 Cal. 88, 43 Pac. 399.

²¹ *Rhodes v. Hinds*, 79 N. Y. App. Div. 379, 79 N. Y. Supp. 437.

²² *Manhattan Co. v. Kaldenberg*, 165 N. Y. 1, 58 N. E. 790, rev'g 27 N. Y. App. Div. 31, 50 N. Y. Supp. 265.

Under N. Y. Stock Corp. Law (L. 1892, c. II) § 30, requiring the annual report to be verified by the oath of the "president or vice-president and treasurer or secretary," the president and vice-president are placed in one class and the secretary and treasurer in another, and each may act for the other in the same category but only in conjunction with one from the other class. *Manhattan Co. v. Kaldenberg*, 165 N. Y. 1, 58 N. E. 790, rev'g 27 N. Y. App. Div. 31, 50 N. Y. Supp. 265.

Where the evidence tended to show that the president of a corporation who was acting as secretary and treasurer in place of an officer who had resigned, verified the report without reference to other offices of which he was a de facto incumbent, there

sufficient, however, where there is an inadvertent omission to sign one of the duplicates of the report which is filed.²³

§ 2868. Seal. Where a statute requires the corporate seal to be affixed to the annual report, it has been held that the affixing of such seal is a mere matter of form,²⁴ and, in the absence of proof to the contrary, it will be presumed that the word "seal" in quotation marks, attached to the report, is the true seal of the company.²⁵

IV. PUBLICATION AND FILING.

§ 2869. In general. Directors or other officers who wish to be relieved from liability under the statutes as to annual reports must comply with the statutory provisions as to the filing or publishing of the report, or both filing and publishing, when both are required.²⁶ The law is not complied with where the report is made out, signed and verified and then left in the office of the corporation,²⁷ and the directors cannot relieve themselves from responsibility by intrusting the duty to file the report to another who fails to perform it.²⁸ It has been held, however, that the court may decline to impose liability upon the officers where the failure to file the report has in no wise misled or caused injury to creditors.²⁹ That a certificate of paid up capital stock was actually made does not relieve directors from a liability imposed by statute from which they are exempted in case the

was substantial compliance with the statute, even though the president did not affix to his signature the title of office which he filled. *Manhattan Co. v. Kaldenberg*, 165 N. Y. 1, 58 N. E. 790, rev'g 27 N. Y. App. Div. 31, 50 N. Y. Supp. 265.

The statute does not demand the performance of impossibilities, and where directors diligently attempted to fill a vacant office of secretary and treasurer, but failed to do so, a report is sufficient when verified by the president and signed by a majority of the directors. *Manhattan Co. v. Kaldenberg*, 165 N. Y. 1, 58 N. E. 790, rev'g 27 N. Y. App. Div. 31, 50 N. Y. Supp. 265.

²³ *Manhattan Co. v. Kaldenberg*, 165 N. Y. 1, 58 N. E. 790, rev'g 27 N. Y. App. Div. 31, 50 N. Y. Supp. 265.

²⁴ *Wingett v. Williams*, — Colo. —, 158 Pac. 139.

As to the necessity of a corporate seal, see §§ 752-756.

²⁵ *Dart v. Hughes*, 49 Colo. 465, 109 Pac. 952. See also § 753.

²⁶ *Whitney v. Cammann*, 137 N. Y. 342, 33 N. E. 305; *Cameron v. Seaman*, 7 Hun (N. Y.) 601, rev'd 69 N. Y. 396, 25 Am. Rep. 212; *Miller v. White*, 59 Barb. (N. Y.) 434, 10 Abb. Pr. (N. S.) 385; *Gildersleeve v. Dixon*, 6 Daly (N. Y.) 76; *Whitney v. Cammann*, 28 Jones & S. (N. Y.) 391, aff'd 137 N. Y. 342, 33 N. E. 305.

²⁷ *Whitney v. Cammann*, 137 N. Y. 342, 33 N. E. 305.

²⁸ *Whitney v. Cammann*, 137 N. Y. 342, 33 N. E. 305.

²⁹ *Stafford v. St. John*, 164 Ind. 277, 73 N. E. 596.

certificate was "made and filed." The filing, in such case, has the effect of giving the facts publicity, and without that the main purpose of the statute is not accomplished.³⁰

Where the statute requires the directors to cause a monthly balance sheet or itemized account to be made and to post it in a conspicuous place in the office of the company, a failure to comply therewith renders the directors liable to the penalty provided by the statute.³¹

§ 2870. Time of filing. The various statutes differ as to the time of filing reports,³² and, as a rule, the report or statement must be filed or published at or within the time prescribed by the statute,³³ although in some cases the courts have refused to hold the directors liable for delay, where no injury resulted or the delay was unavoidable.³⁴ And under some statutes, it is sufficient if the report is made within the time mentioned. It may be filed or published within a reasonable time thereafter.³⁵

³⁰ Cannon v. Breckenridge Mercantile Co., 18 Colo. App. 38, 69 Pac. 269.

³¹ Eyre v. Harmon, 92 Cal. 580, 28 Pac. 779.

³² Cal. Act of April 23, 1880 (St. 1880, p. 134), clearly requires that an account or balance sheet shall be made and posted on the first Monday of the month. Schenck v. Bandmann, 81 Cal. 231, 22 Pac. 654.

Mills' Colo. Ann. St. § 491, requires every corporation, annually, within sixty days from the first of January, to make a report stating the amount of its capital. Fraser & Chalmers v. Mines Leasing Co., 16 Colo. App. 444, 66 Pac. 167. See also Bradford v. Guley, 10 Colo. App. 146, 50 Pac. 314.

Where the corporation filed its certificate designating an agent, and other credentials required by Mills' Ann. St. §§ 499, 500, on February 20, 1896, and this was its first appearance in state, and the annual report was filed February 13, 1897, within one year thereafter and within sixty days after January 1st, the statute (§ 491) as to annual reports was complied with. Fraser & Chalmers v. Mines Leasing Co., 16 Colo. App. 444, 66 Pac. 167.

Mass. St. 1851, c. 133, § 9, as to annual certificate is modified by St. 1854, c. 438, § 1, so that certificate containing required statements as to the condition of the corporation on first day of month then next pending, may be filed at any time in each year. Bond v. Clark, 6 Allen (Mass.) 361.

³³ Cincinnati Cooperage Co. v. O'Keefe, 44 Hun (N. Y.) 64, aff'd 120 N. Y. 603, 24 N. E. 993; Duckworth v. Roach, 8 Daly (N. Y.) 159, aff'd 81 N. Y. 49; Butler v. Smalley, 3 How. Pr. N. S. (N. Y.) 256. See also Githers v. Clarke, 158 Pa. St. 616, 28 Atl. 232.

³⁴ McComb v. Belknap, 30 Abb. N. Cas. (N. Y.) 119; Butler v. Smalley, 3 How. Pr. N. S. (N. Y.) 256.

³⁵ Butler v. Smalley, 101 N. Y. 71, 4 N. E. 104.

It has been held that, under a statute (Laws N. Y. 1848, c. 40, § 12) requiring the annual report of the trustees of a corporation to be published and filed within twenty days after January 1st, it is not necessary that the report be filed and published within the twenty days, where it is prepared, signed and verified within the twenty days, and is filed and pub-

Where the statute definitely prescribes the time for filing the report, failure to file at the stated time may subject the officers to liability.³⁶ Thus, where the statute provides for the filing of the report on the first day of January of each year, and such a report is filed on a subsequent day, there being no suggestion that the report was made on the first day of the month, there is no substantial compliance with the statute.³⁷ And where a statute provides that reports shall be made and published "within twenty days from the 1st day of January in each year," a report filed or published in December of the preceding year within twenty days of the first day of January, does not comply with the statute. The fact that the directors acted in good faith in such a case does not render the report sufficient.³⁸

Incoming directors are usually entitled to a reasonable time after election to acquaint themselves with the affairs of the company and to supply the annual report, if there has been a default on the part of their predecessors.³⁹ And a statute providing for reports is usually enacted with the object of making it to the interest of the officers to file such report as soon as possible when the oversight is discovered. Accordingly if a definite time for filing reports is provided, and such time has expired, the statute will not be construed so as to prevent the filing of the report until the following year. Instead, in such cases, the report should be filed as soon as possible, and the directors are then relieved from liability until another default occurs.⁴⁰

§ 2871. Place of filing. Under some statutes the report must be filed both in the office of the secretary of state and in the office of the recorder of deeds of the county where the business of the cor-

lished as soon thereafter as practicable. *Cameron v. Seaman*, 69 N. Y. 396, 25 Am. Rep. 212.

If the trustees make and verify the report within the time prescribed by N. Y. Act of 1848, § 12, as amended by Laws of 1875, c. 510, it may be filed or published as soon as practicable thereafter, without incurring penalty. *Whitney v. Cammann*, 137 N. Y. 342, 33 N. E. 305.

³⁶ *Continental Nat. Bank of Memphis, Tennessee v. Buford*, 107 Fed. 188.

So where the statute is mandatory

in regard to the time, the directors are not relieved by the fact that the report is posted before the commencement of the action. *Schenck v. Bandmann*, 81 Cal. 231, 22 Pac. 654.

³⁷ *Winthrop Press v. Perkins*, 47 N. Y. Misc. 460, 95 N. Y. Supp. 931.

³⁸ *Cincinnati Cooperage Co. v. O'Keefe*, 120 N. Y. 603, 24 N. E. 993, aff'g 44 Hun (N. Y.) 64.

³⁹ *Risdon Iron & Locomotive Works v. Von Storch*, 166 Fed. 936.

⁴⁰ *Beekman Lumber Co. v. Ahern*, 75 Ark. 107, 86 S. W. 842.

poration is carried on.⁴¹ And under other statutes the report must be filed with the county clerk of the county where the corporation does business or where its principal office is located.⁴² If the corporation changes its principal business office to another county and there files its certificate, its action is legal and the statute is complied with.⁴³

§ 2872. Failure of public officer to file. It has been held that directors are not liable where the required annual report is properly made out, and is mailed to the secretary of state for filing, together with the filing fee, but is not received or filed.⁴⁴

V. LIABILITY FOR NONCOMPLIANCE WITH STATUTE

§ 2873. Nature of liability of officers and directors. The liability of corporate officers or directors for the debts contracted by their corporation, where there is a failure to file reports as required by the statute, is purely statutory,⁴⁵ and such liability is in the nature of a penalty imposed for the failure to comply with the law.⁴⁶ Accordingly some cases hold that since the liability is imposed as a punishment for the breach of a statutory duty, the officers and directors cannot be said to be primarily liable,⁴⁷ and the liability imposed does not partake of the nature of a contract between creditors of the corporation and the corporate officer.⁴⁸ It must be remem-

⁴¹ *Thatcher v. Salomon*, 16 Colo. App. 150, 64 Pac. 368.

⁴² *Beekman Lumber Co. v. Ahern*, 75 Ark. 107, 86 S. W. 842; *Uptegrove v. Schwarzwaelder*, 46 N. Y. App. Div. 20, 61 N. Y. Supp. 623, *aff'd* 167 N. Y. 587, 60 N. E. 1121.

⁴³ *Uptegrove v. Schwarzwaelder*, 46 N. Y. App. Div. 20, 61 N. Y. Supp. 623, *aff'd* 167 N. Y. 587, 60 N. E. 1121.

⁴⁴ *Ford River Lumber Co. v. Perron*, 148 Mich. 399, 111 N. W. 1074, 13 Det. L. N. 201.

⁴⁵ *McDonald v. Mueller*, 123 Ark. 226, 183 S. W. 751; *Breitung v. Lindauer*, 37 Mich. 217; *Benjamin v. Laffray*, 79 N. J. L. 310, 75 Atl. 775.

⁴⁶ *Gregory v. German Bank*, 3 Colo. 332, 25 Am. Rep. 760; *Colorado Fuel & Iron Co. v. Lenhart*, 6 Colo. App. 511, 41 Pac. 834; *Gadsen v. Woodward*,

103 N. Y. 242, 8 N. E. 653; *Stieffel v. Tolhurst*, 67 N. Y. App. Div. 521, 73 N. Y. Supp. 1034.

Under N. Y. Laws 1848, p. 57, § 12 (2 Rev. St., 5th Ed., 661), trustees are neither principal debtors with the company nor sureties, and the statute simply imposes penalty for omission of prescribed duty. *Miller v. White*, 50 N. Y. 137.

⁴⁷ *Breitung v. Lindauer*, 37 Mich. 217.

The liability of the officers under such a statute is secondary and collateral. *Byers v. Franklin Coal Co.*, 106 Mass. 131.

⁴⁸ *Breitung v. Lindauer*, 37 Mich. 217; *Wing v. Slater*, 19 R. I. 597, 33 L. R. A. 566, 35 Atl. 320.

In an action to hold directors liable to creditors for failure to make a re-

bered, however, that it is possible for a statute to impose a contractual or quasi contractual liability for corporate debts upon officers as well as stockholders.⁴⁹ And presumably this theory is the basis of the later decisions holding directly contra to the foregoing cases. Such decisions state that the liability imposed by the statutes is direct and primary,⁵⁰ and that the officer who is guilty of dereliction of official duty does not sustain either the relation of joint principal, surety or guarantor.⁵¹ By accepting office and entering upon his duties, the officer impliedly undertakes, if he neglects the statutory duty, to pay all the debts of the corporation contracted during the period of neglect,⁵² and the liability created is in the nature of a contractual obligation.⁵³

While the liability imposed for disregarding the statute is personal,⁵⁴ the duty required attaches to the officers, as officers of the company, and not to each individually.⁵⁵

Both the statutes as to reports, and the similar statutes as to false reports, usually provide that the officers who disregard the statute shall be jointly and severally liable for the debts contracted.⁵⁶

port as required by statute, the debt is only against the corporation, and the relation of debtor and creditor arose and existed between the creditors and corporation. *Breitung v. Lindauer*, 37 Mich. 217.

⁴⁹ See Chap. 42, §§ 2519-2533, *supra*.

⁵⁰ *McDonald v. Mueller*, 123 Ark. 226, 183 S. W. 751; *Bailey v. O'Neal*, 92 Ark. 327, 135 Am. St. Rep. 185, 122 S. W. 503; *Jones v. Harris*, 90 Ark. 51, 117 S. W. 1077; *First Nat. Bank of Missoula v. Cottonwood Land Co.*, 51 Mont. 544, 154 Pac. 582.

⁵¹ *McDonald v. Mueller*, 123 Ark. 226, 183 S. W. 751.

A director is neither surety nor guarantor for the corporation. *First Nat. Bank of Missoula v. Cottonwood Land Co.*, 51 Mont. 544, 154 Pac. 582.

⁵² *Hughes v. Kelley*, 95 Ark. 327, 129 S. W. 784; *Nickerson v. Wheeler*, 118 Mass. 295.

⁵³ *Hughes v. Kelley*, 95 Ark. 327, 129 S. W. 784.

⁵⁴ *Cavanagh v. Patterson*, 41 Colo. 158, 91 Pac. 1117; *Halsey v. McLean*, 12 Allen (Mass.) 439, 90 Am. Dec. 157.

⁵⁵ Thus, though the president and secretary are made individually liable both civilly and criminally for having failed to comply with the statute as to reports (*Kirby's Dig.*, § 484; Acts 1909, No. 222, p. 643), yet the duty which the statute imposes attaches to them as officials of the corporation, and not to each individually. *Breitzke v. Bank of Grand Prairie*, 124 Ark. 495, 187 S. W. 660.

Duty imposed upon manufacturing corporations by N. Y. Laws, 1848, c. 40, § 12, as to annual reports, is a corporate duty to be discharged by making reports, signed by the president and a majority of trustees. *Cornell v. Roach*, 101 N. Y. 373, 5 N. E. 52.

⁵⁶ *Risdon Iron & Locomotive Works v. Von Storch*, 166 Fed. 936; *Taylor v. Dexter*, — Ark. —, 189 S. W. 1060; *Matthews v. Patterson*, 16 Colo. 215, 26 Pac. 812; *Felker v. Standard Yarn Co.*, 148 Mass. 226, 19 N. E. 220. See also *Halsey v. McLean*, 12 Allen (Mass.) 439, 90 Am. Dec. 157.

Section 15 of the Indiana Act as to

§ 2874. Officers and directors who are liable—In general. The statutes usually specify the officers who shall make and file reports, and such statutes vary considerably in their terms, the duty being imposed on directors or trustees, upon the president or secretary or both, and upon similar officers.⁵⁷

Where a statute provides that the president and secretary shall file an annual statement, and the duty is performed by the vice-president and the secretary during the president's absence, the president cannot be held liable.⁵⁸ Since a proper statement has been filed, it would be needless to require the filing of a second statement.⁵⁹

The liability for the failure to make and file reports, or for the making of false reports, usually attaches only to those officers or directors who hold office at or during the time of the default, or when the false report is made.⁶⁰ The statutes cannot be extended by con-

manufacturing and mining companies as originally passed in 1852 (1 G. & H. p. 425; 1 Rev. St. 1852, p. 358) provided that if a certificate or report of officers should be false in any material representation, or if officers failed to make a report, they should be jointly and severally liable for all debts of company contracted while they were stockholders or officers. *Stafford v. St. John*, 164 Ind. 277, 73 N. E. 596.

A certificate of incorporation of a company filed for the purpose of its organization is not an act of the "officers of the company" within the meaning of a statute providing that, "if any certificate made * * * by the officers of any company, in pursuance of the provisions of this act, shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the company contracted while they were stockholders or officers thereof." *Thompson-Houston Elec. Co. v. Murray*, 60 N. J. L. 20, 37 Atl. 443.

⁵⁷ See § 2852, *supra*.

⁵⁸ *Myar v. Poe*, 79 Ark. 465, 95 S. W. 1005.

⁵⁹ *Myar v. Poe*, 79 Ark. 465, 95 S. W. 1005.

⁶⁰ *California*. *Irvine v. McKeon*, 23 Cal. 472.

Colorado. *Austin v. Berlin*, 13 Colo. 198, 22 Pac. 433.

Indiana. *Schofield v. Henderson*, 67 Ind. 258.

Maine. *Bank of Mutual Redemption v. Hill*, 56 Me. 385, 96 Am. Dec. 470.

New York. *Boughton v. Otis*, 21 N. Y. 261; *Chandler v. Hoag*, 2 Hun 613, *aff'd* 63 N. Y. 624; *Shaler & Hall Quarry Co. v. Brewster*, 10 Abb. Pr. 464; *Shaler & Hall Quarry Co. v. Bliss*, 34 Barb. 309, *aff'd* 27 N. Y. 297; *Vincent v. Sands*, 42 How. Pr. 231. See also §§ 2895, 2896, *infra*.

Under Colo. Gen. Corp. Act, § 16 (Gen. St. § 252), providing that "all the directors or trustees of company shall be jointly and severally liable for all the debts of the company" where there is a failure to file the annual report, the quoted words must be construed to apply to such directors or trustees only as are chargeable with default. *Austin v. Berlin*, 13 Colo. 198, 22 Pac. 433.

struction to apply to all directors who have previously held an official position.⁶¹

One who has been elected a director, but who has never evinced his assent to the election, or in any manner acted as director, cannot be held liable,⁶² and the same rule applies to a person who has been held out as a director but who has never accepted the office or acted as an officer.⁶³ But persons acting as officers of corporations, publicly, are ordinarily presumed to be rightfully in office.⁶⁴

§ 2875. — Married women. A married woman, under the modern statutes giving her a separate estate, may be a stockholder, director or officer of a corporation,⁶⁵ and in the case of a violation of the statutes as to reports, such a married woman may be held liable to creditors.⁶⁶

§ 2876. Intent to disregard statute. The intention in failing to file a report as required by the statute is immaterial, unless it is made otherwise by the express provisions of the statute.⁶⁷ If the

⁶¹ *Jackson v. Clifford*, 5 App. Cas. (D. C.) 312.

⁶² *Cameron v. Seaman*, 69 N. Y. 396, 25 Am. Rep. 212; *Osborne & Cheesman Co. v. Croome*, 14 Hun (N. Y.) 164, aff'd 77 N. Y. 629.

⁶³ *Hume v. Commercial Bank*, 9 Lea (Tenn.) 728.

⁶⁴ *Providence Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 25 L. Ed. 786.

⁶⁵ *Arkansas Stables v. Samstag*, 78 Ark. 517, 94 S. W. 699. See also § 1780.

⁶⁶ Under the Arkansas statute (Kirby's Dig., § 848), a married woman who is the president of a corporation may be held liable to a creditor for failure to file the annual statement required by the statute, since she acts on behalf of her separate estate, or earns a separate income, and in these respects is freed of her coverture, and may be sued under Kirby's Dig., § 5214. *Arkansas Stables v. Samstag*, 78 Ark. 517, 94 S. W. 699.

⁶⁷ *Whitney v. Cammann*, 28 Jones & S. (N. Y.) 391, aff'd 137 N. Y. 342,

33 N. E. 305; *Butler v. Smalley*, 17 Jones & S. (N. Y.) 492.

Under the statute (Kirby's Dig., §§ 848, 859), the question whether an officer neglected or refused to make an annual statement intentionally or not was immaterial. *Hughes v. Kelley*, 95 Ark. 327, 129 S. W. 784.

"If the plaintiff should be required in the first instance to prove by direct evidence the actual intent in the minds of the delinquent directors, and should be precluded from making proof by inference from the fact of omission to perform the act required by the statute, the object of the law would be seriously obstructed, if not in many cases altogether defeated. The directors might at their pleasure neglect to report, and by a careful abstinence from any overt act or word to mark their design, make their liability depend upon their own testimony, and a resort to that, by one seeking to fix a liability upon them might be made difficult and sometimes impossible by accident or contrivance. It is hardly credible that the legisla-

statute, however, provides for liability where directors "intentionally" neglect to make and file certain reports, it cannot be construed as though the quoted word was omitted.⁶⁸ In such case, or where the statute provides for liability if directors "wilfully" neglect to file or publish reports, no liability arises from neglect due to mere inadvertence or forgetfulness.⁶⁹ But in the absence of evidence to the contrary, the presumption is that the neglect was wilful or intentional.⁷⁰

There is no wilful refusal or failure to report where the officers in good faith attempt to comply with the statute and a public official, without authority, extends the time for filing the report,⁷¹ and a like rule has been held to apply where the failure to report was caused by the neglect of a public official in failing to require a report or to prescribe its form.⁷²

The California statute as to reports by superintendents of mines merely imposes liability upon directors for the wilful failure to have reports made and posted by the superintendent⁷³ and this statute

ture could have intended to fetter so beneficial a provision as that in question, in the manner now contended for." *Van Etten v. Eaton*, 19 Mich. 187.

⁶⁸ *Breitung v. Lindauer*, 37 Mich. 217.

⁶⁹ Under Conn. Rev. St. §§ 404, 413, pp. 172, 174, as to annual reports, intentional neglect and refusal create the liability. *Providence Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 25 L. Ed. 788.

Under Mich. Pub. Acts 1885, No. 232, § 12 (3 How. St. § 4161 b1) penalty for wilful neglect is imposed upon the same persons as those made liable for the indebtedness, and those persons who compose the board of directors and who wilfully fail to make report are liable. *Gennert v. Ives*, 102 Mich. 547, 61 N. W. 9. See also *Breitung v. Lindauer*, 37 Mich. 217.

⁷⁰ *M. I. Wilcox Cordage & Supply Co. v. Mosher*, 114 Mich. 64, 72 N. W. 117; *Bank of Saginaw v. Pierson*, 112 Mich. 410, 70 N. W. 901; *Gennert v.*

Ives, 102 Mich. 547, 61 N. W. 9.

⁷¹ *Suburban Elec. Co. v. Com.*, 21 Ky. L. Rep. 1556, 55 S. W. 684.

Under Ky. St. § 4087, providing that a corporation or officer wilfully failing or refusing to make the reports which are required shall be guilty of misdemeanor, the auditor has no power to suspend operation of law and allow further time for compliance. *Suburban Elec. Co. v. Com.*, 21 Ky. L. Rep. 1556, 55 S. W. 684.

⁷² *Louisville Tobacco Warehouse Co. v. Com.*, 20 Ky. L. Rep. 1047, 48 S. W. 420.

⁷³ *Eyre v. Harmon*, 92 Cal. 580, 28 Pac. 779.

Under the statute (Act of April 23, 1880; St. 1880, p. 134; *Deering's Civ. Code*, pp. 148, 149), an evil intention is not essential to such violation of the statute as requires a visitation of the penalty. *Shanklin v. Gray*, 111 Cal. 88, 43 Pac. 399. In a proceeding thereunder it is not incumbent upon plaintiff to show that failure of directors was wilful. *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076.

merely requires good faith and honesty on the part of directors in the management of the corporate business.⁷⁴

§ 2877. Intent to make or publish false report. The statutes as to false reports usually provide for the imposition of liability only when the report is known to be false,⁷⁵ and liability will not attach to an officer or director who signs a report in good faith and in the belief that it is true. The statutes should be so construed even when knowledge is not required.⁷⁶ Of course, directors or other officers must use ordinary diligence in informing themselves of the true condition of the corporation before issuing statements as to such condition, and they will be presumed to have knowledge of such facts as may be obtained by the exercise of ordinary diligence. This does not mean that the officers are required to be expert bookkeepers or financiers, but they cannot close their eyes to the existence of facts which they ought to know and then say that they did not knowingly issue false statements.⁷⁷ Accordingly, liability is imposed where a

⁷⁴ *Eyre v. Harmon*, 92 Cal. 580, 28 Pac. 779.

⁷⁵ Mass. Pub. St., c. 106, § 60, is general in its terms and provides that officers who knowingly make false certificates shall be jointly and severally liable for its debts and contracts. *Felker v. Standard Yarn Co.*, 148 Mass. 226, 19 N. E. 220.

Officers may be held liable for signing a certificate that the capital stock has been paid in where they have knowledge that the corporation has loaned a stockholder the amount of his stock subscription. *Harvey-Watts Co. v. Worcester Umbrella Co.*, 193 Mass. 138, 78 N. E. 886.

Under Mass. Rev. L., c. 112, § 19 (St. 1906, c. 463, pt. III § 29), as to street railway companies, the filing of a certificate falsely stating that capital stock has been paid in does not terminate the liability imposed upon the directors. *Westinghouse Elec. & Mfg. Co. v. Reed*, 194 Mass. 590, 120 Am. St. Rep. 576, 80 N. E. 621.

It is immaterial whether directors did or did not act in good faith in making such false certificate. *West-*

inghouse Elec. & Mfg. Co. v. Reed, 194 Mass. 590, 120 Am. St. Rep. 576, 80 N. E. 621.

⁷⁶ *Felker v. Standard Yarn Co.*, 150 Mass. 284, 22 N. E. 896; *Stebbins v. Edmands*, 12 Gray (Mass.) 203; *Bonnell v. Griswold*, 89 N. Y. 122; *Pier v. Hanmore*, 86 N. Y. 95; *Van Vleet v. Jones*, 75 Hun (N. Y.) 340, 26 N. Y. Supp. 1082.

The penalty imposed by N. Y. Laws 1848, c. 40, § 15, for signing a report false in any material representation, is not incurred where there is no evidence that the report was false, or that defendant signed it knowing it to be false, and where there is no evidence either of bad faith, or of wilful or fraudulent purpose on the part of the trustees, nor of any fact showing actual fraud. *Butler v. Smalley*, 101 N. Y. 71, 4 N. E. 104.

⁷⁷ *Allen v. Neale*, 134 Ky. 690, 121 S. W. 612.

Thus where an action was brought by a purchaser of stock in a national bank against the directors of such bank, alleging damage by reason of the fact that he had purchased in re-

report is signed or issued and the officer does not actually know that it is false, but signs without any knowledge as to its truth or falsity, either negligently or recklessly.⁷⁶

Usually the statutes provide in terms that the false representation must be material; and even in the absence of an express provision to this effect, it would undoubtedly be implied.⁷⁹

It has been held, however, that an intention to defraud is not necessary.⁸⁰

§ 2878. Default of predecessors. Newly-elected officers or directors are bound to acquaint themselves with the financial affairs of the corporation, and must ascertain whether the statute as to reports has been complied with.⁸¹ If their predecessors in office have disregarded the statute, it is the duty of the new officers to perform the statutory duty as soon as they have ascertained the fact, and within a reasonable time after investigating the financial affairs of

liance on the statements of the bank, alleged to have been false, as to its resources and liabilities, made to the comptroller of the currency, the report having been attested by the directors and having been published as directed by the statute, the following charge to the jury was proper: "It must appear by a preponderance of the evidence that, at the time of the attesting and publication of said report, the directors so attesting this report, or who assented to and directed the publication of the same, did so knowing the report to be false, or, under such circumstances as will warrant the jury in finding by a preponderance of the evidence that such directors, by the exercise of ordinary care and prudence, would have known that said report was false in some one or more of the particulars set forth in the petition." *Mason v. Moore*, 73 Ohio St. 275, 4 L. R. A. (N. S.) 597, 4 Ann. Cas. 240, 76 N. E. 932.

⁷⁶ *Tucker v. Osbourn*, 101 Md. 613, 61 Atl. 321; *Huntington v. Attrill*, 118 N. Y. 365, 23 N. E. 544; *Torbett v. Eaton*, 49 Hun (N. Y.) 209, 1 N. Y. Supp. 614, aff'd 113 N. Y. 623, 20 N.

E. 876; *Brand v. Godwin*, 15 Daly (N. Y.) 456, 9 N. Y. Supp. 743, 8 N. Y. Supp. 339; *Hatch v. Attrell*, 1 N. Y. St. Rep. 497, aff'd 118 N. Y. 383, 23 N. E. 549; *Githers v. Clarke*, 158 Pa. St. 616, 28 Atl. 232; *Collins v. Chipman*, 41 Tex. Civ. App. 563, 95 S. W. 666.

⁷⁹ *Waters v. Quimby*, 27 N. J. L. 198; *Butler v. Smalley*, 101 N. Y. 71, 4 N. E. 104; *Walton v. Godwin*, 58 Hun (N. Y.) 87, 11 N. Y. Supp. 391.

Under Ky. St. 1909, § 549, whereby directors are made individually liable for publishing a false statement of the condition of the corporation, if officers give out statements false in a material respect, persons who deal with the corporation are entitled to recover for damage suffered by reason of their reliance on the statement. *Allen v. Neale*, 134 Ky. 690, 131 S. W. 612.

⁸⁰ *Chittenden v. Thannhauser*, 47 Fed. 410. As to necessity of a fraudulent purpose, see also *Butler v. Smalley*, 101 N. Y. 71, 4 N. E. 104.

⁸¹ *Breitzke v. Bank of Grand Prairie*, 124 Ark. 495, 187 S. W. 660.

the company.⁸² But the newly-elected officers or directors are not responsible for the consequences of the defaults committed by their predecessors.⁸³

§ 2879. Debts to which liability extends—In general. It is usually provided by these statutes that directors who disregard the statutes shall be liable for all ordinary debts of the corporation which are contracted in the prosecution of the legitimate business of the

⁸² *Breitzke v. Bank of Grand Prairie*, 124 Ark. 495, 187 S. W. 660.

Under Mont. Civ. Code 1895, § 451, requiring corporations to make an annual report showing the capital paid in and the amount of debts and providing that directors shall be jointly and severally liable for all debts then existing or thereafter contracted until a report is made, etc., directors are liable for debts incurred after they assumed office, where they fail to rectify the omission of their predecessor to make a report prior to creating indebtedness. *Risdon Iron & Locomotive Works v. Von Storch*, 166 Fed. 936.

The fact that a director did not become such until after the expiration of the period when the report should have been filed, does not relieve him of liability for debts incurred thereafter during his administration (1 *Mills' Colo. Ann. St.*, § 491). *Cavanaugh v. Patterson*, 41 Colo. 158, 91 Pac. 1117.

Colo. Rev. St. 1868, c. 18, p. 121, § 15, was amended by *Sess. Laws 1876*, p. 49, § 1, limiting liability of trustees in default to debts contracted or incurred since publication of last annual report, and for all that should be contracted before such report should be made. *Gregory v. German Bank*, 3 Colo. 332, 25 Am. Rep. 760.

If the trustee did not occupy an official position at the time of the default, but became such afterwards, his liability is limited to debts created while he remains trustee and while

default continues (*General Manufacturing Law*, § 12). *Shaler & Hall Quarry Co. v. Bliss*, 27 N. Y. 297.

A director who accepts office after default by the corporation in making a report can refuse to act or he can resign and protect himself, but if he continues to hold office without objection he is liable for the debts contracted by the corporation. *Union Bank of Buffalo v. Keim*, 52 N. Y. App. Div. 135, 64 N. Y. Supp. 1070, aff'd 169 N. Y. 587, 62 N. E. 1101.

⁸³ *Providence Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 25 L. Ed. 786.

Under Mont. Civ. Code 1895, § 451, requiring corporations to make annual report showing the capital paid in and the amount of debts and providing that directors shall be jointly and severally liable for all debts then existing or thereafter contracted until the report is made, etc., no responsibility as to existing debts of company attaches to directors when they assume office, because of the failure of the preceding board to file a statement. *Risdon Iron & Locomotive Works v. Von Storch*, 166 Fed. 936.

Where the term of office of directors expires after an indebtedness has been created and after default in making annual report, it would be an unreasonable construction of statutes to make successors in office liable for indebtedness incurred in which they had no voice. *Austin v. Berlin*, 13 Colo. 198, 22 Pac. 433.

company,⁸⁴ rather than involuntary obligations imposed by law in consequence of the negligent or tortious acts of the corporation's agents or servants,⁸⁵ and the statutes will be liberally construed to embrace all debts within the language of the act.⁸⁶

An unliquidated claim for a breach of a contract of employment, if due, is a "debt," within the meaning of a statute making directors liable for corporate debts on failure to file a report.⁸⁷ A statute making the directors of a corporation liable for "all damages" resulting from their failure to make the reports required by statute, includes unliquidated as well as liquidated damages.⁸⁸

⁸⁴ *Adams v. Mills*, 60 N. Y. 533.

Laws of New York, 1875, c. 510, § 12 (amending L. 1848, c. 40, § 12, as amended by L. 1871, c. 657), by its own terms limits the liability on part of trustees for debts of corporation existing and arising ex contractu. *Chase v. Curtis*, 113 U. S. 452, 28 L. Ed. 1038.

Under Kirby's Dig., §§ 848, 859, as to annual reports, the words "all debts" are intended to include liabilities arising from breach of contract as well as those due by express agreement. *Proctor-Gamble Co. v. Warren Cotton Oil Co.*, 180 Fed. 543.

The natural construction of Mass. Pub. St., c. 106, § 60, includes existing debts and contracts. *Felker v. Standard Yarn Co.*, 148 Mass. 226, 19 N. E. 220.

A "debt" is an unconditional promise to pay a fixed sum at some specified time. *Bovee v. Boyle*, 25 Colo. App. 165, 136 Pac. 467. It is a liquidated demand or sum of money due by a certain and express agreement. *Wing v. Slater*, 19 R. I. 597, 33 L. R. A. 566, 35 Atl. 320. The word denotes any kind of just demand, and ordinarily imports sum of money arising upon contract express or implied, but in its most general sense means that which one person is bound to pay or perform for another. *Proctor-Gamble Co. v. Warren Cotton Oil Co.*, 180 Fed. 543. And it ordinarily may be taken to include all that is due

under any form of obligation as well as under any promise. *Savage v. Shaw*, 195 Mass. 571, 122 Am. St. Rep. 272, 12 Ann. Cas. 806, 81 N. E. 303. It is not, however, synonymous with "obligation." *Bovee v. Boyle*, 25 Colo. App. 165, 136 Pac. 467.

⁸⁵ *Savage v. Shaw*, 195 Mass. 571, 122 Am. St. Rep. 272, 12 Ann. Cas. 806, 81 N. E. 303. See § 2887, *infra*.

⁸⁶ N. Y. Stock Corp. Laws (Laws 1892, c. 688), § 30, should be liberally construed so as to embrace all debts within the language of the act, however strictly construed as to the acts of directors constituting a default or as to evidence of the debt. *Morgan v. Hedstrom*, 164 N. Y. 224, 58 N. E. 26.

Colo. Rev. St. 1868, p. 121, c. 18, § 15, as to annual reports, prescribes a penalty for neglect of duty imposed upon trustees of companies, the amount of forfeiture being measured by the aggregate debts contracted by the company. *Gregory v. German Bank*, 3 Colo. 332, 25 Am. Rep. 760.

⁸⁷ *Green v. Easton*, 74 Hun (N. Y.) 329, 26 N. Y. Supp. 553; *Cady v. Sanford*, 53 Vt. 632.

Under N. Y. Laws 1892, p. 1832, c. 688, § 30, the "debt" must be one existing in fact, and a director cannot be held liable for unliquidated damages arising out of breach of contract. *Hill v. Weidinger*, 110 N. Y. App. Div. 683, 97 N. Y. Supp. 473.

⁸⁸ *MacVeagh v. Wild*, 95 Fed. 84.

If an obligation is not merely contingent, but the consideration has been received by the corporation, and it has become liable, there is a debt or a debt contracted, within the meaning of such statutes; although it is not yet due.⁸⁹

§ 2880. — As dependent upon time of contracting. In determining to what debts or obligations the liability of corporate officers extends, regard must be had to the time when the debt is contracted, as the statutory provisions vary. Liability is imposed by some statutes, when there is a failure to file reports, for all debts of the corporation contracted while they were directors or officers, under others for all debts existing at the time of default, according to others for all debts contracted during the period of default and before it is cured, and by another class for debts contracted during the year preceding the time when the report should be made.⁹⁰ In general the

⁸⁹ *Lee v. Jacob*, 38 N. Y. App. Div. 531, 56 N. Y. Supp. 645; *Providence Steam & Gas Pipe Co. v. Connell*, 86 Hun (N. Y.) 319, 33 N. Y. Supp. 482; *Vernon v. Palmer*, 16 Jones & S. (N. Y.) 231, rev'g 62 How. Pr. (N. Y.) 425.

⁹⁰ **Arkansas.** Under Kirby's Dig., §§ 848, 859, the liability of defaulting officers for the failure to file an annual statement only extends to debts contracted during the period of such default. *Griffin v. Long*, 96 Ark. 268, 35 L. R. A. (N. S.) 855, Ann. Cas. 1912 B 622, 131 S. W. 672; *Beekman Lumber Co. v. Ahern*, 75 Ark. 107, 86 S. W. 842.

Colorado. Gen. St., § 252 (Mills' Ann. St., § 491), includes all debts of company contracted during last preceding year when such report should have been made and filed, and also which may be thereafter contracted until such report shall be made. *Thatcher v. Salomon*, 16 Colo. App. 150, 64 Pac. 368.

Connecticut. Rev. St. §§ 404, 413, pp. 172, 174, extends to the debts contracted by the company during the period of such neglect and refusal and to no others. *Providence Steam-*

Engine Co. v. Hubbard, 101 U. S. 188, 25 L. Ed. 786.

Massachusetts. By St. 1862, c. 210, debts contracted while condition exists are within the spirit and intent of the statute. *Thayer v. New England Lithographic Steam Printing Co.*, 108 Mass. 523. Under St. 1851, c. 133, § 11, and in view of Rev. St. c. 38, §§ 17, 18, officers will be liable for all debts of the corporation, contracted after the default and before such certificate shall be duly made and recorded. *Bond v. Clark*, 6 Allen 361.

Michigan. Under Pub. Acts 1907, No. 137, § 12, directors are liable for all debts of corporation contracted since filing of last report and are liable to corporation for any damage sustained by reason of neglect or refusal, in case of default in filing reports. *Continental & Commercial Nat. Bank v. Emery*, 178 Mich. 612, 146 N. W. 303. Acts 1903, No. 232, contemplated liability of director for debts contracted prior to default and not afterwards. *Continental & Commercial Nat. Bank v. Emery*, 178 Mich. 612, 146 N. W. 303. Under Pub. Acts 1907, No. 137, § 12, the statute fixes date (March 11th) when consequences

liability of directors is made to depend upon the default in making and filing the report, and there is no liability where the debt is not contracted during the period of default.⁹¹ Under such a statute making the directors liable for all debts contracted during the period of their neglect to file a report of the company's condition, they are not liable for debts contracted before their default, although they remain unpaid during the period of their default.⁹² They are liable for

of corporate default attach, and under that provision the consequences of failure to file reports are incurred by the corporation and directors at the same time and are certain. The fact that after default, and after directors have become liable for existing debts of a corporation, a person chooses to deal with a corporation and become its creditor, does not present reason for enlarging statutory liability. *Continental & Commercial Nat. Bank v. Emery*, 178 Mich. 612, 146 N. W. 303. Under Pub. Acts 1885, No. 232, § 12, directors are held liable for debts contracted after default in filing report. *Bank of Saginaw v. Pierson*, 112 Mich. 410, 70 N. W. 901; *M. I. Wilcox Cordage & Supply Co. v. Mosher*, 114 Mich. 64, 72 N. W. 117.

New York. When a new member comes into a board of directors, any default as to the filing of a report makes him jointly and severally liable for debts "then existing." *Morgan v. Hedstrom*, 164 N. Y. 224, 58 N. E. 26; *Gold v. Clyne*, 134 N. Y. 262, 17 L. R. A. 767, 31 N. E. 980, aff'g 58 Hun 419, 12 N. Y. Supp. 531; *Whitney Arms Co. v. Barlow*, 68 N. Y. 34; *Garrison v. Howe*, 17 N. Y. 458; *Carley v. Hodges*, 19 Hun 187; *Blake v. Wheeler*, 18 Hun 496; *Cameron v. Seaman*, 7 Hun 601, rev'd 69 N. Y. 396, 25 Am. Rep. 212. Where a director was elected treasurer and his default in filing report occurred about seven months afterwards, his liability for penalty then attached because debt was "then existing." *Morgan v. Hedstrom*, 164 N. Y. 224, 58 N. E.

26. Under Stock Corp. Law (L. 1892, c. 688) § 30, as to annual reports and imposing liability for debts of corporation on trustees, liability is not limited to debt which was to have been paid within a year, *Ginsburg v. Von Seggern*, 59 App. Div. 595, 69 N. Y. Supp. 758, aff'd 172 N. Y. 662, 65 N. E. 1116; but directors are liable for all debts contracted during the year in which default continues, *Matty v. Sampson*, 64 App. Div. 1, 71 N. Y. Supp. 731. As to whether a transaction was a deposit of money to be repaid on demand, so as to create a debt at the time the money was received, or a loan for a definite period, see *Chapman v. Comstock*, 58 Hun 325, 11 N. Y. Supp. 920.

Vermont. *Cady v. Sanford*, 53 Vt. 632.

⁹¹ *Westchester Appliance Co. v. Englehardt*, 180 Mich. 602, 147 N. W. 489. See also *Beekman Lumber Co. v. Ahern*, 75 Ark. 107, 86 S. W. 842.

Where debt for which a creditor seeks to charge the directors was contracted by the corporation and became due before there had been any neglect or omission on the part of the directors to make and deposit the prescribed certificate with the city clerk (Mass St. 1851, c. 133), none of the directors of corporations is liable. *Bond v. Clark*, 6 Allen (Mass.) 361.

⁹² Conn. Rev. St. §§ 404, 413, pp. 172, 174. *Providence Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 25 L. Ed. 786. See also *Cady v. Sanford*, 53 Vt. 632.

breaches of an executory contract, though the contract was made before their default, where the breaches occur during the period of their default, but not for breaches occurring after their default has been cured by filing the report as required by the statute.⁹³

Under a statute making directors liable for all debts existing or contracted during the period of their default in failing to file a report, they are not liable upon obligations or liabilities which, up to the time their default is cured, are wholly executory or contingent, although they may afterwards become debts.⁹⁴ Where the statute requires the annual report to be filed within sixty days after the first of January, and the directors are made liable for debts contracted during the year next preceding the time when the report should have been made and filed, and until such report shall be made, the year dates backward from the end of the sixty-day limit and not from the first of January.⁹⁵ In such case the liability of directors extends to all debts contracted during the preceding year and continues until the filing of a proper report.⁹⁶

The officers will not be held liable for debts contracted by the cor-

⁹³ *Cady v. Sanford*, 53 Vt. 632.

⁹⁴ *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156; *Gold v. Clyne*, 134 N. Y. 262, 17 L. R. A. 767, 31 N. E. 980, aff'g 58 Hun (N. Y.) 419, 12 N. Y. Supp. 531; *Whitney Arms Co. v. Barlow*, 68 N. Y. 34; *Garrison v. Howe*, 17 N. Y. 458; *Brand v. Godwin*, 15 Daly (N. Y.) 456, 9 N. Y. Supp. 743, 8 N. Y. Supp. 339; *Nimmons v. Hennion*, 2 Sweeny (N. Y.) 663.

The contingent liability of a land company on its covenant of warranty in a deed of land, claimed by it under a script entry, which is canceled after the conveyance, is not, prior to such cancellation, an existing debt, within a statute imposing liability for debts upon officers for failure to file a report. *Giddings v. Holter*, 19 Mont. 263, 48 Pac. 8.

⁹⁵ *Bovee v. Boyle*, 25 Colo. App. 165, 136 Pac. 467; *Bradford v. Gulley*, 10 Colo. App. 146, 50 Pac. 314.

⁹⁶ *Fraser & Chalmers v. Mines Leasing Co.*, 16 Colo. App. 444, 66 Pac.

167; *Thatcher v. Salomon*, 16 Colo. App. 150, 64 Pac. 368; *Bradford v. Gulley*, 10 Colo. App. 146, 50 Pac. 314; *Fairbanks, Morse & Co. v. Macleod*, 8 Colo. App. 190, 45 Pac. 282; *Colorado Fuel & Iron Co. v. Lenhart*, 6 Colo. App. 511, 41 Pac. 834.

Under the statute (Colo. Gen. St., §§ 248, 252), the liability of the directors is not dependent upon the time of maturity of the debt, and if the debt was contracted while they were in default, it cannot avail them as a defense that they terminated such default and all further personal liability for subsequent debts by filing the certificate of paid-up capital stock before the debt upon which action is based had matured. *Thatcher v. Salomon*, 16 Colo. App. 150, 64 Pac. 368.

Under the statute (Colo. Gen. St., §§ 248, 252) the liability of the directors is based upon a fact—whether report was made within time required, and if not, the directors become personally liable. *Thatcher v. Salomon*, 16 Colo. App. 150, 64 Pac. 368.

poration after they go out of office, although liable for the debts contracted during the period of their default.⁹⁷

Whether a debt was incurred during the period of delinquency of officers may be a question of fact to be resolved by findings of the court or chancellor.⁹⁸

Under a statute making the directors of a corporation, if they shall fail to file and publish a report of its condition within twenty days from the first of January of each year, liable for all debts of the corporation then existing and all debts contracted before the report is filed or published, it is essential to the liability of directors that their occupancy of that relation, the default in filing and publishing a report, and the debt of the corporation, shall exist at the same time; and therefore, where the charter of a corporation expires after the making of an executory contract for work to be performed and before performance thereof, the directors are not liable for the work because of failure to file a report for the last year of the corporation's existence, since there is no debt until the work is performed, and at that time there is no corporation.⁹⁹ Under the statutes as to false reports, the debts for which officers are liable are those contracted subsequent to the making of the report,¹ and it has been held that the New York statute providing that officers signing a false report shall be liable "for all the debts of a corporation while they are officers thereof" does not apply to debts in existence at the time of the signing and filing of the report.² But the Massachusetts statute declaring that directors, if they make a false certificate, "shall be jointly and severally liable for its debts and contracts," has been held to extend to debts existing when the certificate was made, as well as to those contracted afterwards.³

§ 2881. — **Bills and notes.** A debt exists at the time of the giving of a promissory note within the statutes as to reports, and if

⁹⁷ *Breitzke v. Bank of Grand Prairie*, 124 Ark. 495, 187 S. W. 660.

See § 2874, *supra*.

⁹⁸ A finding of the chancellor that debts were incurred during the period of delinquency of the officers, is not against preponderance of evidence, where such debts are in shape of overdrafts on a bank, which accrued during the period of the officer's default. *Breitzke v. Bank of Grand Prairie*, 124 Ark. 495, 187 S. W. 660.

⁹⁹ *Gold v. Clyne*, 134 N. Y. 262, 17

L. R. A. 767, 31 N. E. 980, *aff'g* 58 Hun (N. Y.) 419, 12 N. Y. Supp. 531.

¹ *Giddings v. Holter*, 19 Mont. 263, 48 Pac. 8.

² *Ferguson v. Gill*, 64 Hun (N. Y.) 284, 19 N. Y. Supp. 149; *Watson v. Godwin*, 62 Hun (N. Y.) 622, 17 N. Y. Supp. 51; *Torbett v. Godwin*, 62 Hun (N. Y.) 407, 17 N. Y. Supp. 46; *Woods v. Godwin*, 19 N. Y. Supp. 658.

³ *Felker v. Standard Yarn Co.*, 148 Mass. 226, 19 N. E. 220.

such a statute has been disregarded, the liability of the directors or officers is determined by the facts existing at that time. If a note is given to renew the former note, the existence of the debt is not determined as of the date of the renewal note.⁴ The obligation of a corporation, either as drawer of a bill of exchange or under an express agreement as to a bill of exchange drawn by a third person for its benefit, to indemnify an accommodation acceptor for his payment of the bill, is a debt contracted by the corporation at the time of the acceptance.⁵

§ 2882. — **Mortgage bonds.** Bonds issued by a corporation and secured by a mortgage on its real estate are debts within the meaning of a statute making the directors liable for all debts on failure to file a report.⁶

§ 2883. — **Rent.** Under the statutes as to annual reports, directors are liable for a debt of the corporation such as the rent of premises under a lease executed prior to the passage of the law as to reports.⁷

§ 2884. — **Taxes.** Under a statute rendering directors liable for the filing of a false certificate, a tax duly assessed against the corporation and presently payable is a debt, since the sum is certain, the obligation to pay is one which is imposed by law and an action of contract will lie to recover thereon.⁸

§ 2885. — **Under contracts for goods.** A debt for property purchased becomes such when the property is delivered,⁹ even though

⁴ So when a corporation indorses a note made by an officer for a debt which is in fact that of the corporation, the debt exists when the note is given, within a statute making the directors liable, in case of failure to make an annual report, for all debts then existing or that shall be contracted before the report is made. *Witherow v. Slayback*, 158 N. Y. 649, 70 Am. St. Rep. 507, 53 N. E. 681, rev'g 11 N. Y. Misc. 526, 32 N. Y. Supp. 746.

Under Pub. Acts 1885, No. 232, § 12, where no annual report was filed in 1895 until September 23rd, and the corporation became indebted on a promissory note dated July 23rd, and payable sixty days after date, officers were liable for such debt. *M. I. Wil-*

cox Cordage & Supply Co. v. Mosher, 114 Mich. 64, 72 N. W. 117.

See also *Hardman v. Sage*, 124 N. Y. 25, 26 N. E. 354, aff'g 47 Hun (N. Y.) 230; *Ferguson v. Gill*, 64 Hun (N. Y.) 284, 19 N. Y. Supp. 149; *Sullivan v. Sullivan Mfg. Co.*, 24 S. C. 341.

⁵ *Byers v. Franklin Coal Co.*, 106 Mass. 131.

⁶ *Morgan v. Hedstrom*, 164 N. Y. 224, 58 N. E. 26.

⁷ *Stieffel v. Tolhurst*, 67 N. Y. App. Div. 521, 73 N. Y. Supp. 1034.

⁸ *Felker v. Standard Yarn Co.*, 148 Mass. 226, 19 N. E. 220.

⁹ *Thatcher v. Salomon*, 16 Colo. App. 150, 64 Pac. 368.

In an action under R. I. Pub. St. c. 155, §§ 11, 12, requiring an annual

the purchase price is not payable until after a new board of directors assumes office.¹⁰ Accordingly such a debt cannot rightfully be said to have been incurred by a subsequent board so as to make them liable merely because it matured by performance and became payable after they came into office.¹¹ The same rule applies to extra freight on goods shipped and received during the predecessors' term in office, but not adjusted until after a new board assumes office.¹²

§ 2886. — Judgments. A judgment against a corporation for the recovery of a sum of money is a "debt," within a statute as to reports, and may be counted on in an action against a director without pleading the original indebtedness.¹³ Thus it has been held that a judgment for costs is a debt contracted by the corporation within the meaning of such statutes.¹⁴ But the fiction of the law which implies upon the part of the judgment debtor a promise to pay the judgment and which will support an action of contract against him and upon which the judgment may be called, justifiably, a debt or contract of record, cannot be carried so far as to change an involuntary into a voluntary assumption of liability.¹⁵ A judgment recovered after failure to file a report, on a debt contracted before, or a judgment recovered after a person became a director, is not within a statute making directors liable for debts contracted during the time of their

certificate of the capital stock, assets and debts, and rendering stockholders liable for existing debts in case of failure to file the certificate, where a corporation which was in default as to the certificate entered into a contract to purchase goods, but the goods were not delivered until after the corporation had corrected its default and filed the certificate, a debt was not created until delivery was made under the contract and did not exist at time contract was entered into. *Wing v. Slater*, 19 R. I. 597, 33 L. R. A. 566, 35 Atl. 302.

¹⁰ *Risdon Iron & Locomotive Works v. Von Storch*, 166 Fed. 936.

¹¹ *Risdon Iron & Locomotive Works v. Von Storch*, 166 Fed. 936. See also § 2880, *supra*.

¹² *Risdon Iron & Locomotive Works v. Von Storch*, 166 Fed. 936.

¹³ *Tabor v. Commercial Nat. Bank of Cleveland*, 62 Fed. 383; *Lewis v. Armstrong*, 8 Abb. N. Cas. (N. Y.) 385.

Judgment against the corporation is conclusive in a suit against the directors and stockholders of the existence and amount of the debt or demand as declared on. *Savage v. Shaw*, 195 Mass. 571, 122 Am. St. Rep. 272, 12 Ann. Cas. 806, 81 N. E. 303.

¹⁴ *Allen v. Clark*, 108 N. Y. 269, 15 N. E. 387, *rev'g* 43 Hun (N. Y.) 377; *Matty v. Sampson*, 64 N. Y. App. Div. 1, 71 N. Y. Supp. 731; *Allen v. Clark*, 66 Hun (N. Y.) 628, 21 N. Y. Supp. 338; *Andrews v. Murray*, 9 Abb. Pr. (N. Y.) 8.

¹⁵ *Savage v. Shaw*, 195 Mass. 571, 122 Am. St. Rep. 272, 12 Ann. Cas. 806, 81 N. E. 303. See § 2887, *infra*.

neglect to file a report, or for debts contracted while they are directors, as the case may be.¹⁶

§ 2887. — **Damages for torts and judgments therefor.** Bearing in mind the rule, heretofore discussed, that these statutes as to reports are penal and are not to be extended by construction,¹⁷ it has been held that statutes imposing liability for debts existing or contracted during the period of default will not be extended so as to impose liability for debts not arising *ex contractu*.¹⁸ Therefore obligations *ex delicto* are not included, even when reduced to judgments.¹⁹ A judgment does not become a debt by contract when it is entered, since a contract signifies the agreement of two or more minds, and mutual assent is necessary.²⁰ The fiction of the law as to the promise of judgment debtors to pay the debt will not be carried to this extent.²¹

§ 2888. — **Debts contracted in other states.** A statute making directors liable for corporate debts on failure to file an annual report extends to debts contracted and due in other states.²²

¹⁶ *McHarg v. Eastman*, 4 Robt. (N. Y.) 635, 7 Robt. 137.

¹⁷ See § 2855, *supra*.

¹⁸ *United States*. *Chase v. Curtis*, 113 U. S. 452, 28 L. Ed. 1038.

Colorado. *Bovee v. Boyle*, 25 Colo. App. 165, 136 Pac. 467.

Massachusetts. *Savage v. Shaw*, 195 Mass. 571, 122 Am. St. Rep. 272, 12 Ann. Cas. 806, 81 N. E. 303.

Missouri. *Cable v. Gaty*, 34 Mo. 573, 86 Am. Dec. 126.

New York. *Esmond v. Bullard*, 16 Hun 65, *aff'd* 79 N. Y. 404.

Rhode Island. *Leighton v. Campbell*, 17 R. I. 51, 9 L. R. A. 187, 20 Atl. 14.

Liability for unliquidated damages for infringement of a patent, copyright, or trade-mark is not a "debt contracted," within the meaning of a statute making directors personally liable for debts contracted. *Child v. Boston & F. Iron Works*, 137 Mass. 516, 50 Am. Rep. 328; *Roberts v. Reed*, 4 Wkly. Notes Cas. (Pa.) 417.

¹⁹ *Taylor v. Dexter*, — Ark. —, 189 S. W. 1060.

Under the statute (Rev. L. c. 112, § 19) as to the liability of the directors of a street railway company for debts and contracts until the capital stock is paid in or a certificate stating its amount is filed, a judgment in an action of tort for injuries received by a passenger is not a debt for which the directors are liable. *Savage v. Shaw*, 195 Mass. 571, 122 Am. St. Rep. 272, 12 Ann. Cas. 806, 81 N. E. 303.

Such words as "debts" or "debts and contracts" of corporations, in statutes imposing personal liability upon directors or stockholders, cannot be construed to include judgments for torts of corporation. *Savage v. Shaw*, 195 Mass. 571, 122 Am. St. Rep. 272, 12 Ann. Cas. 806, 81 N. E. 303.

²⁰ *Chase v. Curtis*, 113 U. S. 452, 28 L. Ed. 1038.

²¹ See § 2886, *supra*.

²² *Sears v. Waters*, 44 Hun (N. Y.) 101.

§ 2889. — **Extinguished debts.** It has been held that the liability of directors for an original corporate debt under a statute making them liable for corporate debts on failure to file a report, is not affected by the creditor's recovering a judgment thereon against the corporation or taking a note therefor.²³ But this view cannot be sustained where the original debt is thereby extinguished. In such a case they are liable on the new debt or not at all. They are only liable for debts actually due, and for which a right of action exists against the corporation, and whatever will defeat or abate an action against the corporation on a debt will be a defense to them.²⁴ Where a corporate creditor, secured by a chattel mortgage on machinery and tools with a power of sale in case of default, undertook to sell under the power, but sold at auction at a place on the premises where not all of the property could be seen, and sold it as a whole instead of in parcels, when no one was present except himself and the secretary of the company, and the creditor bid in the property for very much less than the debt, whereas it was worth more than the debt, it was held that the creditor had no claim against the corporation for the deficiency, and could not hold the directors liable therefor because of their failure to file an annual report.²⁵

§ 2890. — **Effect of fraud of creditors.** A statute making directors liable for corporate debts for failure to file a report of the company's condition does not render them liable for an indebtedness imposed upon the corporation by fraud or improper practices of the creditor.²⁶

§ 2891. **Penalties—In general.** Cumulative penalties are not favored, and successive defaults by the same directors do not renew as to them penalties already incurred.²⁷ Thus, if a statute as to reports imposes a definite penalty for its violation, and does not provide that each neglect or refusal shall render the directors liable for

²³ *Novelty Mfg. Co. v. Connell*, 88 Hun (N. Y.) 254, 34 N. Y. Supp. 717; *Jones v. Barlow*, 6 Jones & S. (N. Y.) 142; *Deming v. Puleston*, 3 Jones & S. (N. Y.) 309, aff'd 55 N. Y. 655; *McHarg v. Eastman*, 7 Robt. (N. Y.) 137.

²⁴ *Jones v. Barlow*, 62 N. Y. 202.

²⁵ *Sherman v. Slayback*, 58 Hun (N. Y.) 255, 12 N. Y. Supp. 291.

²⁶ *Adams v. Mills*, 60 N. Y. 533.

So, where the evidence shows fraud-

ulent concealment of alleged borrowing of plaintiff's money and that the transaction was not brought to the attention of the board of trustees or to the knowledge of defendant and the loan was usurious, as well as without authority, a debt does not exist which can be enforced against a trustee. *Adams v. Mills*, 60 N. Y. 533.

²⁷ *Morgan v. Hedstrom*, 164 N. Y. 224, 58 N. E. 26.

such penalty, no other or greater sum than the penalty named can be recovered, although the violations of the statute have been frequent.²⁸ The maxim *de minimis non curat lex* cannot be applied in an action to recover a penalty where the statute has been violated, even though the required reports would have shown very little of interest to the stockholders for whose benefit the report is required.²⁹

§ 2892. — Forfeiture of charter. Under the Illinois statute as to reports, failure to comply with the statute is *prima facie* evidence of nonuser of the corporate charter,³⁰ and the secretary of state is required to enter a cancellation of the charter. Such cancellation does not of itself work a forfeiture of the charter, however.³¹

²⁸ *Loveland v. Garner*, 71 Cal. 541, 12 Pac. 616.

The pendency of an action for a penalty under the statute (Cal. Act of April 23, 1880; St. 1880, p. 134), or a recovery therein, is not a bar to an action for a delinquency occurring after the former action was commenced. *Shanklin v. Gray*, 111 Cal. 88, 43 Pac. 399.

An action will lie under Cal. Act of March 30, 1874, to recover a penalty of one thousand dollars from the director of a mining company where an account is not posted as required. *Francais v. Soms*, 92 Cal. 503, 28 Pac. 592.

²⁹ *Francais v. Soms*, 92 Cal. 503, 28 Pac. 592.

³⁰ *People v. Rose*, 207 Ill. 352, 69 N. E. 762.

³¹ *Henssler v. A. G. Wiese Drug Co.*, 133 Ill. App. 539; *Spreyne v. Garfield Lodge No. 1, United Slavonian Benev. Society*, 117 Ill. App. 253.

Ill. Laws 1901, p. 124, J. & A. Ann. St. ¶¶ 2667-2675, as to annual reports, does not authorize the secretary of state to declare absolute forfeitures of the charters of defaulting corporations, but merely establishes a new rule of evidence and is a lawful exercise of legislative power. *People v. Rose*, 207 Ill. 352, 69 N. E. 762.

The effect of Ill. Laws 1901, p.

124, J. & A. Ann. St. ¶¶ 2667-2675, is simply to make a failure to report *prima facie* evidence of nonuser, and the cancellation which the secretary of state is required to enter upon the records of his office does not of itself work a forfeiture of the charter of the corporation. *People v. Rose*, 207 Ill. 352, 69 N. E. 762.

“The thing that works a forfeiture of the corporation is the fact of non-user, which can be finally determined only by a court of competent jurisdiction (*Bruffett v. Great Western R. Co.* of 1859, 25 Ill. 353; *Baker v. Backus’ Adm’r*, 32 Ill. 79; *Board of Education of Illinois v. Bakewell*, 122 Ill. 339, 10 N. E. 378); and the cancellation which the secretary of state is required to enter upon the records of his office would, in such proceeding, make a *prima facie* case for the people. If the corporation is, in fact, engaged in active business and fails to make the report, it is not, by reason of that failure, deprived of its charter, but may, in a suit brought against it, show the fact and thereby defeat the proceeding. * * * The effect of the act is simply to make a failure to report, as required, *prima facie* evidence, and the clause providing that the failure to report and pay the fee therefor ‘shall be *prima facie* evidence that said corporation is out of busi-

§ 2893. — **Suspension of corporate powers.** Under the Michigan statute as to reports, the corporation in case of default suffers a suspension of its powers until such report is filed, and is also denied the right of action on contracts entered into during the period of default.³²

§ 2894. **Waiver or release of liability.** Creditors who agree with directors that they need not file the annual report, cannot afterward hold them liable for the violation of the statute.³³ The right to enforce such liability is not waived, however, by recovering a judgment against the corporation,³⁴ and directors are not relieved from liability because a bond of the corporation, constituting one of its debts, contains a provision that no stockholder shall be individually liable upon or in respect to it.³⁵

Where a statute makes a director personally liable for failure to file an annual report, in an action based on the statute, it is not necessary that there be a specific finding that the plaintiff has not waived the personal liability of the director or that the liability has not been waived by any instrument creating the debt, the burden being on the defendant to prove the waiver if advantage is to be taken thereof.³⁶

§ 2895. **Termination of duties and liabilities—Termination of official relation.** An official's duty, under statutes relative to the making and filing of reports, terminates when his relation as an officer of the corporation is severed. Having no power to perform the duties imposed by the statute, he cannot be held liable for the debts

ness, and shall work a forfeiture of the charter of such corporation,' was merely intended to be a statement of the effect of a condition, namely, non-user, of which condition the failure is made *prima facie* evidence." *People v. Rose*, 207 Ill. 352, 69 N. E. 762.

The term "active business" as used in Ill. Laws 1901, p. 124, §§ 2, 7, J. & A. Ann. St. ¶¶ 2668, 2673, as to annual reports, means the exercise of corporate powers—the doing of those things which the corporation is authorized to do by its charter. *People v. Rose*, 207 Ill. 352, 69 N. E. 762.

³² *Continental & Commercial Nat.*

Bank v. Emery, 178 Mich. 612, 146 N. W. 303.

³³ *Caraher v. Mulligan*, 54 Hun (N. Y.) 638, 8 N. Y. Supp. 42.

A creditor cannot waive the default of directors in one year and avail himself of the default in the next year. *Colorado Fuel & Iron Co. v. Lenhart*, 6 Colo. App. 511, 41 Pac. 834.

³⁴ *Byers v. Franklin Coal Co.*, 106 Mass. 131. See also *McHarg v. Eastman*, 35 How. Pr. (N. Y.) 205.

³⁵ *Swancoat v. Remsen*, 78 Fed. 592.

³⁶ *Shepard v. Fulton*, 171 N. Y. 184, 63 N. E. 966.

subsequently incurred,³⁷ or for the defaults committed by his successor.³⁸ Accordingly, a director is not liable for defaults subsequently occurring if he resigns in good faith and ceases to act as a director, and this is true even if his resignation is not formally accepted.³⁹ Fraud in the making and acceptance of a resignation under such circumstances will not be presumed,⁴⁰ and it can make no difference that the creditors had no notice of the resignation.⁴¹ The facts as to his resignation may, in some cases, be proved by oral evidence.⁴² It is important, however, that the director cease to act after resigning,⁴³ and he may be held liable for misfeasance while in office although he resigns prior to an attempt to enforce his liability.⁴⁴ This rule obtains although the ceasing of the relationship may have occurred after the failure of the corporation to file the report.⁴⁵ Where an officer's term of office expires and he ceases to act, he is not liable for subsequent defaults,⁴⁶ but if he continues to act as an officer, his liability continues.⁴⁷ Thus, a trustee or director may hold over and

³⁷ *Breitzke v. Bank of Grand Prairie*, 124 Ark. 495, 187 S. W. 660; *Stafford v. St. John*, 164 Ind. 277, 73 N. E. 596; *Sinclair v. Fuller*, 158 N. Y. 607, 53 N. E. 510; *Shaler & Hall Quarry Co. v. Bliss*, 27 N. Y. 297; *Vincent v. Sands*, 42 How. Pr. (N. Y.) 231. See also §§ 1808 and 1813.

Under *Burns' Ind. Ann. St.* 1901, § 5073 (Rev. St. 1881, § 3865), officers who fail to make reports are rendered jointly and severally liable for all damages resulting from such failure "while they are stockholders in such company," and the word "while" is the equivalent of, and means, during the time they are stockholders. *Stafford v. St. John*, 164 Ind. 277, 73 N. E. 596.

³⁸ *Providence Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 25 L. Ed. 786.

³⁹ *Jackson v. Clifford*, 5 App. Cas. (D. C.) 312; *Van Amburgh v. Baker*, 81 N. Y. 46; *Bruce v. Platt*, 80 N. Y. 379; *Hoboken Beef Co. v. Hand*, 104 N. Y. App. Div. 390, 93 N. Y. Supp. 834; *Noble v. Euler*, 20 N. Y. App. Div. 548, 47 N. Y. Supp. 302; *Blake v. Wheeler*, 18 Hun (N. Y.) 496; *Chandler v. Hoag*, 2 Hun (N. Y.) 613, aff'd

63 N. Y. 624; *Squires v. Brown*, 22 How. Pr. (N. Y.) 35. See § 1813.

⁴⁰ *Jackson v. Clifford*, 5 App. Cas. (D. C.) 312.

⁴¹ See § 1811.

⁴² See Chap. 42, *supra*. See also § 1810.

⁴³ See § 1811. See also *Western Nat. Bank v. Faber*, 29 N. Y. Misc. 467, 62 N. Y. Supp. 82.

⁴⁴ See § 1813 and *Citizens' State Bank of Kenyon v. Story Specialty Mfg. Co.*, 84 Minn. 408, 87 N. W. 1016; *Boyd v. Mutual Fire Ass'n of Eau Claire*, 116 Wis. 155, 61 L. R. A. 918, 96 Am. St. Rep. 948, 94 N. W. 171, 90 N. W. 1086.

⁴⁵ *Demelman v. Brown*, 23 B. I. 596, 51 Atl. 217.

⁴⁶ *Van Amburgh v. Baker*, 81 N. Y. 46. See generally Chap. 42.

⁴⁷ *Jenet v. Nims*, 7 Colo. App. 88, 43 Pac. 147; *Reed v. Keese*, 5 Jones & S. (N. Y.) 269, aff'd 60 N. Y. 616; *Deming v. Puleston*, 3 Jones & S. (N. Y.) 309, aff'd 55 N. Y. 655. See generally Chap. 42.

Where officers neglect to make annual certificate as required by Mass. St. 1862, c. 210, and hold office for

continue to act until his successor is elected, in which case the duty to make reports continues.⁴⁸ A director's liability may also be terminated when he ceases to be a stockholder, as where a statute declares that in such event his office shall be deemed vacant. His relation to the corporation as an officer, having been severed, there is no liability for the debts subsequently incurred.⁴⁹

The officer continues liable for the debts incurred during the period of default,⁵⁰ and such liability, having been imposed by the statute

thirty days after annual meeting, they are liable for debts contracted within such thirty days after meeting. *Thayer v. New England Lithographic Steam Printing Co.*, 108 Mass. 523.

⁴⁸ *Van Amburgh v. Baker*, 81 N. Y. 46. As to holding over, see generally § 1808.

A director is liable in case of failure to file a report after his term of office expires but before his successor is elected, where a statute provides that every director shall continue to hold office until his successor has been elected. *Tysen v. Fritz*, 44 N. Y. App. Div. 562, 60 N. Y. Supp. 923.

Under a statutory provision that directors shall hold office for one year and until their successors are elected, a director may be held liable under the statute for a debt contracted more than one year after his election, where there was failure to file the annual report as the statute required and no successor to the director has ever been elected. *Seebeck v. King*, 34 N. Y. Misc. 483, 70 N. Y. Supp. 322.

⁴⁹ Under a statute (Laws N. Y. 1892, c. 688, §§ 20, 30, 48), providing that "if a director shall cease to be a shareholder, his office shall be vacant"; that a transfer of stock by a shareholder in contemplation of the insolvency of the corporation shall be void, and that a director violating a provision of the section shall be liable to creditors of the corporation for "any loss they may respectively sustain by such violation"; and declaring directors, in case an annual report

is not made, "liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made," it has been held that a director who makes an absolute transfer of his shares, although with the belief that the corporation is insolvent and will ultimately fail, but without reference to any particular liability to be thereafter incurred, ceases to be a director, and is not liable to a person who becomes a creditor of the corporation after a new certificate has been issued to the transferee. *Sinclair v. Fuller*, 158 N. Y. 607, 53 N. E. 510; *Sinclair v. Dwight*, 9 N. Y. App. Div. 297, 41 N. Y. Supp. 193. See § 1806.

⁵⁰ *Vincent v. Sands*, 42 How. Pr. (N. Y.) 231.

Liability, both civil and criminal, for dereliction in failing to make certificate is continuing so long as the statute is not complied with. *Breitzke v. Bank of Grand Prairie*, 124 Ark. 495, 187 S. W. 660.

Under Mich. Pub. Acts, 1903, No. 232, § 12, a corporation is relieved of default as soon as it complies with the law, but there is nothing to indicate that directors are relieved from liability by filing a report subsequently, as after their liability has become fixed it continues. *Reuter Hub & Spoke Co. v. Hicks*, 181 Mich. 250, 148 N. W. 339.

Under the statute as to annual reports (Conn. Rev. St. §§ 404, 413, pp. 172, 174), officers are responsible for their neglect or refusal to comply with the statute not only while they remain

as a penalty, is not affected by acts of the corporation, such as the giving of a note, which renews the debt.⁵¹

§ 2896. — Abandonment or dissolution of corporation; receivership; bankruptcy. The duty to file or publish reports as required by the statutes, is not terminated by the mere fact that the corporation is insolvent and makes an assignment for the benefit of creditors,⁵² by the mere belief of the officers that the corporation is insolvent,⁵³ because dissolution proceedings have been commenced,⁵⁴ or because the corporation has ceased to do business and is winding up its affairs.⁵⁵ Nor are directors relieved from liability by the fact that the active business of the corporation has ceased where the actual corporate existence still continues.⁵⁶ Neither are directors relieved of their duties as to reports, although the active business of the corporation has ceased, where the continued existence of the corporation is manifested by acts showing control of its property,⁵⁷ and liability

in office, but also even after they go out of office. *Providence Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 25 L. Ed. 786.

⁵¹ *First Nat. Bank of Missoula v. Cottonwood Land Co.*, 51 Mont. 544, 154 Pac. 582.

The acceptance of a note of the debtor is not payment, unless so agreed to by parties, of an indebtedness existing and for which note may be given. *Breitung v. Lindauer*, 37 Mich. 217.

⁵² *Gans v. Switzer*, 9 Mont. 408, 24 Pac. 18; *Horrocks Desk Co. v. Fangel*, 71 N. Y. App. Div. 313, 75 N. Y. Supp. 967.

⁵³ *Githers v. Clarke*, 158 Pa. St. 616, 28 Atl. 232.

⁵⁴ So where the proceeding to dissolve the corporation was opposed by two of four trustees and the evidence did not show abandonment of business, the trustees were not relieved of their duty to file reports. *First Nat. Bank of Jersey City v. Lamon*, 130 N. Y. 366, 29 N. E. 321, rev'g 55 Hun (N. Y.) 414, 8 N. Y. Supp. 444.

As to effect of appointment of receiver, see *infra*, this section.

⁵⁵ *Witherow v. Slayback*, 158 N. Y.

649, 70 Am. St. Rep. 507, 53 N. E. 681, rev'g 11 N. Y. Misc. 526, 32 N. Y. Supp. 746; *First Nat. Bank of Jersey City v. Lamon*, 130 N. Y. 366, 29 N. E. 321, rev'g 55 Hun (N. Y.) 414, 8 N. Y. Supp. 444; *Sanborn v. Lefferts*, 58 N. Y. 179; *Kirkland v. Kille*, 16 Wkly. Dig. (N. Y.) 227, rev'd 99 N. Y. 390.

⁵⁶ *Stevenson v. Cowan*, 84 N. Y. App. Div. 135, 82 N. Y. Supp. 78; *Matty v. Sampson*, 64 N. Y. App. Div. 1, 71 N. Y. Supp. 731.

Under Mont. Comp. St. div. 5, c. 25, § 460, as to annual reports, trustees are not relieved of duty to file or publish reports, although corporation has practically abandoned its business, operation having resulted in financial disaster. *Gans v. Switzer*, 9 Mont. 408, 24 Pac. 18.

⁵⁷ *Witherow v. Slayback*, 158 N. Y. 649, 70 Am. St. Rep. 507, 53 N. E. 681, rev'g 11 N. Y. Misc. 526, 32 N. Y. Supp. 746.

Where a water company which had discontinued its business maintained an action to establish its exclusive right to supply water to a village, the directors were not relieved from the duty of filing annual report. *Steven-*

cannot be avoided by the claim that the corporation has forfeited its franchise by the failure to comply with statutes imposing such a penalty.⁵⁸

It is otherwise, however, if the corporation has, for every practical purpose, been dissolved by the loss of all its property and the total abandonment of its business, or if it has gone into the hands of a receiver or assignee in bankruptcy or insolvency for the purpose of being wound up.⁵⁹ If the corporation has actually ceased to exist, there are no directors, trustees or other officers, and no report can be made legitimately, nor can any default arise for want of it.⁶⁰ The fact that a report is made after dissolution does not as a matter of law raise a presumption that proceedings have been taken to extend the life of the corporation.⁶¹

Directors are not relieved from liability by reason of the fact that the corporation has been dissolved, where the failure to file report and the incurring of the debt were prior to the dissolution.⁶² But if a mere contract exists which does not ripen into a debt until after the dissolution of the corporation, the directors are relieved of liability.⁶³

VI. ENFORCEMENT OF LIABILITY

§ 2897. In general. To establish the liability of directors, trustees or other officers under the statutes as to annual reports, three

son v. Cowan, 84 N. Y. App. Div. 135, 82 N. Y. Supp. 78.

⁵⁸ So in an action against directors under Mont. Rev. Code, § 3850, for failure to file annual reports, liability cannot be avoided on the ground that the corporation forfeited its franchise by its failure to comply with the statutes as to the adoption of by-laws, election of officers, etc. Daily v. Marshall, 47 Mont. 377, 133 Pac. 681.

⁵⁹ Benjamin v. Laffray, 79 N. J. L. 310, 75 Atl. 775; Gold v. Clyne, 134 N. Y. 262, 17 L. R. A. 767, 31 N. E. 980, aff'g 58 Hun (N. Y.) 419, 12 N. Y. Supp. 531; First Nat. Bank of Jersey City v. Lamon, 130 N. Y. 366, 29 N. E. 321, rev'g 55 Hun (N. Y.) 414, 8 N. Y. Supp. 444; Bruce v. Platt, 80 N. Y. 379; Bonnell v. Griswold, 80 N. Y. 128; Losee v. Bullard, 79 N. Y. 404; Huguenot Nat. Bank v. Studwell,

74 N. Y. 621; De Witt v. Hastings, 69 N. Y. 518; Costello v. Outtersson, 112 N. Y. App. Div. 680, 98 N. Y. Supp. 880; Horrocks Desk Co. v. Fangel, 71 N. Y. App. Div. 313, 75 N. Y. Supp. 967; Wade v. Baker, 14 Hun (N. Y.) 615, aff'd 81 N. Y. 622; Cochran v. Smith, 22 Jones & S. (N. Y.) 117; Wamsley v. Palmer, 5 N. Y. St. Rep. 307.

⁶⁰ Gold v. Clyne, 134 N. Y. 262, 17 L. R. A. 767, 31 N. E. 980, aff'g 58 Hun (N. Y.) 419, 12 N. Y. Supp. 531.

⁶¹ Gold v. Clyne, 134 N. Y. 262, 17 L. R. A. 767, 31 N. E. 980, aff'g 58 Hun (N. Y.) 419, 12 N. Y. Supp. 531.

⁶² Steiffel v. Tolhurst, 67 N. Y. App. Div. 521, 73 N. Y. Supp. 1034.

⁶³ Gold v. Clyne, 134 N. Y. 262, 17 L. R. A. 767, 31 N. E. 980, aff'g 58 Hun (N. Y.) 419, 12 N. Y. Supp. 531.

things must concur: First, it must appear that the defendant or defendants occupied the official position or positions whereby they were bound to make and file or publish a report. Secondly, it must appear that there was a default in the making and filing or publishing of such report, and under some statutes this dereliction of duty must be shown to have been intentional. Thirdly, it must appear that the debt involved existed or matured during the period of default.⁶⁴

It is also a general rule that creditors seeking to recover a penalty must bring themselves strictly within the law,⁶⁵ and an averment

⁶⁴ *Providence Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 25 L. Ed. 786.

Under Laws 1892, p. 1832, c. 688, § 30. *Hill v. Weidinger*, 110 N. Y. App. Div. 683, 97 N. Y. Supp. 473; *Trinity Church v. Vanderbilt*, 98 N. Y. 170; *Shaler & Hall Quarry Co. v. Bliss*, 27 N. Y. 297.

Proof of default of the defendant, without more, will not sustain an action, as it is also incumbent upon plaintiffs to prove that the debt was contracted during the period of neglect or refusal. *Providence Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 25 L. Ed. 786.

Where the declaration does not allege that the officers "neglected or refused to join in the making of such report," and a stipulation shows the making and mailing of such report, the officers are not brought within the statute. *Ford River Lumber Co. v. Perron*, 148 Mich. 399, 111 N. W. 1074, 13 Det. L. N. 201.

Under N. Y. General Manufacturing Act (2 Rev. St., 5th Ed., 660), § 35, requiring annual reports, it is essential to aver that the debt was existing at the time of default in making the report, or that it was contracted afterwards, and before such report was published. *Chambers v. Lewis*, 28 N. Y. 454.

The date when the debt of the corporation was contracted must be clearly made to appear, as well as facts showing that the officers were then in default relative to such filing.

Continental Nat. Bank of Memphis, Tennessee v. Buford, 107 Fed. 188.

⁶⁵ *Colorado. Fairbanks, Morse & Co. v. Masleod*, 8 Colo. App. 190, 45 Pac. 282; *Colorado Fuel & Iron Co. v. Lenhart*, 6 Colo. App. 511, 41 Pac. 834.

Indiana. In an action under the statute (*Burns' Ann. St.* 1901, § 5071; *Rev. St.* 1881, § 3865), the plaintiff must by the facts alleged in the complaint bring his cause of action clearly and fully within the provisions of the statute. *Stafford v. St. John*, 164 Ind. 277, 73 N. E. 596.

Montana. In an action for failure of directors to file the report required by *Rev. Code*, § 3850, plaintiff must allege and prove affirmatively every fact and circumstance upon which his right to recover depends, nothing being presumed in his favor. *Daily v. Marshall*, 47 Mont. 377, 133 Pac. 681.

New York. Parties seeking to make trustees of corporation liable under Act of 1848, § 12, as amended by Laws of 1875, c. 510, must allege and must prove affirmatively every fact and circumstance upon which the right to recover depends, and nothing will be presumed in their favor. *Whitney v. Cammann*, 137 N. Y. 342, 33 N. E. 305.

Rhode Island. One who seeks to enforce liability of corporate officers under statute, must allege and prove affirmatively every fact, default or contingency upon which the right to recover depends, so as to bring himself

statutes,⁷⁷ and judgments in scire facias suits against the corporation have been held sufficient to enable the creditors to sue the officers.⁷⁸

When the liability of the officers is direct and primary, a judgment recovered against the corporation is not conclusive evidence of the debt, and in fact is not even primary evidence of such debt.⁷⁹ Since the officers are not parties or privies to the judgment, they are not bound by it.⁸⁰ But under the other statutes requiring a judgment against the corporation, the officers are concluded by such judgment and cannot show the invalidity of the claims involved.⁸¹ The judgment in such case operates to merge the debt to the extent that an action cannot be maintained against the corporation, but does not merge and extinguish the debt so as to relieve the officers of their statutory liability.⁸²

§ 2899. Enforcement of liability in foreign state; foreign judgments. The liability of directors for the failure to make and publish annual reports has been held unenforceable in other states in a number of cases.⁸³ Such decisions are based on the theory that the liability is imposed by penal statutes, and the general rule of international law that "penal laws will not be allowed extra-territorial operation" has been applied.⁸⁴

The question has been passed upon by the Supreme Court of the United States with respect to the rights of a creditor who has recov-

⁷⁷ *Norfolk v. American Steam Gas Co.*, 103 Mass. 160.

⁷⁸ *Norfolk v. American Steam Gas Co.*, 103 Mass. 160.

⁷⁹ *Chase v. Curtis*, 113 U. S. 452, 28 L. Ed. 1038; *McMahon v. Macy*, 51 N. Y. 155; *Miller v. White*, 50 N. Y. 137; *Watson v. Godwin*, 62 Hun (N. Y.) 622, 17 N. Y. Supp. 51; *Torbett v. Godwin*, 62 Hun (N. Y.) 407, 17 N. Y. Supp. 46; *Kraft v. Coykendall*, 34 Hun (N. Y.) 285; *Esmond v. Bullard*, 16 Hun (N. Y.) 65, aff'd 79 N. Y. 404; *Brand v. Godwin*, 15 Daly (N. Y.) 456, 9 N. Y. Supp. 743, 8 N. Y. Supp. 339.

Compare, however, *Allen v. Clark*, 108 N. Y. 269, 15 N. E. 387, rev'g 43 Hun 377; *Tyng v. Clarke*, 9 Hun (N. Y.) 269; *Squires v. Brown*, 22 How. Pr. (N. Y.) 35; *Cady v. Sanford*, 53 Vt. 632.

⁸⁰ *Miller v. White*, 50 N. Y. 137.

⁸¹ *Thayer v. New England Lithographic Steam Printing Co.*, 108 Mass. 523.

⁸² *Byers v. Franklin Coal Co.*, 106 Mass. 131.

⁸³ *Halsey v. McLean*, 12 Allen Mass.) 439, 90 Am. Dec. 157; *Cary v. Schmeltz*, 141 Mo. App. 570, 125 S. W. 532; *Derrickson v. Smith*, 27 N. J. L. 166. See also *Attrill v. Huntington*, 70 Md. 191, 2 L. R. A. 779, 14 Am. St. Rep. 344, 16 Atl. 651, rev'd 146 U. S. 657, 36 L. Ed. 1123.

⁸⁴ *Halsey v. McLean*, 12 Allen (Mass.) 439, 90 Am. Dec. 157.

It is a general principle of international law that "the courts of no country execute the penal laws of another." Chief Justice Marshall, in *The Antelope*, 10 Wheat. (U. S.) 66, 123, 6 L. Ed. 268.

ered a judgment to enforce the same in another state. The court held that a judgment recovered by a creditor against a director under such a statute, in the state in which the corporation was created, is not based upon a penal statute in the sense of the rule of international law under which penal statutes are not enforced in other states, and that for the courts of other states to refuse to enforce the judgment on this ground is to deny to the judgment the full faith, credit, and effect to which it is entitled under the Constitution and laws of the United States.⁸⁵ This decision, of course, does not affect the power of state courts to refuse to enforce such statutes of other states, where the action is not based upon a judgment, the question of the enforcement of such a statutory obligation being a question of public policy and comity.⁸⁶

In somewhat analogous cases, similar obligations have been denied enforcement on the theory that the liability involved had no basis at common law or in contract, and was purely statutory.⁸⁷

§ 2900. Remedies. Under some of the statutes as to annual reports, the appropriate remedy to enforce the liability of the officers is in equity.⁸⁸ But usually the statutes impose a joint and several liability upon directors or other officers who violate their provisions,⁸⁹ which may be enforced by an action at law.⁹⁰ The same rule applies

⁸⁵ *Huntington v. Attrill*, 146 U. S. 657, 36 L. Ed. 1123.

⁸⁶ *Halsey v. McLean*, 12 Allen (Mass.) 439, 90 Am. Dec. 157.

⁸⁷ Thus in a case arising in New York, the court declined to enforce liability of directors of a foreign corporation for payment of dividends from capital stock on the ground that, while the liability was not penal, it was statutory, and had its basis neither in common law nor in contract. The court held, however, that it would entertain suit in behalf of the corporation for the recovery of funds unlawfully distributed as dividends. *Hutchinson v. Stadler*, 85 N. Y. App. Div. 424, 83 N. Y. Supp. 509.

⁸⁸ *Westinghouse Elec. & Mfg. Co. v. Reed*, 194 Mass. 590, 120 Am. St. Rep. 576, 80 N. E. 621; *Byers v. Franklin Coal Co.*, 106 Mass. 131.

⁸⁹ See § 2873, *supra*.

⁹⁰ *Colorado. Gregory v. German Bank*, 3 Colo. 332, 25 Am. Rep. 760.

Michigan. M. I. Wilcox Cordage & Supply Co. v. Mosher, 114 Mich. 64, 72 N. W. 117.

Minnesota. Patterson v. Stewart, 41 Minn. 84, 4 L. R. A. 745, 16 Am. St. Rep. 671, 42 N. W. 926.

Montana. Fitzgerald v. Weidenbeck, 76 Fed. 695.

New York. Sanborn v. Lefferts, 58 N. Y. 179; *Garrison v. Howe*, 17 N. Y. 458; *Hutchinson v. Young*, 93 App. Div. 407, 87 N. Y. Supp. 678; *Milsom Rendering & Fertilizer Co. v. Baker*, 16 App. Div. 581, 44 N. Y. Supp. 999; *Camp Mfg. Co. v. Reamer*, 14 App. Div. 408, 43 N. Y. Supp. 1027, *rev'd* 18 Misc. 619, 43 N. Y. Supp. 673; *Rose v. Chadwick*, 9 App. Div. 311, 41 N. Y. Supp. 190; *Empire State Sav. Bank of Buffalo v. Beard*, 81 Hun 184, 30 N. Y. Supp. 756; *Bauer v. Platt*, 72

to the statutes as to false reports which impose a joint and several liability.⁹¹

Where there is a failure to file the annual report, and an action is brought to recover from the directors a debt due by the corporation, there is not an action to recover a debt owed by such directors, but to impose upon them, as a penalty for their default, the payment of the debts of the corporation.⁹² Accordingly, the action should be classed as *ex delicto*, rather than *ex contractu*.⁹³ Under some of the statutes requiring annual reports, the disregard of the statute gives rise to a cause of action for damages as for deceit and the creditors must show that they have been deceived or misled.⁹⁴

In the case of false reports, the action has been held analogous to the old common-law action for deceit or fraud, the notable difference being that proof of *scienter* is not required.⁹⁵ Also, where a false report is made, it has been held that creditors relying upon the same and making a sale in consequence thereof can rescind the sale and maintain an action of *replevin* for the goods.⁹⁶

Hun 326, 25 N. Y. Supp. 426; Kugelman v. Hirschman, 23 Misc. 773, 53 N. Y. Supp. 1107, *aff'g* 22 Misc. 533, 49 N. Y. Supp. 1012.

⁹¹ *Huntington v. Attrill*, 118 N. Y. 365, 23 N. E. 544; *Pier v. Hanmore*, 86 N. Y. 95.

⁹² *Gadsen v. Woodward*, 103 N. Y. 242, 8 N. E. 653. See § 2855, *supra*.

⁹³ *Stokes v. Stickney*, 96 N. Y. 323.

⁹⁴ The action under *Burns' Ind. Ann. St.* 1901, §§ 5071, 5073, is for deceit. *Brown v. Clow*, 158 Ind. 403, 62 N. E. 1006; *American Credit-Indemnity Co. v. Ellis*, 156 Ind. 212, 59 N. E. 679. Under this statute the creditor must have been misled and deceived. *Stafford v. St. John*, 164 Ind. 277, 73 N. E. 596; *Brown v. Clow*, 158 Ind. 403, 62 N. E. 1006. The recovery thereunder is strictly limited to the amount of damages sustained. *Brown v. Clow*, 158 Ind. 403, 62 N. E. 1006.

Under original statute is was not necessary that any one should be deceived or misled. *American Credit-Indemnity Co. v. Ellis*, 156 Ind. 212, 59 N. E. 679. And under *Burns' Ind.*

Ann. St. 1894, §§ 5071, 5073, failure to publish report gives rise to cause of damage for which creditors may recover. *Clow v. Brown*, 150 Ind. 185, 49 N. E. 1057, 48 N. E. 1034.

An action for deceit will lie though the statement required of fire insurance companies (*Iowa Code*, § 1714) was not published but merely on file in a public office for public purpose. *Warfield v. Clark*, 118 Iowa 69, 91 N. W. 833. Under this statute, as far as buying insurance is concerned, any person has the right to rely and act upon reports required thereby as fully as if they were personal communications to him, and to treat them as frauds if he was deceived to his damage. *Warfield v. Clark*, 118 Iowa 69, 91 N. W. 833.

⁹⁵ *Hutchinson v. Young*, 93 N. Y. App. Div. 407, 87 N. Y. Supp. 678.

⁹⁶ Where a certificate filed under *Mass. Pub. St. c. 106*, § 54, is false and made with intent to deceive the public, creditors relying thereon and making sale in consequence thereof can rescind a sale and maintain an ac-

§ 2901. Election of remedies. Where the debt is represented by a note, the unpaid creditor has a choice of remedies: He can proceed to recover on the note, or he can proceed against the corporate officers for their official neglect. He can pursue these remedies simultaneously, but can have only one satisfaction of his demand.⁹⁷

§ 2902. Joinder of causes of action—In general. An action to enforce liability of an officer imposed by statute for making a false annual report by reason of which a party became a stockholder in the corporation may be joined with an action at common law against the officer on practically the same facts and for the same damage.⁹⁸

§ 2903. —Joinder of violations of statute. A number of alleged violations of the statute may be joined together in one count, and the plaintiff may prove any one of them, where they constitute separately or together but one cause of action.⁹⁹ A complaint alleging the liability of defendant as trustee for the failure to file a report and also charging liability of the defendant as a stockholder, because a certificate has not been made and recorded showing that the capital stock has been paid in, states two causes of action independent of each other, and the transactions are different, there being no legal affinity between them.¹

§ 2904. Survival of action. The rule as to the survival of actions is that applicable to actions on obligations in the nature of contract, and not to actions on obligations imposed as a penalty.² Accordingly, it has been held that where the liability imposed upon directors because of disregarding statutes as to reports is in the nature of an ordinary contract, the cause of action survives the death of the officer.³ If directors are jointly liable for the debts of the corporation and one of them dies before suit is brought, his exec-

tion of replevin for the goods. *Steel v. Webster*, 188 Mass. 478, 74 N. E. 686.

⁹⁷ *McDonald v. Mueller*, 123 Ark. 226, 183 S. W. 751.

⁹⁸ *Hutchinson v. Young*, 93 N. Y. App. Div. 407, 87 N. Y. Supp. 678.

⁹⁹ *Loveland v. Garner*, 71 Cal. 541, 12 Pac. 616.

¹ *Wiles v. Suydam*, 64 N. Y. 173.

² *Hughes v. Kelley*, 95 Ark. 327, 129 S. W. 784.

³ *Hughes v. Kelley*, 95 Ark. 327, 129 S. W. 784.

The right of action created by Mont. Rev. Codes, § 3850, as amended by Laws 1909, p. 217, § 1, as to annual reports, survives the death of the delinquent director, and may be prosecuted against his estate (§ 6494). *First Nat. Bank of Missoula v. Cottonwood Land Co.*, 51 Mont. 544, 154 Pac. 582.

utor cannot be sued jointly with the survivors, and if he dies after suit brought against all of them, it is optional with the plaintiff to bring in his administrator or to proceed against his survivors without doing so.⁴

But where the liability is considered as a penalty, the action dies with the creditor.⁵

The cause of action is not such a cause as would survive at common law, and it is not within a statute as to the survival of actions for wrongs to property rights or interests.⁶

§ 2905. Limitation of actions. In conformity with the view that view that these statutes as to reports are penal,⁷ and in proceedings under those statutes which provide for the recovery of definite penalties, it is held that the statutes of limitations governing actions for penalties, or to recover a penalty, apply.⁸ But where the statutes are construed as creating a contractual or quasi contractual liability,⁹ the statute of limitations governing actions *ex contractu* or actions to enforce a liability created by statute applies, instead of the provisions as to the recovery of penalties.¹⁰ Under some statutes, the period of limitations is six months,¹¹ and it has been held that

⁴ *Githers v. Clarke*, 158 Pa. St. 616, 28 Atl. 232.

⁵ *Brackett v. Griswold*, 103 N. Y. 425, 9 N. E. 438.

⁶ *Brackett v. Griswold*, 103 N. Y. 425, 9 N. E. 438; *Stokes v. Stickney*, 96 N. Y. 323.

⁷ See § 2855, *supra*.

⁸ *Credit Men's Adjustment Co. v. Vickery*, — Colo. —, 161 Pac. 297.

A suit for the recovery of a penalty under Colo. Gen. St. § 252, must be commenced within one year after the cause of action accrues (§ 2170). *Dart v. Hughes*, 49 Colo. 465, 109 Pac. 952; *Clough v. Rocky Mountain Oil Co.*, 25 Colo. 520, 55 Pac. 809; *Colorado Fuel & Iron Co. v. Lenhart*, 6 Colo. App. 511, 41 Pac. 834.

⁹ See § 2855, *supra*.

¹⁰ The Arkansas statute (Sand. & H. Dig. § 4822, Rev. St. c. 91, § 6) as to the limitation of actions founded upon any contract of liability, express or implied, not in writing, applies to

an action to enforce the liability of officers for failure to file reports (§ 1337 et seq.), since debt was the proper action for enforcing such statutory liability before forms of action were abolished. *Nebraska Nat. Bank v. Walsh*, 68 Ark. 433, 82 Am. St. Rep. 301, 59 S. W. 952. *Kirby's Dig.*, § 5068, requiring all actions on penal statutes to be brought within two years, cannot be invoked in bar of remedial portion of statute as to liability for failure to file reports (*Kirby's Dig.*, §§ 848 and 859 as amended by Acts 1909, No. 222, p. 643), but the three-year statute applies. *McDonald v. Mueller*, 123 Ark. 226, 183 S. W. 751.

¹¹ *State v. Missouri Exploration & Land Co.*, 97 Mo. App. 226, 70 S. W. 1107.

In an action under N. Y. Laws 1897, c. 384, p. 313, § 30, as to annual reports and imposing liability upon directors, Laws 1901, c. 354, p. 961, shortening

such a period of time is not unreasonable.¹² In other states the limitation period extends up to six years.¹³

A statute shortening the limitation period is not void as interfering with vested property rights, since the right to recover a penalty is not an existing right but is merely executory.¹⁴

A statute providing that the liability must be enforced within a certain time applies when it is sought to enforce such liability in another state.¹⁵ The statute of limitations must be said to be in motion when a complete cause of action exists in favor of any creditor,¹⁶ but the right of action against an officer does not accrue on the creation of a debt, but on its maturity.¹⁷ A cause of action does not accrue against

the limitation period to six months applies, the former limitation period being three years as provided by Laws 1899, c. 354, p. 767, § 34, since latter statute amends former act and supersedes it. *Davidson v. Witthaus*, 106 N. Y. App. Div. 182, 94 N. Y. Supp. 428.

¹² *Davidson v. Witthaus*, 106 N. Y. App. Div. 182, 94 N. Y. Supp. 428.

¹³ *Brown v. Clow*, 158 Ind. 403, 62 N. E. 1006; *American Credit-Indemnity Co. v. Ellis*, 156 Ind. 212, 59 N. E. 679.

An action to secure the rights of creditors and to recover debts from stockholders, because of failure to comply with Neb. Comp. St., c. 16, § 136, is not barred by statute of limitations in one year. *Coy v. Jones*, 30 Neb. 798, 10 L. R. A. 658, 47 N. W. 208.

¹⁴ *Davidson v. Witthaus*, 106 N. Y. App. Div. 182, 94 N. Y. Supp. 428.

¹⁵ *Davis v. Mills*, 194 U. S. 451, 48 L. Ed. 1067.

¹⁶ *McDonald v. Mueller*, 123 Ark. 226, 183 S. W. 751.

When the liability to a penalty under Colo. Gen. St., § 252, is incurred, a creditor's cause of action for its recovery accrues and statute is set in motion. *Colorado Fuel & Iron Co. v. Lenhart*, 6 Colo. App. 511, 41 Pac. 834.

¹⁷ *McDonald v. Mueller*, 123 Ark.

226, 183 S. W. 751; *Woolverton v. Taylor*, 132 Ill. 197, 22 Am. St. Rep. 521, 23 N. E. 1007, rev'g 30 Ill. App. 70.

Where a corporation leased premises and covenanted to pay water rents and taxes, and agreed that if they were not paid on first of February, the additional rent would be paid to lessor, the debt became due to lessor for water rents which were unpaid on first of February, and cause of action accrued on such date. *Trinity Church v. Vanderbilt*, 98 N. Y. 170.

Where the principal of bonds and the interest became due on certain dates and were unpaid, the cause of action for a penalty against directors then in office matured at same dates, and when action was commenced within three years thereafter, it was within Code Civ. Proc., § 394. *Morgan v. Hedstrom*, 164 N. Y. 224, 58 N. E. 26.

Under New York Manufacturing Act (L. 1848, c. 40), § 24, requiring actions to be commenced within one year, the year within which the action must be begun for recovery of a debt owing by manufacturing corporation, so as to lay a foundation for recovery against stockholder, where certificate of stock paid in is not filed, begins to run on the day when debt first becomes due. *Hardman v. Sage*, 124 N. Y. 25, 26 N. E. 354, aff'g 47 Hun (N. Y.) 230.

directors until after the time has expired within which they may file their report.¹⁸ Under some statutes, it has been held that the limitation act begins to run when there is a failure to file the report, both as to accrued and contingent liabilities, and the dates when the debts fall due or are contracted are immaterial.¹⁹

The cause of action accruing to creditors of a corporation against the directors or trustees who fail to file an annual report as required by statute, is not extended by the continuance of the default nor by subsequent defaults in filing reports,²⁰ nor is it extended by renewals or extensions of time of payment given to the corporation by the creditor without the director's consent, nor by part payments made by the corporation.²¹

¹⁸ *Clough v. Rocky Mountain Oil Co.*, 25 Colo. 520, 55 Pac. 809.

¹⁹ *Dart v. Hughes*, 49 Colo. 465, 109 Pac. 952; *Clough v. Rocky Mountain Oil Co.*, 25 Colo. 520, 55 Pac. 809; *Cannon v. Breckenridge Mercantile Co.*, 18 Colo. App. 38, 69 Pac. 269.

²⁰ *State Sav. Bank of Butte City v. Johnson*, 18 Mont. 440, 33 L. E. 'A. 552, 56 Am. St. Rep. 591, 45 Pac. 662; *Chapman v. Lynch*, 156 N. Y. 551, 51 N. E. 275; *Trinity Church v. Vanderbilt*, 98 N. Y. 170; *Losee v. Bullard*, 79 N. Y. 404, 54 How. Pr. 319.

²¹ *Patterson v. Thompson*, 86 Fed. 85; *Blake v. Clausen*, 10 N. Y. App. Div. 223, 41 N. Y. Supp. 772, *aff'd* 158 N. Y. 727, 53 N. E. 1123.

Under Sand. & H. Dig. Ark., § 1347, as to annual reports, the renewal of a note given for a corporate debt by the corporation does not toll a cause of action against the president and the limitation period runs from the maturity of the note. *Continental Nat. Bank of Memphis, Tennessee v. Buford*, 114 Fed. 290, 107 Fed. 188. In discussing this case the federal court said: "Under the statute the defendant did not sustain to the debtor bank the relation of a joint principal, surety, or guarantor. His liability was primary, and not secondary. It was created by statute, and was not contingent upon the failure or inability

of the bank to pay, but was absolute and unconditional. It resulted from his dereliction of official duty, and, if he had been compelled to pay the debt, he would have had no right of reclamation or indemnity from the bank. The statute imposed upon him the obligation of a principal debtor for his refusal and neglect to perform a duty enjoined upon him by law for the protection of the public. His legal liability for the debt was fixed and perfect the moment it was contracted, without regard to the solvency or insolvency of the bank, or to any proceedings against it to enforce payment. At the time when the first renewal notes were taken, the debt and the original notes given therefor had then become due and payable. The renewal of the notes operated as an extension of time for the payment of the debts by the bank, but did not release the defendant either from his statutory liability to pay the debts or from immediate action therefor. As soon as the original notes became due and payable, if not before, the defendant was liable. The defendant was unquestionably then liable to an action, and so was the bank. These two rights of action in the plaintiff were not dependent. They were concurrent and independent. The plaintiff could assert either or both. The as-

Where a statute as to annual reports, and imposing liability upon the officers, is repealed with a saving clause providing that the rights of creditors shall not be affected if an action is commenced within a certain time, such saving clause does not operate as a statute of limitations, but imposes a condition precedent to the action,²² and such a condition precedent may be waived.²³

§ 2906. Estoppel. The statement by an officer of the creditor that the officers would not be held personally liable on a note executed by them for a debt of their corporation does not estop the creditor to sue to hold the officers liable for such debt by reason of their failure to file the report required by the statute.²⁴ If a creditor was not induced by the directors to believe that a report was filed, the directors are not estopped from questioning such report.²⁵ A director or other officer who is also a creditor cannot hold the other directors or officers liable for his debt because of acts or omissions of which he is equally guilty and for which he would be liable, equally with them, to other creditors; for he cannot thus take advantage of his own neglect or misconduct,²⁶ and this estoppel extends also to his

assertion of one would not preclude the assertion of the other. Suspending the assertion of the one would not preclude the assertion of the other. Nothing but satisfaction of the plaintiff's debt by the pursuit of one would take away its right to follow the other. If, therefore, the right of action against the defendant on his statutory liability did not accrue on the creation of the debt, it unquestionably did on its maturity, and the statute, having once commenced to run, could not thereafter be suspended so far forth as concerned the defendant, by any action of the plaintiff and the bank which might have that effect as between them." *Continental Nat. Bank of Memphis, Tennessee v. Buford*, 114 Fed. 290.

²² *Watertown Nat. Bank of Watertown v. Bagley*, 62 N. Y. Misc. 380, 116 N. Y. Supp. 772.

²³ *Watertown Nat. Bank of Watertown v. Bagley*, 62 N. Y. Misc. 380, 116 N. Y. Supp. 772.

Where a condition precedent requiring suit against directors within six months was waived by a valid agreement, such agreement was not a mere temporary waiver, since the general rule is that if a condition precedent is waived, it is gone forever. *Watertown Nat. Bank of Watertown v. Bagley*, 62 N. Y. Misc. 380, 116 N. Y. Supp. 772.

²⁴ *Breitzke v. Bank of Grand Prairie*, 124 Ark. 495, 187 S. W. 660.

²⁵ *Colorado Fuel & Iron Co. v. Lenhart*, 6 Colo. App. 511, 41 Pac. 834.

²⁶ *Wingett v. Williams*, — Colo. —, 158 Pac. 139; *Knox v. Baldwin*, 80 N. Y. 610; *Easterly v. Barber*, 65 N. Y. 252; *Bronson v. Dimock*, 4 Hun (N. Y.) 614; *Wait v. Ferguson*, 14 Abb. Pr. (N. Y.) 379; *Briggs v. Easterly*, 62 Barb. (N. Y.) 51; *Roach v. Duckworth*, 61 How. Pr. (N. Y.) 128, aff'd 65 How. Pr. 303; *Estes v. Burns*, 5 Jones & S. (N. Y.) 1.

Contra, under the Massachusetts statute making officers liable for mak-

assignee,²⁷ unless the assignment of the debt was absolute and for value, and was made before the default.²⁸

A creditor is not precluded from enforcing his claim against an officer for the filing of a false report because he knew the report was false, where the statute does not require that he shall have relied on the report.²⁹ And a creditor is not precluded from holding the officers liable for failure to file a report by the fact that he had actual notice of all facts which would have been stated in the report if filed.³⁰

In some cases the directors will be estopped from denying the existence of the corporation,³¹ and if they have assumed to act as officers of a de jure corporation, and have contracted debts, they will be estopped from denying their official character.³²

§ 2907. Enjoining creditors' actions; subrogation and marshaling assets. Officers who are liable under the statute for the failure to file reports cannot enjoin creditors' actions against them, by petitioning the court to have the creditors' claims presented to the court where a receiver for the corporation has been appointed, and by praying that they be subrogated to the rights of the creditors. Such of-

ing any false certificate required by law. *George Woods Co. v. Storer*, 144 Mass. 399, 11 N. E. 662.

In an action by a secretary of a corporation to recover salary, where the plaintiff alleged that the annual report was not filed as required by Colo. Sess. Laws 1911, c. 102, and it appeared that the report was prepared in time to have been filed, but that the plaintiff retained the corporate seal without right, the plaintiff could not take advantage of his own wrong. *Wingett v. Williams*, — Colo. —, 158 Pac. 139.

²⁷ *Knox v. Baldwin*, 80 N. Y. 610; *Bronson v. Dimock*, 4 Hun (N. Y.) 614; *Briggs v. Easterly*, 62 Barb. (N. Y.) 51; *Roach v. Duckworth*, 61 How. Pr. (N. Y.) 128, aff'd 65 How. Pr. 303.

²⁸ *Cornell v. Roach*, 101 N. Y. 373, 5 N. E. 52; *Chemical Nat. Bank v. Colwell*, 14 Daly (N. Y.) 361, 132 N. Y. 250, 30 N. E. 644.

The fact that a director of a corporation who held its bonds was in de-

fault in filing a report does not affect the right of one to whom he has sold and assigned the bonds to sue the directors to enforce their personal liability. *Morgan v. Hedstrom*, 164 N. Y. 224, 58 N. E. 26.

²⁹ *Ferguson v. Gill*, 64 Hun (N. Y.) 284, 19 N. Y. Supp. 149.

³⁰ *Sullivan v. Sullivan Mfg. Co.*, 20 S. C. 79.

³¹ See § 349.

³² Persons having assumed to act as officers of de jure corporation, and having contracted debts, are estopped to deny official character. *Jenet v. Nims*, 7 Colo. App. 88, 43 Pac. 147. See also *Jenet v. Albers*, 7 Colo. App. 271, 43 Pac. 452, and § 1852, supra.

In an action under N. Y. General Manufacturing Act of 1848, c. 40, § 12, as to reports, if a person voluntarily assumes the character of a trustee, he cannot be permitted to deny either as to his co-trustees, or the cestuis que trust, that he held that character, or to disavow his acts done in that capacity. *Easterly v. Barber*, 65 N. Y. 252.

ficers have no right to postpone the enforcement of the statute against them, and no equities can arise in their favor as against the creditors. The equitable principle as to enjoining the prosecution of numerous actions arising out of the same transaction cannot be applied in such a case, where the officers have no defense whatever to the actions at law brought to enforce their liability.³³ The officers cannot assert their right to subrogation until the debts are paid in full, and while they may be entitled to subrogation ultimately, such right will not entitle them to interfere with or delay the rights of creditors, who may pursue every remedy open to them for the collection of their debts. By the same reasoning, the officers cannot ask a postponement of the creditors' rights in order that assets or securities may be marshalled.³⁴

§ 2908. Parties—Plaintiffs. In determining who may enforce the liability of directors or other officers under the statutes as to reports, resort must be had to the particular statute involved, the terms of which are usually definite in this regard. Usually the liability is created for the benefit of, and may be enforced by, the creditors of the corporation.³⁵ The term "creditors" is usually understood to mean creditors whose debts are within the terms of the statutes,³⁶ and one who sues the directors under such a statute must prove that there is a valid subsisting debt due from the corporation to him.³⁷ A creditor may maintain an action against the officers of a corporation under a statute rendering them personally liable for making a false certificate with reference to the corporate assets, irrespective of the fact

³³ *Jones v. Harris*, 90 Ark. 51, 117 S. W. 1077.

³⁴ *Jones v. Harris*, 90 Ark. 51, 117 S. W. 1077.

³⁵ *First Nat. Bank of Missoula v. Cottonwood Land Co.*, 51 Mont. 544, 154 Pac. 582.

³⁶ As to what debts are within the statutes, see § 2879, *supra*.

Under the Massachusetts statute making officers liable for corporate debts if the certificate made as required by law is false, or if they fail to file a report, etc., and providing that, to render an officer liable, judgment must be recovered against the corporation and an execution returned unsatisfied, after which any creditor

may file a bill in equity for himself and all other creditors against all the officers liable for the debts of the corporation,—in such a proceeding, the judgment creditor, as well as other creditors, may prove any claims due on simple contract. *Thacher v. King*, 156 Mass. 490, 31 N. E. 648.

³⁷ *National Park Bank of New York v. Remsen*, 43 Fed. 226; *Jones v. Barlow*, 62 N. Y. 202; *Adams v. Mills*, 60 N. Y. 533; *Miller v. White*, 50 N. Y. 137; *Hoboken Beef Co. v. Hand*, 104 N. Y. App. Div. 390, 93 N. Y. Supp. 834; *Sherman v. Slayback*, 58 Hun (N. Y.) 255, 12 N. Y. Supp. 291; *Hill v. Frazier*, 22 Pa. St. 320.

that he had not seen the certificate at the time of extending credit and was not injured thereby.³⁸

The fact that a creditor is also a stockholder, or even an officer, does not prevent him from enforcing the liability of the directors or other officers, if he is in no way responsible for or connected with the misconduct or neglect of which he complains,³⁹ also, the fact that a director seeking to hold the others liable was illegally elected is immaterial, if he acted as director.⁴⁰

In the case of the assignment of debts or judgments, the right to enforce such debt passes to the assignee,⁴¹ and it has even been held that an assignee of bonds could enforce the liability of directors, where he purchased the bonds from a director who was in default for the failure to file the annual report.⁴² The director's delinquency

³⁸ *Heard v. Pictorial Press*, 182 Mass. 530, 65 N. E. 901.

³⁹ *Weber v. Fickey*, 52 Md. 500; *Janney v. Minneapolis Industrial Exposition*, 79 Minn. 488, 50 L. E. A. 273, 82 N. W. 984; *Anderson v. Blat-tau*, 43 Mo. 42; *Sanborn v. Lefferts*, 58 N. Y. 179.

Under N. Y. Stock Corp. Law (L. 1892, c. 688), § 30, a co-director who is a creditor may sue another director. *Ginsburg v. Von Seggern*, 59 N. Y. App. Div. 595, 69 N. Y. Supp. 758, aff'd 172 N. Y. 662, 65 N. E. 1116.

⁴⁰ *Easterly v. Barber*, 65 N. Y. 252.

⁴¹ *Davis v. Mills*, 99 Fed. 39; *Fitzgerald v. Weidenbeck*, 76 Fed. 695; *Credit Men's Adjustment Co. v. Vickery*, — Colo. —, 161 Pac. 297; *Morgan v. Hedstrom*, 164 N. Y. 224, 58 N. E. 26; *Cornell v. Roach*, 101 N. Y. 373, 5 N. E. 52; *Bolen v. Crosby*, 49 N. Y. 183; *Allen v. Clark*, 66 Hun (N. Y.) 628, 21 N. Y. Supp. 338; *Pier v. George*, 14 Hun (N. Y.) 568, 86 N. Y. 613.

Under Colo. Laws, 1911, c. 102, whereby directors are made liable for all debts without restriction when they fail to file annual reports, if the claims are assigned to another person he becomes a creditor by virtue of ownership of the debts, and the remedial right to collect such debts passes

to the assignee. *Credit Men's Adjustment Co. v. Vickery*, — Colo. —, 161 Pac. 297.

When the debt against a corporation owned by a trustee is assigned absolutely for value, the assignee may proceed, on the subsequent default of the company to make a report, under N. Y. Laws, 1848, c. 40, § 12, although the assignor continues to be a trustee up to the time of the default. *Cornell v. Roach*, 101 N. Y. 373, 5 N. E. 52.

A cause of action under the New York statute (1848, c. 40, § 12) is given to creditors, and since the debt is assignable, the owner thereof takes as an incident thereof the right to the penalty, and is by statute entitled to maintain an action. *Stokes v. Stiekney*, 96 N. Y. 323.

Under a law rendering directors personally liable for failure to file an annual report, an assignment of a debt during the lifetime of the creditor passes right of action under the statute as an incident to the debt either to the assignee of the debt or to a receiver for the creditor in supplementary proceedings against such creditor. *Boynton v. Sprague*, 100 N. Y. App. Div. 443, 91 N. Y. Supp. 839, aff'd 183 N. Y. 505, 76 N. E. 1089.

⁴² *Morgan v. Hedstrom*, 164 N. Y. 224, 58 N. E. 26.

did not affect the salability of the bonds, and it could not affect the purchaser's rights as a creditor to enforce the statutory remedy.

In the case of a receivership, it has been held under statutes imposing a direct liability to creditors, that such creditors might proceed to enforce the liability regardless of the receivership,⁴³ but in other cases it has been held that the receiver as an assignee at law might sue to recover the penalty for the failure to file reports.⁴⁴

§ 2909. — Defendants. Under a statute providing that all directors are liable, they may all be sued in one action,⁴⁵ and it has been held under some statutes that it is necessary to join all the officers, and that the creditors cannot single out and sue only one, as is the rule in the case of trespassers.⁴⁶

The corporation is not a necessary party when it is sought to enforce the liability of the officers or directors,⁴⁷ and there is a misjoinder of parties defendant where a complaint proceeds against the corporation on a liability based on contract and also proceeds against the directors on a liability arising from tort in failing to comply with the statute as to filing reports.⁴⁸

When a married woman is the officer of a corporation and is liable to creditors for the failure to file a report, her husband need not be joined as a codefendant in an action to enforce such liability. This

⁴³ So held under Kirby's Ark. Dig. §§ 841, 848, 859, 862-864, as to the management of business by directors which provides that the president and the secretary of the corporation shall be liable jointly and severally for debts contracted, if there is neglect or refusal to make annual reports of the condition of affairs, etc. *Bailey v. O'Neal*, 92 Ark. 327, 135 Am. St. Rep. 185, 122 S. W. 503.

See also *Fletcher v. Eagle*, 74 Ark. 585, 109 Am. St. Rep. 100, 86 S. W. 810, where suit was brought by creditors in the name of the receiver without any objection being made on that account, though the case turned on other issues.

⁴⁴ *Boynton v. Sprague*, 100 N. Y. App. Div. 443, 91 N. Y. Supp. 839, aff'd 183 N. Y. 505, 76 N. E. 1089.

In an action by a receiver to en-

force the liability created, by N. Y. Stock Corp. Law (L. 1892, c. 688, as amended by L. 1897, c. 384), § 30, where a receiver's bond was filed with the clerk of the city court instead of with the clerk of the county as ordered, the court may correct such error under Code Civ. Proc. § 723, and defendants are not thereby injured. *Boynton v. Sprague*, 100 N. Y. App. Div. 443, 91 N. Y. Supp. 839, aff'd 183 N. Y. 505, 76 N. E. 1089.

⁴⁵ *M. I. Wilcox Cordage & Supply Co. v. Mosher*, 114 Mich. 64, 72 N. W. 117.

⁴⁶ *Nickerson v. Wheeler*, 118 Mass. 295.

⁴⁷ *Westinghouse Elec. & Mfg. Co. v. Reed*, 194 Mass. 590, 120 Am. St. Rep. 576, 80 N. E. 621.

⁴⁸ *Clough v. Rocky Mountain Oil Co.*, 25 Colo. 520, 55 Pac. 809.

rule results from the enactment of statutes providing that a married woman may be sued alone in respect to her separate property, business or individual earnings.⁴⁹

A defect of parties is waived where no objection is made, either by demurrer or answer.⁵⁰

§ 2910. Pleading—Nature of complaint. Under some of the statutes, a complaint seeking to enforce the liability of directors is based upon a liability arising from tort, the penalty being imposed for the failure to perform a statutory duty.⁵¹

§ 2911. — Allegations in general. Usually it is sufficient to aver the existence of the corporation without showing the steps taken to form it,⁵² and an allegation that officers of a corporation failed to make a report is the same as an allegation that the corporation failed to make such report.⁵³

An averment which alleges that the directors failed, refused and neglected to make reports, is sufficient, even though it goes further than the language of the statute.⁵⁴

Where the action under the statutes is founded on fraud and deceit, the creditor must allege in what manner he has been misled.⁵⁵

§ 2912. — Conclusions. An averment that if a report had been made and published, it would have shown that the corporation was largely indebted and practically insolvent, states a mere conclusion.⁵⁶ The same is true of an averment that the corporation became largely indebted to divers and sundry persons and was practically insolvent,⁵⁷ also of an averment that the failure to make and publish a report caused damage to a creditor, under a statute requiring the creditor to show that he was misled.⁵⁸

⁴⁹ *Arkansas Stables v. Samstag*, 78 Ark. 517, 94 S. W. 699.

⁵⁰ *State v. Missouri Exploration & Land Co.*, 97 Mo. App. 226, 70 S. W. 1107.

⁵¹ *Clough v. Rocky Mountain Oil Co.*, 25 Colo. 520, 55 Pac. 809.

As to the nature of the liability under these statutes, see § 2855, *supra*.

⁵² *Traber v. Bright*, 32 Ind. 69.

⁵³ *Bradford v. Gulley*, 10 Colo. App. 146, 50 Pac. 314.

⁵⁴ *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076.

⁵⁵ So of an action under Burns'

Ann. St. 1901, § 5091; Rev. St. 1881, § 3865. *Stafford v. St. John*, 164 Ind. 277, 73 N. E. 596.

Actions under Burns' Ann. St. 1901, §§ 5071, 5072, 5073, are founded upon fraud and deceit which the creditor must allege and prove. *Brown v. Clow*, 158 Ind. 403, 62 N. E. 1006.

⁵⁶ *Stafford v. St. John*, 164 Ind. 277, 73 N. E. 596.

⁵⁷ *Stafford v. St. John*, 164 Ind. 277, 73 N. E. 596.

⁵⁸ *Stafford v. St. John*, 164 Ind. 277, 73 N. E. 596.

§ 2913. — **Sufficiency of complaint.** Whatever is necessarily implied or reasonably to be inferred from an allegation is to be taken as directly averred,⁵⁹ and an allegation that a company was organized and operated for profit necessarily implies that it is of a class which must have capital stock in order to have legal existence.⁶⁰ Where the statute provides for reports by all corporations other than moneyed or railroad corporations, a complaint alleging that the company is a business corporation is sufficient.⁶¹ A complaint which is defective in failing to show the place where the corporation does business may be held sufficient, where the answer admits the violation of the statute and such admission is aided by proof showing where the corporation did business, there being no demurrer. In such a case the statement of the cause of action may be held sufficient, at least to prevent a nonsuit.⁶²

§ 2914. — **Amended complaints.** A new cause of action is not set up by an amended complaint which states more fully the same cause of action as stated in the original complaint.⁶³

§ 2915. — **Complaints as to false reports.** Complaints for the making of false certificates must show that the defendant was an officer of the corporation,⁶⁴ and usually the complaint must show not only that the certificate or report involved was false in some material misrepresentation, but also that the officer knew that it was false.⁶⁵

A complaint seeking recovery for the neglect to file or publish reports is insufficient when it proceeds on the theory that the report that was made was false and therefore constituted no report, especially where another statute provides a penalty for the making of false reports.⁶⁶ Allegations in a complaint that a specified published report was false within the knowledge of the directors, and that it was intended to deceive and did deceive plaintiff so that credit was extended by plaintiff to the corporation to the damage of plaintiff, are sufficient, at least to require an answer, there having been neither a

⁵⁹ *Daily v. Marshall*, 47 Mont. 377, 133 Pac. 681. leod, 8 Colo. App. 190, 45 Pac. 282.

⁶⁰ *Daily v. Marshall*, 47 Mont. 377, 133 Pac. 681. ⁶³ *Clough v. Rocky Mountain Oil Co.*, 25 Colo. 520, 55 Pac. 809.

⁶¹ *Union Bank of Buffalo v. Keim*, 52 N. Y. App. Div. 135, 64 N. Y. Supp. 1070, aff'd 169 N. Y. 587, 62 N. E. 1101. ⁶⁴ *Thompson-Houston Elec. Co. v. Murray*, 60 N. J. L. 20, 37 Atl. 443.

⁶⁵ *Matthews v. Patterson*, 16 Colo. 215, 26 Pac. 812.

⁶⁶ *Matthews v. Patterson*, 16 Colo. 215, 26 Pac. 812. ⁶² *Fairbanks, Morse & Co. v. Mac-*

demurrer to the complaint nor a motion to make its averments more certain.⁶⁷

§ 2916. — **Indictments for making false reports.** When a defendant is indicted for making or publishing a false report and he cannot identify the particular report involved, the matter should be reached by a demand for a bill of particulars.⁶⁸

§ 2917. — **Answer; defenses.** Directors who rely upon the existence of facts excusing compliance with the statute should set forth and prove such facts,⁶⁹ and the effect of a denial of the violation of the statute is not waived by the setting up of affirmative matter in another defense.⁷⁰ Usually the defendant may plead any or all defenses which are available,⁷¹ and he may use as an offset any claim which the corporation might have used as a defense to the suit.⁷²

Admissions in an answer in support of the plaintiff's allegations necessarily tend to expose the director to the penalty,⁷³ but when an original answer has been superseded by an amended pleading, the admission in evidence of portions of such original answer containing admissions is error.⁷⁴

§ 2918. **Variance.** Where the complaint alleges breach of contract of the corporation, it is error to allow recovery upon the theory and proof of rescission of a contract.⁷⁵

⁶⁷ *United States v. Lake*, 129 Fed. 499; *American Credit-Indemnity Co. v. Ellis*, 156 Ind. 212, 59 N. E. 679.

⁶⁸ *State v. O'Neil*, 24 Idaho 582, 135 Pac. 60.

⁶⁹ *Schenck v. Bandmann*, 81 Cal. 231, 22 Pac. 654.

Where debt involved was part of trust fund, and plaintiff was trustee of such fund, an interlocutory judgment against such plaintiff granting an accounting, in the results of which the director was to share proportionately, would not affect such director's liability and could not be set up as a defense. *Ginsburg v. Von Seggern*, 59 N. Y. App. Div. 595, 69 N. Y. Supp. 758, aff'd 172 N. Y. 662, 65 N. E. 1116.

In an action against a director to enforce personal liability for debts because of the failure to file reports, the defense showing that plaintiff did not

pay the debts declared on except as agent for a third person, is sufficient in law. *Staten Island Midland R. Co. v. Hinchliffe*, 170 N. Y. 473, 63 N. E. 545.

⁷⁰ *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076.

⁷¹ Defendant may plead any or all defenses and they may be inconsistent (Code Civ. Proc. § 441), wherefore defendant may plead denial of violation of the statute as to filing reports, and by another defense aver matters of extenuation. *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076.

⁷² *Stieffel v. Tolhurst*, 67 N. Y. App. Div. 521, 73 N. Y. Supp. 1034.

⁷³ *Gadsen v. Woodward*, 103 N. Y. 242, 8 N. E. 653.

⁷⁴ *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076.

⁷⁵ *Hill v. Weidinger*, 110 N. Y. App. Div. 683, 97 N. Y. Supp. 473.

§ 2919. Presumptions. Under some statutes a presumption arises that the failure to file reports is wilful,⁷⁶ but such a presumption is overcome where the director testifies that there was no purpose in keeping back the report, that he was not aware that the report was required to be filed and that during the period of default he had not in mind that he was a director, even though such testimony is disputed.⁷⁷ A *prima facie* case of violation of the statute is raised where it appears that no report was filed and the secretary testifies that he did not verify such a report.⁷⁸ Evidence of a public official, who has examined the indexes of his office, to the effect that a report has not been filed, has been held sufficient, *prima facie*, to put the defendants to the proof that the papers were filed.⁷⁹

§ 2920. Burden of proof. The burden of proof to establish the liability of the defendants under the statutes as to reports or as to false reports, rests on the plaintiff.⁸⁰ Thus, the burden to establish the existence of a valid debt of the corporation, and that it was contracted during the time when a default existed as to making reports, rests on the plaintiff.⁸¹ The burden of showing waiver of the liability imposed by the statutes is on the defendant.⁸²

§ 2921. Admissibility of evidence. Parol evidence is admissible to show the history of an indebtedness resulting in the giving of notes,⁸³ and a debt may be proved by any of the methods by which a debt may be proved against either a corporation or an individual.⁸⁴

The fact that a defendant was the director of a company may be proved by parol evidence,⁸⁵ and documents tending to show that a corporation engaged in business as such and that the defendants acted as directors are also admissible.⁸⁶

Statements in a pleading are evidence for the purposes of trial,⁸⁷

⁷⁶ *M. I. Wilcox Cordage & Supply Co. v. Mosher*, 114 Mich. 64, 72 N. W. 117; *Gennert v. Ives*, 102 Mich. 547, 61 N. W. 9.

⁷⁷ *Gennert v. Ives*, 102 Mich. 547, 61 N. W. 9.

⁷⁸ *Deloria v. Van Winkle*, 162 Mich. 660, 127 N. W. 782.

⁷⁹ *Jenet v. Nims*, 7 Colo. App. 88, 43 Pac. 147.

⁸⁰ *Jackson v. Clifford*, 5 App. Cas. (D. C.) 312.

⁸¹ *Thatcher v. Salomon*, 16 Colo. App. 150, 64 Pac. 368.

⁸² *Shepard v. Fulton*, 171 N. Y. 184, 63 N. E. 966.

⁸³ *Witherow v. Slayback*, 158 N. Y. 649, 70 Am. St. Rep. 507, 53 N. E. 681, rev'g 11 N. Y. Misc. 526, 32 N. Y. Supp. 746.

⁸⁴ *Thatcher v. Salomon*, 16 Colo. App. 150, 64 Pac. 368.

⁸⁵ *Deloria v. Van Winkle*, 162 Mich. 660, 127 N. W. 782.

⁸⁶ *Daily v. Marshall*, 47 Mont. 377, 133 Pac. 681.

⁸⁷ *Union Bank of Buffalo v. Keim*, 52 N. Y. App. Div. 135, 64 N. Y. Supp.

and an answer showing that a director attended meetings as such is sufficient prima facie to show that he served as director after his election, although such answer also states that the director was induced to attend the meetings by false representations and that he refused further to act as a director.⁸⁸

To permit a witness to testify as to whether or not he would have loaned money to a corporation if he had known of its financial condition is improper, since this is in effect to permit testimony of an undisclosed intent of the witness or the secret operations of his mind.⁸⁹

Papers appearing to be reports which were made are not admissible when they are not shown to be the reports required by the statute and which were made and posted.⁹⁰

Evidence to show that the proceeding was instituted for revenge is properly excluded where there is no offer to impeach witnesses.⁹¹

As has already been noted, the judgment recovered against the corporation is not competent evidence to show the debt in an action against directors.⁹²

Under a general allegation of the liability of trustees for the making of a false report, proof of indebtedness incurred subsequent to the making of such report is admissible.⁹³ In an action for deceit for the giving of false reports by an insurance company, where the statement was required to show the financial condition of the company before a certain date, testimony as to transactions after such date was immaterial.⁹⁴ To show the crime of making and issuing false reports, evidence of other false reports is proper on the issue of knowledge,⁹⁵ and where the defendants are officers of a corporation engaged in banking, books of another bank are admissible to show the concealment of indebtedness.⁹⁶

1070, aff'd 169 N. Y. 587, 62 N. E. 1101.

⁸⁸ Union Bank of Buffalo v. Keim, 52 N. Y. App. Div. 135, 64 N. Y. Supp. 1070, aff'd 169 N. Y. 587, 62 N. E. 1101.

⁸⁹ Stafford v. St. John, 164 Ind. 277, 73 N. E. 596.

⁹⁰ Miles v. Woodward, 115 Cal. 308, 46 Pac. 1076.

⁹¹ Ball v. Tolman, 119 Cal. 358, 51 Pac. 546.

⁹² Chase v. Curtis, 113 U. S. 452, 28 L. Ed. 1038.

See § 2898, supra.

⁹³ Bagley & Sewall Co. v. Lennig,

61 N. Y. App. Div. 26, 70 N. Y. Supp. 242.

⁹⁴ Warfield v. Clark, 118 Iowa 69, 91 N. W. 833.

⁹⁵ State v. O'Neil, 24 Idaho 582, 135 Pac. 60.

Evidence of other false statements and reports is admissible to prove crime under Idaho Rev. Codes, § 7128, since such reports were made to conceal money withdrawn, and also to illustrate the character of act. State v. O'Neil, 24 Idaho 582, 135 Pac. 60.

⁹⁶ State v. O'Neil, 24 Idaho 582, 135 Pac. 60.

Where a corporation sues to recover a debt due it, the defendant cannot show the failure to file reports and that as a consequence the corporation forfeited its charter, since such a question must be raised by the state.⁹⁷

§ 2922. Questions of law and fact. The question whether a person was an officer of the corporation at the time of default and at the time of maturity of the debt has been held a question of fact, when an action is brought to enforce the liability of such person under the statutes as to reports.⁹⁸ And the question whether there was a failure to file the report may be one of fact.⁹⁹

§ 2923. Contribution. When the liability imposed upon the directors or other officers of a corporation is penal in its nature,¹ an officer who has been sued and compelled to pay a debt cannot sue the other officers for contribution.² But it is otherwise if the liability is not penal, but quasi contractual in its nature.³

⁹⁷ Spreyne v. Garfield Lodge No. 1 United Slavonian Benev. Society, 117 Ill. App. 253.

⁹⁸ First Nat. Bank v. Lamon, 130 N. Y. 366, 29 N. E. 321, rev'g 55 Hun (N. Y.) 414, 8 N. Y. Supp. 444.

Where one who had recovered a judgment against a corporation for personal injuries sought to fix personal liability on one as president of the corporation because of the failure to file reports as required by Kirby's Ark. Dig. § 848, the question whether such person was president of the corporation when the injury occurred and judgment was obtained was for the

jury. Taylor v. Dexter, — Ark. —, 189 S. W. 1060.

⁹⁹ Taylor v. Dexter, — Ark. —, 189 S. W. 1060.

¹ See § 2855, supra.

² Gregory v. German Bank, 3 Colo. 332, 25 Am. Rep. 760; Andrews v. Murray, 33 Barb. (N. Y.) 354; Hill v. Frazier, 22 Pa. St. 320.

³ Woolverton v. Taylor, 132 Ill. 197, 22 Am. St. Rep. 521, 23 N. E. 1007, rev'g 30 Ill. App. 70; Nickerson v. Wheeler, 118 Mass. 295; National Bank of Auburn v. Dillingham, 147 N. Y. 603, 49 Am. St. Rep. 692, 42 N. E. 338.

CHAPTER 47

ACTIONS BY AND AGAINST CORPORATIONS

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- § 3082. Set-off and counterclaim.
- § 3083. Signature, seal and verifications or affidavits.
- § 3084. Issues and variance, and admissions—In general.
- § 3085. — Misnomer or misdescription.
- § 3086. — As to existence or charter.

VI. EVIDENCE AND WITNESSES [See Vol. 5]

VII. TRIAL AND ITS INCIDENTS [See Vol. 5]

VIII. JUDGMENT AND ENFORCEMENT: APPEAL AND REVIEW [See Vol. 5]

IX. ARBITRATION [See Vol. 5]

I. POWER AND CAPACITY FOR LITIGATION ; RIGHTS OF ACTION AND DEFENSE

§ 2924. Scope of chapter. In the opening chapter of this work the results of the distinction between the corporation and its members have been discussed. Every aspect of an action to which a corporation is a party is affected by this distinction. The right of action or defense, the form and entitlement of the pleadings and their substantial allegations, the admissibility and sufficiency of the evidence,

the control of the case, and the resultant judgment, all partake of it inherently, and it must never be lost sight of.¹ This chapter therefore is confined to questions of procedural law which are general to actions and suits "by" or "against" a corporation. In the many actions which may be brought and maintained between members or stockholders based on their individual rights as such, or by or against corporate officers as such, or between strangers involving some corporation question, procedural rulings are made which often seem to be expressive of a general rule applicable equally when the corporation is a party to a suit. But they cannot be used with safety or accuracy as precedents in this chapter, being at most but analogies affected in greater or less degree by the nonincorporate character of the parties, and therefore the chapters in the footnote are referred to as containing matter designedly excluded from this chapter.² Similar considerations warrant the exclusion to other chapters of many procedural questions which arise in actions wherein the corporation is one of the parties and a stockholder or officer is the other. Such, for example are actions on the contract of subscription, or for dividends, or for malfeasance or misfeasance of officers, or stockholders' suits brought on behalf of a corporation unable or unwilling to sue.³ Actions by or against foreign corporations are distinctive, and where the foreign character of the corporation is the chief element in the questions considered all matters of such procedure are considered fully elsewhere.⁴ Especially during recent years there have been created many quasi-judicial boards and commissions clothed with regulative powers and functions which are exercised after an inquiry or proceeding much resembling actions and suits. Such, for example, are the public utility commissions now existing in nearly all the states. The proceedings before them are not, however, susceptible of treatment in this chapter, and the reader is referred elsewhere to the treatment of the general subject-matter of governmental regulation.⁵ A more detailed ref-

¹ Doctrine of separate entities, stockholder and corporation, see Chapter 1, *supra*.

² Actions by or against officers or directors, see Chap. 42, *supra*.

Actions between individuals concerning rights in stock, see chapter on Stock and Stockholders, *infra*.

Stockholders' suits in general, see chapter on Stock and Stockholders, *infra*.

Actions by stockholders against pro-

motors, see Chapter 5, *supra*.

Actions between promoters, see Chapter 5, *supra*.

³ See Chapters 17 and 42, *supra*, and chapter on Stock and Stockholders, *infra*.

⁴ Actions by and against foreign corporations, see chapter on Foreign Corporations, *infra*.

⁵ See chapters on Governmental Regulation, *et seq.*, *infra*.

erence to all of the foregoing subjects may be had by searching the general index to this treatise.

And finally it is not intended here to treat of every point of practice presented in every case in which a corporation was one of the parties. That would simply submerge the distinctive law of corporation practice in a mass of procedural law depending in no way on anything pertaining to corporations. Corporations, as will be seen presently, are suitors and defendants likened as far as can be to natural persons. All the law of practice therefore applies to corporations unless their nature or the statutes or the unwritten law has made some different or apparently different rules, or has required some distinction and discrimination. It is such matters of distinction and difference, real or apparent, that are the subject of this chapter, a few suitable general illustrations being added.

§ 2925. In general; corporation as distinct party. The power to sue and to be sued is one incident to every corporation,⁶ and corporate rights of action are distinct from those of or against the members or stockholders,⁷ except when in equity or to prevent crime or wrongdoing the separate entity is disregarded.⁸ Because of this distinction the rule that a person cannot sue himself does not apply as between a corporation and its stockholders or members, and they may litigate antagonistically to each other.⁹ For example, a corporation

⁶ See § 790, *supra*; § 2926, *infra*.

⁷ One in control of a corporation is not subject to action to restrain violation by him of a contract of assignment of patent rights, the contract having been entered into between the corporation and the plaintiff. *Aberthaw Const. Co. v. Ransome*, 192 Mass. 434, 78 N. E. 485.

As to what causes of action are individual to stockholders and what are in right of the corporation, see chapter on Stock and Stockholders, *infra*.

⁸ Equity will when necessary regard the fact that an individual owns or controls the corporation. At law they are distinct. *Leigh v. American Brake-Beam Co.*, 205 Ill. 147, 68 N. E. 713. And see cases cited §§ 42-48, *supra*.

Corporation and chief stockholder may be treated as identical to prevent it from reaping benefits of his fraud, both being parties. *Cawthra v. Stewart*, 59 N. Y. Misc. 38, 109 N. Y. Supp. 770; *Home Inv. Co. v. Strange*, — Tex. Civ. App. —, 152 S. W. 510.

For the purpose of applying the statute of limitations in equity and to frustrate fraud, the distinctness of the entities was disregarded in *Linn & Lane Timber Co. v. United States*, 196 Fed. 593.

⁹ See Chapter 1, *supra*, and chapter on Stock and Stockholders, *infra*.

As illustrating this, see *Hooks v. Aldridge*, 145 Fed. 865 (where the action was by the president against his corporation for moneys due him); *Fisher v. Parr*, 92 Md. 245, 48 Atl.

may sue a stockholder on his subscription to its capital stock,¹⁰ and a stockholder may sue the corporation for his share of a dividend declared upon its capital stock.¹¹ The same is true of other causes of action, whether arising *ex contractu* or *ex delicto*, at law or in equity.¹² Corporations may litigate with each other notwithstanding they have common officers or members¹³ or sustain a relation of trust to each other,¹⁴ though not solely because of it.¹⁵ The corporation though not a party to litigation may be interested therein or in the outcome of it; and therefore may assist by money contributions or otherwise in prosecuting or defending an action or proceeding that will directly or indirectly affect its own rights and privileges, but not otherwise.¹⁶

§ 2926. Rule at common law; assimilation to natural persons.

Among the incidental or implied powers which have been attributed to corporations from the earliest period is the power to sue and be sued. This power need never be expressly conferred. Whenever a corporation is duly created, among the incidents "tacite annexed" is the capacity "to sue and be sued, implead and be impleaded."¹⁷ Corporations, like natural persons, therefore, unless

621 (where the action was by a corporation for the enforcement of a personal liability of directors for negligent performance of duty); *Consolidated Fruit Jar Co. v. Wisner*, 110 N. Y. App. Div. 99, 97 N. Y. Supp. 52 (where the action was by a corporation against its president for accounting); *Beach v. Guaranty Sav. Ass'n*, 44 Ore. 530, 1 Ann. Cas. 418, 76 Pac. 16; *Burke v. Sidra Bay Co.*, 116 Wis. 137, 92 N. W. 568. See also *Posner v. Southern Exhaust & Blow Pipe Co.*, 109 La. 658, 33 So. 641.

¹⁰ See Chap. 17, *supra*.

¹¹ See chapter on Stock and Stockholders, subd. "Dividends," *infra*.

¹² See §§ 2936, 2939 and 2940, *infra*, and see generally Chapter 42, *supra*, as to actions by or against officers and agents, chapter on Stock and Stockholders, *infra*, as to actions by or against members or stockholders and as to technical stockholders' suits.

¹³ It is no obstacle to an action that

plaintiff and defendant corporations have "interlocking" directors. *G. W. Jones Lumber Co. v. Wisarkana Lumber Co.*, 125 Ark. 65, 187 S. W. 1068.

¹⁴ A trust relation does not prevent one corporation from suing another. *Leavenworth County Com'rs v. Chicago, R. I. & P. R. Co.*, 134 U. S. 688, 33 L. Ed. 1064.

¹⁵ One corporation cannot litigate with another merely because members are common to both and members' interests are in both. *German Evangelical Society v. Prospect Hill Cemetery*, 2 App. Cas. (D. C.) 310.

¹⁶ Power of corporation to assist or support actions by others, see Chapter 22, § 817, *supra*.

¹⁷ *United States. Dental Vulcanite Co. v. Wetherbee*, 2 Cliff. 555, Fed. Cas. No. 3,810.

Connecticut. Proprietors of White School House v. Post, 31 Conn. 240; *Town of Stratford v. Sanford*, 9 Conn. 275.

there is some restriction in the charter, "may maintain all such actions as are necessary to assert their rights when invaded, or to give them a recompense for any injury that can be done to them;" and, e converso, they may be sued like a natural person, to enforce any obligation to which they may be subject, or to obtain redress for any wrong for which they are liable.¹⁸ Positive law, statutory

Illinois. Marsh v. Astoria Lodge No. 112, I. O. O. F., 27 Ill. 421.

Indiana. Estell v. Knightstown & M. Turnpike Co., 41 Ind. 174.

Maryland. McKim v. Odom, 3 Bland 407.

Montana. S. C. Herbst Importing Co. v. Hogan, 16 Mont. 384, 41 Pac. 135.

New Jersey. Leggett v. New Jersey Manufacturing & Banking Co., 1 N. J. Eq. 541, 23 Ann. Dec. 728.

New York. Clarissy v. Metropolitan Fire Dept., 7 Abb. Pr. (N. S.) 352; Thomas v. Dakin, 22 Wend. 9. See National Mechanics' Banking Ass'n v. Usher, 31 N. Y. Super. Ct. 403.

Tennessee. Jonesboro v. McKee, 10 Tenn. (2 Yerg.) 167 (municipal corporation).

Texas. Conley v. Daughters of Republic of Texas, — Tex. Civ. App. —, 151 S. W. 877.

England. Conservators of River Tone v. Ash, 10 Barn. & C. 349; Sutton's Hospital Case, 10 Coke 23a.

See also § 790, supra.

¹⁸ 1 Kyd, Corporations, 185.

Blackstone phrases it: "To sue or be sued, implead or be impleaded * * * and do all other acts as natural persons may." 1 Bl. Comm. 475 cited in Santillan v. Moses, 1 Cal. 92, applying the rule to allow a Roman Catholic priest to sue as a corporation sole.

"The tendency of the modern decisions is to assimilate the actions, rights, duties, and liabilities of corporations to those of individuals." Moss v. Averell, 10 N. Y. 449. See

also Jones v. Florence Wesleyan University, 46 Ala. 626 (rules of evidence assimilated).

The same rules of procedure apply to a corporation as to a natural person. Johnson v. Butte & Superior Copper Co., 41 Mont. 158, 48 L. R. A. (N. S.) 938, 108 Pac. 1057.

Rule of damages is not affected by corporate character of party. Murrell v. Pacific Exp. Co., 54 Ark. 22, 26 Am. St. Rep. 17, 14 S. W. 1098.

Action at law may be maintained against a corporation the same as against a natural person. McLoud v. Selby, 10 Conn. 390, 27 Am. Dec. 689; Sutton's Hospital Case, 10 Coke 23a; 1 Kyd, Corporations, 185.

Allegation that plaintiff is a corporation of the state is sufficient to import the right to sue and be sued. California Steam Nav. Co. v. Wright, 6 Cal. 258, 65 Am. Dec. 511. See also §§ 3043 and 3046, infra.

"Is an incident to bodies politic of all descriptions, even to those which have been incorporated by and are located in another state or in a foreign country." McKim v. Odom, 3 Bland (Md.) 407.

A corporation "for the purpose only" of receiving, holding and managing a donation for school purposes has power to sue for the fund. Proprietors of White School House v. Post, 31 Conn. 240.

It was held in an Illinois case that a corporation cannot sue in its own name when its charter requires suits to be brought by the trustees or other officers. Marsh v. Astoria Lodge No. 112, I. O. O. F., 27 Ill. 421. See also

or constitutional, has in some places ordained a right to sue and be sued "in like cases as natural persons."¹⁹ The constitutional provision referred to has not been construed extensively in its literal sense and probably is little more than a declaration of the common-law principle,²⁰ though it does invalidate discriminations not reasonably ascribable to any distinction from natural persons.²¹

§ 2927. Statutory regulations and conditions—In general. The legislature may impose any regulations which are within the constitutional limitations. Thus it may establish rules for laying the venue unlike those governing the same matter in suits affecting only natural persons, and such legislation is not class or unequal when

Dental Vulcanite Co. v. Wetherbee, 2 Cliff. 555, 3 Fish. Pat. Cas. 87, Fed. Cas. No. 3,810; *Indiana Natural & Illuminating Gas Co. v. Anthony*, 26 Ind. App. 307, 58 N. E. 868; *State v. Inter Urban R. Co.*, 135 Iowa 694, 109 N. W. 867; *Wilson v. American Palace Car Co.*, 67 N. J. Eq. 262, 58 Atl. 195; *Phillips v. American Telephone & Telegraph Co.*, 71 S. C. 571, 51 S. E. 247.

¹⁹For a constitutional provision declarative of this principle, see *Const. of Alabama 1875*, art. 14, § 12 (*Const. 1901*, § 240).

"All corporations shall have the right to sue and be subject to be sued in all courts in like cases as natural persons." *Michigan Const.* art. 12, § 2.

For a statute declarative of it, see *Colorado Rev. St.* § 855; *Michigan Corp. Act*, § 13; *Wisconsin St.* 1915, § 1748.

²⁰Such a constitutional provision does not intend that procedure and process intrinsically inapplicable can be used. *Johnson v. Cayuga & S. R. Co.*, 11 Barb. (N. Y.) 621.

A statute making claims against railroad companies for injuries to property assignable and suable by the assignee does not, in case of a claim *ex contractu* arising out of a contract of carriage, discriminate against cor-

porations, or deny them the constitutional right to sue and be sued as natural persons, such claims being assignable without the statute. *Louisville & N. R. Co. v. Landers*, 135 Ala. 504, 33 So. 482. See also *Alabama Girls' Industrial School v. Reynolds*, 143 Ala. 579, 42 So. 114, denying that it withdrew the immunity of state institutions from private suit; *Kansas City, M. & B. R. Co. v. Whitehead*, 109 Ala. 495, 19 So. 705, with comment on *Brown v. Alabama Great Southern R. Co.*, 87 Ala. 370, 6 So. 295. Under such a provision a statutory liability for wrongful death of a child was held unconstitutional because none but corporations was made liable. Exception in necessary procedural matters, like venue, was noted however in the opinion. *Smith v. Louisville & N. R. Co.*, 75 Ala. 449. See also holding that it does not apply to procedure like venue. *Home Protection v. Richards & Sons*, 74 Ala. 466.

²¹The right under the constitution to sue "in all courts" in like cases as natural persons (*Const. 1846*, art. 8, § 3) invalidates a charter provision prescribing only the supreme court for injunction cases affecting the particular corporation. *Story v. New York El. R. Co.*, 3 Abb. N. Cas. (N. Y.) 478.

based on the inherent distinction between them and corporations.²² And statutory regulation of the jurisdiction of courts has been made, especially that of inferior courts, and that affecting foreign corporations.²³ In some states it has been prescribed that a copy of the articles shall be filed in the county before suits therein can be maintained,²⁴ and statutes requiring compliance with prescribed conditions by foreign corporations as a condition of suing are numerous.²⁵

The payment of taxes and the filing of reports and the like are often required under a penalty of forfeiture for noncompliance; and, when such forfeiture is complete, pending actions abate and power to sue or defend in new ones is gone.²⁶

Regulative statutes in an enabling act for incorporation of a specific kind of corporations will operate on procedure as if they were found in a special charter, and will be construed accordingly as exceptions in applying the procedural law of corporations generally.²⁷ Special charters sometimes contain provisions fixing practice in actions by or against the corporation.²⁸ The strong tendency, in the absence of any such regulations, is to assimilate all procedural law to that of natural persons, and to construe regulations of a general nature affecting "persons," "parties," or the like as including corporations.²⁹

§ 2928. — Regulations affecting "persons," etc., as applying to corporations. Generally a procedural regulation applicable in terms

²² See cases cited, § 2978 et seq., *infra*.

²³ See § 2957 et seq., § 2968, *infra*.

²⁴ As to the operation of such statutes as conditions precedent, see § 2949, *infra*.

²⁵ See chapter on Foreign Corporations, *infra*.

²⁶ See §§ 2954 and 2955, *infra*.

²⁷ Provisions in Manufacturing Corporations Act held to be exceptions to general law. *Dewey v. Central Car & Manufacturing Co.*, 42 Mich. 399, 4 N. W. 179.

²⁸ A charter provision: "being of a purely benevolent character it [the company] shall not be subject to the laws of this state governing life insurance companies, except as herein

provided," does not exempt the corporation from being sued as the law provides for other such companies. *Kentucky Mut. Security Fund Co. v. Logan's Adm'r*, 90 Ky. 364, 14 S. W. 337. But such provisions must not work any unconstitutional discrimination from natural persons. *Story v. New York El. R. Co.*, 3 Abb. N. Cas. (N. Y.) 478. Such a provision held not obnoxious to constitution as containing matters not expressed in title "An Act to Incorporate," etc. *Davis v. Bank of Fulton*, 31 Ga. 69. And see also cases cited, § 2978 et seq., *infra*, as to venue; § 2985 et seq., *infra*, as to process and service.

²⁹ See § 2926, *supra*, § 2928, *infra*.

to "persons" ³⁰ or to "parties," "plaintiffs" or "defendants" ³¹ will

³⁰ "Corporations are in law, for civil purposes, deemed persons. They have the power to plead, be impleaded, * * * and to do all other acts within the purview of their corporate power which natural persons could do." * * * "When the word 'person' is used in a statute, corporations as well as natural persons are included for civil purposes." *Baltimore & O. R. Co. v. Gallahue's Adm'rs*, 12 Gratt. (Va.) 655, 65 Am. Dec. 254, holding corporation may be garnisheed.

Corporation is included in term "person" in statute relating to jurisdiction over nonresidents. *Scharmann & Sons v. De Palo*, 66 N. Y. App. Div. 29, 72 N. Y. Supp. 1008; *Sommese v. Florence Distilling Co.*, 56 N. Y. Misc. 670, 107 N. Y. Supp. 630; *Goldzier v. Central R. Co. of New Jersey*, 43 N. Y. Misc. 667, 88 N. Y. Supp. 214.

Person may include corporation and a state may sue as a corporation. *Indiana v. Woram*, 6 Hill (N. Y.) 33, 40 Am. Dec. 378.

"Parties" in the Venue Act includes persons, and "persons" by statute includes corporations. Hence corporations when parties are entitled to same rights respecting change of venue as persons have. *Commercial Ins. Co. v. Mehlman*, 48 Ill. 313, 95 Am. Dec. 543.

Statutes regulating trustee process (Rev. St. c. 109, § 7; c. 2, § 13) include corporations for purpose of fixing venue. *Lewis v. Denney*, 4 Cush. (Mass.) 588.

Person as including corporation in statutes relating to service, see *Hinckley v. Bluehill Granite Co.*, 16 Me. 370; *Dock v. Elizabethtown Steam Mfg. Co.*, 34 N. J. L. 312.

Domestic or foreign corporation which cannot be found, having no officers within the state, is a "person"

on which constructive service may be had (Code Civ. Proc. § 412). *McKendrick v. Western Zinc Min. Co.*, 165 Cal. 24, 130 Pac. 865; to same effect under earlier like statute, see *Douglas v. Pacific Mail-S. S. Co.*, 4 Cal. 304.

Person includes corporation (Code, c. 14, § 17) for purpose of fixing place where service must be had. *Frazier v. Kanawha & M. Ry. Co.*, 40 W. Va. 224, 21 S. E. 723.

Attachment act held to apply only to natural persons and not to foreign corporations. *McQueen v. Middletown Mfg. Co.*, 16 Johns. (N. Y.) 5. This was based on the supposed impossibility of serving a foreign corporation or subjecting it to suit.

Whether corporation is "person" within statutes discussed without decision, see *Life Ass'n of America v. Fassett*, 102 Ill. 315.

A corporation is a person which may plead limitations. *People v. Trinity Church*, 22 N. Y. 44, aff'g 30 Barb. (N. Y.) 537. See also § 2951, *infra*.

It is a person within statute providing for summary dispossession proceedings. *Facts Pub. Co. v. Felton*, 52 N. J. L. 161, 19 Atl. 123.

An action for death by wrongful act, given against "persons," includes corporations. *Southwestern R. Co. v. Paulk*, 24 Ga. 356. A corporation is a person within the Captured and Abandoned Property Act and may sue as such. *United States v. Home Ins. Co.*, 22 Wall. (U. S.) 99, 22 L. Ed. 816. Corporations are also persons within statutory liability for official fees. *Carr v. St. Louis*, 9 Mo. 191 (municipal corporation).

³¹ Plaintiff "not a resident" includes foreign corporations. *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367, 38 Am. Rep. 518.

Act giving jurisdiction over "de-

include corporations as well unless the context or some intrinsic quality makes the regulation inapplicable to corporations,³² it being the general rule that "person" includes corporation whenever that is necessary to the sense or application of the statute.³³ Words in a statute referring to the "Christian name" of the party carry no implication that the regulation made is inapplicable to a corporation because it can have no Christian name; ³⁴ a regulation concerning misnomer in "Christian" or surnames therefore has been held applicable to corporations, the quoted word being taken in the sense of "given" and thus applying to a name given by the legislature.³⁵ Statutes are not uncommon which expressly provide that the word "person" shall be taken to mean corporation although such statutes are not to be literally applied where that would be contrary to the necessities or to the evident intendment of the law.³⁶

§ 2929. De facto, incomplete and irregular corporations. As has been shown in an earlier chapter, a de facto corporation has plenary power to sue and be sued coextensive with its de facto existence, subject to the sole exception that, in an action between it and the state wherein the existence of the corporation is the very issue to be tried, it must have and establish a de jure existence,³⁷ and since only the

fendants" who "reside" in a city, held to apply only to natural persons. *Davidsburgh v. Knickerbocker Life Ins. Co.*, 90 N. Y. 526.

Corporation held subject to provision fixing venue at place of "defendants'" residence in "all cases." *Central Bank v. Gibson*, 11 Ga. 453.

³² As to application of the statutes relating to jurisdiction venue, process and pleading, see generally §§ 2956 et seq., 2978 et seq., 2985 et seq. and 3038 et seq., *infra*.

³³ See § 54, *supra*.

³⁴ A law giving a remedy to "any person" and setting out a form with Christian names indicated for the parties does not thereby require exclusion of corporations from its benefits. *Kentucky Ins. Co. v. Hawkins*, 7 Ky. (4 Bibb) 470.

³⁵ *Johnson v. Central R. R.*, 74 Ga. 397.

³⁶ Corporation is included when

"person" used in statute (*Rev. St. c. 90, § 29*). It expressly declares so. *Bristol v. Chicago & A. R. Co.*, 15 Ill. 436; *Baldwin v. Mississippi & M. R. Co.*, 5 Iowa 518.

Of a statute declaring generally that when any "person" is referred to in a statute, it shall include bodies corporate, the Arkansas court said: "This like most rules of law falls short of universal application, and * * * must have a reasonable interpretation." Applicability to statute of limitation was denied. *Clarke v. Bank of Mississippi*, 10 Ark. 516, 52 Am. Dec. 248.

³⁷ See §§ 312 and 313, *supra*.

Against all but attorney general in a direct proceeding to test its corporate franchise it has such power. *People's Ditch Co. v. '76 Land & Water Co. (Cal.)*, 44 Pac. 176.

That a judgment against a de facto corporation is good from the time of

state may question irregularities in organization, the question will generally be whether the corporation is one de facto, conceding that, if such is the case, it may sue or defend.³⁸ This, of course, leaves open the question whether any corporate existence or attributes or powers essential to the case were ever acquired,³⁹ which question is raised by nul tiel corporation or other appropriate plea.⁴⁰ It was held of a corporation formed under the government of one of the Confederate States, that it was not disabled to sue after the resumption of peace merely because the state which was the author of its being was at the time incapable of de jure recognition; provided that the corporation had no relation to other than domestic concerns and was not promotive of rebellion.⁴¹

By way of illustration of the de facto doctrine eminent domain proceedings already discussed in this work⁴² may be mentioned because a double authority or franchise emanating from the state is involved and the doctrine of the cases is pertinent wherever, as in cases of operating or service franchises, a similar double authority is involved. According to the better doctrine eminent domain proceedings are no exception to the rule that a de facto corporation can sue,⁴³ though there is a minority which maintains a view to the con-

its rendition, see *Bergen v. Porpoise Fishing Co.*, 41 N. J. Eq. 238, 3 Atl. 404.

When the corporation sues on a claim against the state, it is not necessary to show a de jure existence, as is the case when a direct proceeding is brought to try right to be a corporation and to oust the claim of a franchise. *People v. La Rue*, 67 Cal. 526, 530, 8 Pac. 84; *North v. State*, 107 Ind. 356, 8 N. E. 159; *Coxe v. State*, 144 N. Y. 396, 39 N. E. 400.

³⁸ See §§ 276 and 277, supra.

³⁹ The rule against collateral attack does not prevent a question whether corporate attributes and powers were ever acquired. It relates to forfeiting or nullifying causes assigned to defeat an existence de jure or de facto begun. *Maryland Tube & Iron Works v. West End Improvement Co.*, 87 Md. 207, 39 L. R. A. 810, 39 Atl. 620.

⁴⁰ See, as to such pleas, § 3073 et seq., infra.

⁴¹ *United States v. Home Ins. Co.*, 22 Wall. (U. S.) 99, 22 L. Ed. 816. The peculiar status of the Confederate States was material in this decision. It will of course not apply in any full sense to alien enemy corporations.

⁴² See Chap. 36, supra.

⁴³ Right to maintain eminent domain proceedings, see § 310, pp. 639-645, supra, and cases there cited. See also the following:

Arkansas. *Niemeyer v. Little Rock Junct. R. Co.*, 43 Ark. 111.

Illinois. *Morrison v. Forman*, 177 Ill. 427, 53 N. E. 73; *Thomas v. St. Louis, B. & S. R. Co.*, 164 Ill. 634, 46 N. E. 8; *Henry v. Centralia & C. R. Co.*, 121 Ill. 264, 12 N. E. 744; *Ward v. Minnesota & N. W. R. Co.*, 119 Ill. 287, 10 N. E. 365; *Peoria & P. U. R. Co. v. Peoria & F. R. Co.*, 105 Ill. 110; *McAuley v. Columbus, C. & I. C. R. Co.*, 83 Ill. 348.

Indiana. *Aurora & C. R. Co. v. Miller*, 56 Ind. 88.

trary.⁴⁴ The rule as deduced in such cases is, that the corporate existence is or may be an issue as well as the right to exercise the power of eminent domain but the proof of a de facto existence suffices. It seems that this should be the true rule in all cases of a special franchise or right given to a de facto corporation.⁴⁵ An answer denying public utility and necessity by reason of petitioner's defective organization, whereby it cannot serve the public use, is not a collateral attack, precluded by the doctrine mentioned.⁴⁶

Kansas. *Reisner v. Strong*, 24 Kan. 410.

North Carolina. *Wellington & P. R. Co. v. Cashie & C. Railroad & Lumber Co.*, 114 N. C. 690, 19 S. E. 646.

Texas. *Roaring Springs Townsite Co. v. Paducah Tel. Co.*, — Tex. Civ. App. —, 164 S. W. 50.

See also *Shroeder v. Detroit*, G. H. & N. Ry. Co., 44 Mich. 387, 6 N. W. 872, in which it was said that inferior tribunals entertaining condemnation proceedings could not pass on questions of corporate existence.

Equity will not interfere in private suit by injunction to prevent a de facto corporation from exercising the power of eminent domain. That is for the state in quo warranto. *National Docks Ry. Co. v. Central R. Co. of New Jersey*, 32 N. J. Eq. 755.

⁴⁴ **Missouri.** The corporate existence of the condemnor is an issue in such proceedings, because without existence there is no capacity to sue. *St. Joseph & I. R. Co. v. Shambaugh*, 106 Mo. 557, 17 S. W. 581. The objection may be raised at any stage of the proceedings. *Hopkins v. Kansas City, St. J. & C. B. R. Co.*, 79 Mo. 98; *Orrick School Dist. v. Dorton*, 125 Mo. 439, 28 S. W. 765 (a school district seeking to condemn).

New York. *In re Brooklyn, W. & N. R. Co.*, 73 N. Y. 245.

It was held that the affidavit by defendant necessary under the statute to raise an issue of corporate existence in ordinary actions was not required to raise it in condemnation.

In re Broadway & S. A. R. Co., 73 Hun 7, 25 N. Y. Supp. 1080.

Ohio. *Powers v. Hazelton & L. Ry. Co.*, 33 Ohio St. 429; *Atkinson v. Marietta & C. R. Co.*, 15 Ohio St. 21; *Atlantic & O. R. Co. v. Sullivant*, 5 Ohio St. 276.

⁴⁵ As pointed out by Mr. Lewis, *Eminent Domain* [3rd Ed.], § 592, the corporate existence is in issue and must be proved but proof of a de facto existence suffices.

In some of the above cited cases the proof showed not even a de facto corporation, and only a usurpation without authority. The distinction is apparent. Thus the Supreme Court of Missouri held in *School Dist. No. 35 v. Hodgins*, 180 Mo. 70, 79 S. W. 148, that the issue was met by showing the action and decision of the proper officer proclaiming the formation of the district, and that it was not needful to show every regular step leading thereto, such matters being inquirable only by the state in a quo warranto. The effect of the earlier Missouri cases is greatly qualified by this decision. See also § 310, note 69, *supra*.

⁴⁶ Although existence cannot be collaterally assailed in eminent domain proceedings, an answer denying public utility by reason of defective and incomplete organization is another thing and is a proper pleading. *New Orleans Terminal Co. v. Teller*, 113 La. 733, 2 Ann. Cas. 127, 37 So. 624.

No corporation as such can do any act until it has acquired a corporate existence by grant and acceptance of a charter, or what is equivalent to that,⁴⁷ and if incomplete in that sense it can neither sue nor be sued.⁴⁸

A suit against a corporation as such, or by a corporation claiming to be such, estops the person founding his action on the fact or the corporation, respectively, to deny corporate existence, and admits the legality of the incorporation.⁴⁹ There are numerous other bases on which this estoppel may rest.⁵⁰

§ 2930. Insolvent, dissolved or suspended corporations; want of officers. The power to litigate or defend the corporate interests is not taken away by anything which leaves the corporate functions intact. Accordingly it may be said that only a dissolution or succession which renders the corporation extinct will destroy its power for litigation.⁵¹ Whether or not it does extinguish the corporation is a question of the effect of insolvency, bankruptcy, dissolution or forfeiture, and suspension.⁵² The same is true of consolidation and merger.⁵³ If there has been an extinction of the corporation, the creditors, stockholders or officers, or others on whom its property has

⁴⁷ See §§ 404 and 405, *supra*.

Summons and judgment pending application for a charter is void. *Barttram, Hendrix & Co. v. Collins Mfg. Co.*, 69 Ga. 751.

⁴⁸ If the corporation was never completed by organization the members can sue. *Lawrie v. Silsby*, 76 Vt. 240, 104 Am. St. Rep. 927, 56 Atl. 1106.

⁴⁹ See §§ 352 and 353, *supra*.

⁵⁰ See Chap. 11, *supra*.

⁵¹ Not affected by abortive attempt to dissolve voluntarily without decree of court. *Simms v. Bialy Hardware & Supply Co.*, 187 Mich. 375, 153 N. W. 821.

Mere receivership without winding up does not prevent suit against the corporation. *Paddock v. Staley*, 13 Colo. App. 363, 58 Pac. 363; *Ennest v. Pere Marquette R. Co.*, 176 Mich. 398, 47 L. R. A. (N. S.) 179, Ann. Cas. 1915 B 594, 142 N. W. 567; *Heath*

v. Missouri, K. & T. Ry. Co., 83 Mo. 617.

When for aught that appears "trustees" operating the railroad of defendant may be its agents, the suit may be against the corporation and not against them. *Grand Tower Mfg. & Transp. Co. v. Ullman*, 89 Ill. 244.

⁵² See chapters on Insolvency; Bankruptcy; Receivers; Forfeiture, Dissolution and Winding Up, *infra*.

⁵³ See chapter on Consolidation and Merger, *infra*.

Consolidation prevents subsequent action against old company. *Capp v. Colorado Coal & Iron Co.*, 29 N. Y. Misc. 109, 60 N. Y. Supp. 293, rev'g 28 N. Y. Misc. 795, 59 N. Y. Supp. 1101.

Merged former corporations can be sued at law through the consolidation which assumed their liabilities. *United New Jersey Railroad & Canal Co. v. Hoppock*, 28 N. J. Eq. 261.

devolved should sue or defend in respect to such property,⁵⁴ and an action thereafter and judgment therein will be of no validity when brought by the corporate name.⁵⁵ Change of the corporate name ordinarily has no effect on its identity or on the rights of action or defense that pertain to it, and it may maintain them by litigation⁵⁶ with appropriate allegations of the change.⁵⁷ Where the right to sue or defend is on a condition precedent, as in case of a foreign corporation, which has become impossible by reason of dissolution or the like, then it is a complete bar.⁵⁸

The want of officers does not affect the capacity of the corporation to be sued,⁵⁹ assuming that a means of gaining jurisdiction by service exists.⁶⁰ Obviously the total lack of officers would produce a state of inability to sue due to the want of corporate organs. Either a stockholders' suit in behalf of it⁶¹ or one by the last elected officers holding over would seem to be the proper practice in such a case.⁶²

The surrender of a franchise for a particular business is a thing distinct from the corporate franchise, and does not affect the capacity to sue.⁶³

⁵⁴ See chapter on Forfeiture, Dissolution and Winding Up, *infra*.

⁵⁵ Judgment in action, begun after revocation of charter, is erroneous. *Rankin v. Sherwood*, 33 Me. 509. See also § 2954, *infra*. See, however, *Kansas City Hotel Co. v. Sauer*, 65 Mo. 279, in which it was held that one who had contracted with the dissolved corporation and suffered judgment in action brought in its name, could only complain of it as a technical defect on the trial and not on appeal.

⁵⁶ A mere change of name with no change of powers or rights does not affect power to sue. The true identity may be shown. *Rosenthal v. Madison & I. Plank-Road Co.*, 10 Ind. 358. See other cases cited, § 747, note 88, *supra*.

⁵⁷ See § 3045, *infra*.

⁵⁸ Precedently conditioned on compliance with statutes, and by reason of dissolution such compliance had become impossible. A complete bar and not mere abatement is presented to a suit by its trustee for winding up. *Swing v. Wellington*, 44 Ind. App. 455, 89 N. E. 514.

⁵⁹ Want of officers and cessation of business does not extinguish the corporation. It may still be sued. Resignation of all officers to avoid suits is ineffectual. *Evarts v. Killingworth Mfg. Co.*, 20 Conn. 447.

Mere resolution of dissolution and dormancy of corporation does not disable it to be sued. *Carnaghan v. Exporters' & Producers' Oil Co.*, 57 Hun (N. Y.) 588, 11 N. Y. Supp. 172.

⁶⁰ See §§ 3002, 3005 and 3006, *infra*.

⁶¹ See chapter on Stock and Stockholders, subd. Remedies of Stockholders, etc., *infra*.

⁶² See §§ 1808, 1942, *supra*.

⁶³ A bank which has surrendered nothing but its certificate from the banking department by which it was authorized to conduct a banking business and has ceased all business except to collect debts owing it is still a corporation and may sue. *Wilson v. First State Bank of Jetmore*, 77 Kan. 589, 95 Pac. 404.

The capacity to sue or defend may exist, however, without the right to exercise it during receivership or other suspension or bankruptcy of the corporation. It may be that the title to the subject-matter has been vested in the receiver or other custodian like him, so that he and not the corporation is the proper party to sue or defend in respect to it; or it may be that to avoid possible interference with and embarrassment of the receiver and conflict with the jurisdiction which appointed him, the statutes or an order of court will restrain the bringing of actions against the receiver's corporation while he is in possession, unless by leave of court. Even without any statute equity will protect its jurisdiction and its receivers from such conflict or interference.

The receiver, or corresponding officer of the court, is the person to sue or defend all actions within the scope of the control or administration devolved on him.⁶⁴ The effect of a receivership on the corporation's right to sue or defend also depends on whether the receiver is domestic or foreign and depends, if foreign, on whether the receiver is a chancery receiver without title to corporate property and choses, or is a statutory receiver with such title. If without title the receiver deriving his authority from a foreign court cannot sue. If with title he can sue basing his right to do so on his title. In neither case can the corporation sue, for it would not be allowed to violate the jurisdiction of the appointing court and, under the statutory receivership, would have no title. In equity, however, a stockholders' suit brought with leave may be sustained if the receiver has title and could sue, so that recovery will be in his right.⁶⁵ Leave to sue may however be had and the corporation thereby enabled to sue anywhere according to the leave given.⁶⁶

⁶⁴ See generally chapters on Insolvency; Bankruptcy; Receivers, *infra*.

Suits by receivers against officers and directors, see Chap. 42, *supra*.

Suits to enforce liability of stockholders, see also chapter on Stock and Stockholders, and chapters on Insolvency; Bankruptcy; Receivers, *infra*.

Suits by receivers and assignees against promoters, see Chapter 5, *supra*, and chapters on Insolvency; Receivers, *infra*.

⁶⁵ A statutory receivership may divest the right of action from the corporation to the receiver. A chancery

receivership does not. *Kelly v. Dolan*, 218 Fed. 966.

At law neither the chancery receiver nor the corporation could sue in another jurisdiction; but in equity by joining the statutory receiver who has title, a stockholders' suit can be sustained, it seems, on the ground that it will redound to the receiver's benefit and thus to the corporation's. *Kelly v. Dolan*, 218 Fed. 966. See also chapter on Receivers, *infra*.

⁶⁶ Where a foreign receivership vests the receiver with corporate causes of action, leave to the corpo-

Pending actions and suits, as distinguished from causes of action and defenses, will abate if the dissolution or other extinction of the corporate functions intervenes, and if no statute exists preventing such a result, such, for instance, as the statutes continuing the corporate existence for the purpose of concluding litigation and winding up the corporate affairs.⁶⁷

§ 2931. Publicly owned, operated or interested corporations. Although a state or the United States cannot be sued without its consent, this doctrine does not prevent a suit against a corporation in which the state is a stockholder or has an interest. It has been held that the fact that a state is the sole proprietor of a corporation does not prevent the corporation from being sued.⁶⁸ And a fortiori a corporation is not exempt from suit merely because a state is a stockholder, or is otherwise partly interested therein.⁶⁹ Where a state owning a canal transferred it to a corporation created by itself, and retained an interest therein, it was held that it thereby divested itself of its sovereignty as to the corporation, and that the corporation might be used for mismanagement of the canal.⁷⁰ In any case the plaintiff must show a special right in himself distinct from that owed to the general public.⁷¹ The foregoing applies only to those corporations which are of proprietary nature, for in Alabama, where by the constitution all corporations are suable in like cases as natural persons, corporate agencies of the state administering governmental functions are immune as parts of the state.⁷² The state may

ration, or its stockholders in its right, to sue in another jurisdiction is essential. *Kelly v. Dolan*, 218 Fed. 966. See also chapter on Receivers, *infra*.

⁶⁷ See §§ 2954 and 2955, *infra*.

⁶⁸ *Briscoe v. Bank of Commonwealth*, 11 Pet. (U. S.) 257, 9 L. Ed. 709; *Bank of Commonwealth v. Wister*, 2 Pet. (U. S.) 318, 7 L. Ed. 437; *Bank of United States v. Planters' Bank*, 9 Wheat. (U. S.) 904, 6 L. Ed. 244; *Hutchinson v. Western & A. R. Co.*, 6 Heisk. (Tenn.) 634; *Western & A. R. Co. v. Taylor*, 6 Heisk. (Tenn.) 408.

⁶⁹ *Moore v. Wabash & E. Canal*, 7 Ind. 462.

The fact that the state is mortgagee of its property does not enable the

corporation to be relieved from garnishment or execution. *Boyd v. Chesapeake & O. Canal Co.*, 17 Md. 195, 79 Am. Dec. 646.

⁷⁰ *Moore v. Wabash & E. Canal*, 7 Ind. 462.

⁷¹ In the case of a canal partly state owned, an individual who suffers in common with the public by disrepair cannot sue, but where he has paid tolls to use it and could not his special injury sustains suit. *Moore v. Wabash & E. Canal*, 7 Ind. 462.

⁷² The immunity of the state from suit, and her institutions as well, was not destroyed by Const. 1901, § 240, making all corporations subject to be sued in all courts in like cases as natural persons. *Alabama Girls' Indus-*

nevertheless have rights that ordinary stockholders would not have in such corporations; and it was held in Georgia that it might intervene of its own motion in a stockholders' suit⁷³ and that the corporation could not consent to be sued in any county other than that of its charter place of business.⁷⁴ Necessarily state owned corporations can also sue, though it seems never to have been questioned in that form, but trustees of a state institution or property are not necessarily a corporation. If they are nothing but a board of officers managing certain affairs for the state, it must sue.⁷⁵

§ 2932. Inherent limitations due to impersonal nature or to want of power. The corporation can maintain no action or defense which essentially pertains only to natural persons.⁷⁶ In Blackstone's time and before it was deemed that a corporation aggregate could maintain no action nor be sued in any which was grounded on an assault and battery or other personal injuries. Having no body it could neither beat nor be beaten,⁷⁷ and it cannot now be suable for that quality of delinquency which only a natural person can commit.⁷⁸ It is now settled, however, that it may be liable for torts done by its agents although they consist in an application of personal force or contain an element of malice or intent; and an action for such injuries therefore lies against it.⁷⁹

trial School v. Reynolds, 143 Ala. 579, 42 So. 114; *White v. Alabama Insane Hospital*, 138 Ala. 479, 35 So. 454.

⁷³ *Central Ry. Co. v. Collins*, 40 Ga. 582.

⁷⁴ *Central Bank v. Gibson*, 11 Ga. 453.

⁷⁵ Trustees of the state normal school held not a corporation. *Drake v. Normal School*, 11 Iowa 54.

Commissioners of the canal fund were held to be not a corporation, nor yet entitled as individuals to enforce subscriptions to the canal fund, but such suits should be in the name of the state. *Commissioners of Canal Fund v. Perry*, 5 Ohio 56.

⁷⁶ That a corporation cannot sue as a common informer, see 1 Kyd, *Corporations*, 218; *Weavers' Co. v. Forrest*, 2 Str. 1241.

⁷⁷ 1 Bl. Comm. 476.

⁷⁸ It was held in *State v. Field*, 49

Mo. 270, that a regulation of persons engaged in a certain business, and requiring of them a license and an oath under penalty, did not apply to corporations. The reason assigned was that the regulation was of a personal nature, which the corporation could not assume. 1 Bl. Comm. 476, 477, was cited on the incapacity of a corporation to be a moral agent.

⁷⁹ Torts partaking of malice or personal intent, see chapter on Torts, *infra*. As will be seen in that chapter the incapacity of the corporation to harbor malice or specific intent does not prevent its being liable for torts of a malicious essence done by its agents pursuant to its directions or in the line of the authority given them. As to libel, slander and malicious prosecution, see also § 2940, *infra*.

The doctrine, now exploded or neutralized by qualifying doctrines, that there could be no right of action or defense founded on a wholly ultra vires act required all suits to be predicated on express or implied corporate power, if by the corporation, and all defenses consisting in an assertion of corporate right to be likewise predicated. But a corporation has the power to sue for injuries to it, or may be sued for its injurious acts towards others, even if no charter power authorized the doing of the acts whence the wrong came.⁸⁰ And the right to sue on a chose in action lawfully devolved on the corporation does not depend on its power to have engaged generally in traffic in such choses.⁸¹

§ 2933. Modes and agents of conducting litigation—In general. A suit by or against a corporation is to be instituted and conducted in the same way as a suit by or against a natural person, unless there is some special charter or statutory provision to the contrary. Of course, if there is such a provision, it must be observed.⁸² All actions instituted or defenses made by a corporation must be in its name or in the name which by law it is given for that purpose.⁸³ The process⁸⁴ and the pleadings must sufficiently name and describe it⁸⁵ and it must be the proper party⁸⁶ properly served or appearing and so brought under the jurisdiction.⁸⁷

Suits by corporations must be instituted and defenses made, as other acts by corporations must be done, by proper authority. The proper persons to authorize the commencement of a suit or the interposition of a defense on behalf of a corporation are primarily the directors, but the power may be vested in the president or other

⁸⁰ See generally Chapters 37 and 38, where the subject is fully treated.

⁸¹ Lumber corporation might take assignment of judgment for debt and sue on it. *Capital Lumbering Co. v. Learned*, 36 Ore. 544, 78 Am. St. Rep. 792, 59 Pac. 454.

⁸² See *Marsh v. Astoria Lodge No. 112*, I. O. O. F., 27 Ill. 421. See also §§ 2926 and 2928, supra.

⁸³ *Marsh v. Astoria Lodge No. 112*, I. O. O. F., 27 Ill. 421. The only real question in the above case was how the suit should be entitled, and it was held that the prefix, "The Trustees of" must be added to the corporate name in pleadings by it.

See also § 3040, infra.

Under Indiana statute for incorporating churches and declaring that "Wardens and Vestrymen of [name]" or "Trustees of [name]" shall be a corporation and shall sue and be sued by that name, it must be used rather than the church name. *Drumheller v. First Universalist Church*, 45 Ind. 275.

⁸⁴ See § 2986, infra.

⁸⁵ See §§ 3040 and 3041, infra.

⁸⁶ See § 3022 et seq., infra.

⁸⁷ See §§ 2988 et seq. and 3018, infra.

managing officer.⁸⁸ The control and conduct of the suit or defense after it is begun and pending is likewise in the directors acting through the attorney for the corporation.⁸⁹

A corporation aggregate, as distinguished from one that is sole, must always appear by attorney, for it cannot appear in person.⁹⁰

§ 2934. — Authorization of agents and officers to sue, defend or appear. Theoretically the authority of an officer or attorney emanates from a by-law or from the directors by a resolution, but it need not be a formally passed and recorded one, so far as the adverse party in litigation is concerned,⁹¹ although under the earlier rule a seal was essential;⁹² but the common law requirement that the warrant of attorney be entered and spread on the record is now obsolete in most or all jurisdictions,⁹³ it being presumed that an attorney of

⁸⁸ See §§ 1988, 2054, 2055 and 2136, *supra*.

Authority to employ attorneys, see Chapter 42, §§ 2054, 2064, 2157, *supra*.

⁸⁹ As to control of litigation and dismissals and discontinuances, see § 3112, *infra*, and see also Chap. 42, §§ 1981, 2051, 2131, 2155, *supra*, as to compromises and settlements.

⁹⁰ 1 Bl. Comm. 476; *Nispel v. Western Union R. Co.*, 64 Ill. 311; *Nixon, Ellison & Co. v. Southwestern Ins. Co. of Cairo, Illinois*, 47 Ill. 444; *Kankakee Drain. Dist. v. Commissioners Lake Fork Spec. Drain. Dist.*, 29 Ill. App. 86, *rev'd* 130 Ill. 261, 22 N. E. 607; *Brookville Ins. Co. v. Records*, 5 Blackf. (Ind.) 170; *State Bank v. Bell*, 5 Blackf. (Ind.) 127.

Cannot appear by its cashier. *State Bank v. Van Horn*, 4 N. J. L. 382.

At common law the technical rules of a plea to the jurisdiction required it to be in person, since appearance by attorney admitted the jurisdiction. *Mineral Point R. Co. v. Keep*, 22 Ill. 9, 74 Am. Dec. 124.

See §§ 3018-3020, *infra*, as to appearances.

⁹¹ A resolution of the board is not necessary. *Kenton-Furnace R. & Mfg. Co. v. McAlpin*, 5 Fed. 737.

A resolution authorizing the bring-

ing of suit is good if the only director not notified of the meeting had waived notice. *Las Ovas Co. v. Davis*, 35 App. Cas. (D. C.) 372.

A letter signed by the corporation by its secretary authorizing the addressee, an attorney at law, to appear for it in all suits in justice court, is sufficient in justice court and on appeal from it. *Norberg v. Heineman*, 59 Mich. 210, 26 N. W. 481.

The president's written authorization to a solicitor to take an appeal binds the corporation. *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 496, 38 Am. Dec. 561.

Attorney's statement that he has authority suffices but does not authorize a suit in the name of the corporation by one without its authority to institute same. *Bridgton v. Bennett*, 23 Me. 420 (municipal corporation).

As to the mode of conferring authority generally, see Chapters 39 and 42, *supra*.

As to by-laws generally, see Chapter 16, *supra*.

⁹² Authorization to appear for it must be under seal. *In re Cape Sable Co.*, 3 Bland (Md.) 606.

⁹³ See *Farmers' & Mechanics' Bank v. Troy Bank*, 1 Dougl. (Mich.) 457, following *Osborn v. Bank of United*

the court has the necessary authority when he enters an appearance for the corporation,⁹⁴ and also that a suit instituted by the officers was authorized.⁹⁵ Assent to the use of the corporate name in suing for the use of the real party in interest may be inferred.⁹⁶

A substitution of attorneys, if contested, must be after a hearing and not *ex parte*.⁹⁷ If the attorney was without authority the proceeding may be set aside, but this will not be done to the prejudice of the other party unless necessary for the protection of the corporation.⁹⁸ As in the case of ordinary clients the attorney cannot change sides or represent both parties.⁹⁹

A general manager has authority to institute necessary legal proceedings in the usual course of business¹ and to perform the necessary incidents² but one not a general manager has not such authority.³

States, 9 Wheat. (U. S.) 738, 6 L. Ed. 204. And see also *Gaines v. Tombeckbee Bank*, Minor (Ala.) 50; *State Bank v. Bell*, 5 Blackf. (Ind.) 127; *Penobscot Boom Corporation v. Lamson*, 16 Me. (4 Shep.) 224, 33 Am. Dec. 656; *Whyte v. Betts Mach. Co.*, 61 Md. 172. See also § 3046, *infra*.

⁹⁴ *Norberg v. Heineman*, 59 Mich. 210, 26 N. W. 481, and see also cases cited in the note preceding this.

⁹⁵ *Conley v. Daughters of Republic of Texas*, — Tex. Civ. App. —, 151 S. W. 877.

⁹⁶ *Lime Rock Bank v. Macomber*, 29 Me. 564.

⁹⁷ Substitution of attorneys for the corporation for the purpose of dismissing its appeal. *Woodbury v. Nevada Southern Ry. Co.*, 115 Cal. 85, 46 Pac. 862.

⁹⁸ *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 496, 38 Am. Dec. 561. It will be noted that this was a chancery suit, and the rule might be different on the law side; although in opening judgments a showing of merits and equity is required on the law as well as on the equity side. If the attorney carried on the litigation without knowledge of the corporation, there would be other grounds to open a judgment; and if it suffered him

to do so with knowledge, it might well be bound by the result. See § 3118, *infra*.

⁹⁹ An attorney who appeared for defendant in a former trial cannot appear for plaintiff corporation on the second trial. *Price v. Grand Rapids & I. R. Co.*, 18 Ind. 137.

An attorney having appeared for a corporation specially to ask dismissal of a bill for a receiver, is not disabled to appear for the trustee in a subsequent suit to foreclose a mortgage on its road. *Shaw v. Bill*, 95 U. S. 10, 24 L. Ed. 333.

¹ *Frost v. Domestic Sew. Mach. Co.*, 133 Mass. 563. See also Chap. 42, § 2136, *supra*.

² Execution of an appeal bond. *Sarmiento v. Davis Boat & Oar Co.*, 105 Mich. 300, 55 Am. St. Rep. 446, 63 N. W. 205.

³ An officer, merely as an officer, has no power to bring suits even if necessary in his judgment. *American Waterworks Co. v. Venner*, 63 Hun (N. Y.) 632, 18 N. Y. Supp. 379; *Pinkerton v. Gilbert*, 22 Ill. App. 568 (superintendent of a factory).

As to general powers of attorneys and other agents, see also Chap. 42, *supra*.

Consequently, the president,⁴ vice president,⁵ treasurer,⁶ cashier of a bank,⁷ or secretary⁸ merely by virtue of the name of the office has no such power but it may reside in any of such officers who is the general managing officer, or who is thereto expressly authorized, and if the suit or litigation is within the authority conferred or the ordinary course of business. A subsequent ratification is equivalent to original authority for this purpose.⁹ The officers incumbent at the time should act for the corporation, and sign its pleadings.¹⁰ Mere authority to receive service of process does not qualify or authorize

⁴ See §§ 2054, 2055, *supra*, and see also the following cases:

United States. *In re Winston*, 122 Fed. 187 (institution of petition in bankruptcy against debtor).

California. *Streeten v. Robinson*, 102 Cal. 542, 36 Pac. 946.

Illinois. *Boston Tailoring House v. Fisher*, 59 Ill. App. 400.

Kentucky. *Savings Bank v. Benton*, 2 Mete. 240.

Massachusetts. *New England Mut. Life Ins. Co. v. Wing*, 191 Mass. 192, 77 N. E. 376; *Trustees of Smith Charities v. Connolly*, 157 Mass. 272, 31 N. E. 1058.

Michigan. *Sarmiento v. Davis Boat & Oar Co.*, 105 Mich. 300, 55 Am. St. Rep. 446, 63 N. W. 205.

Missouri. *Lewis v. Pulitzer Pub. Co.*, 77 Mo. App. 434.

Nevada. *Reno Water Co. v. Leete*, 17 Nev. 203, 30 Pac. 702.

New Jersey. *Beebe v. George H. Beebe Co.*, 64 N. J. L. 497, 46 Atl. 168.

New York. *Potter v. New York Infant Asylum*, 44 Hun 367, *aff'd* 118 N. Y. 684, 23 N. E. 1147; *Recamier Mfg. Co. v. Seymour*, 15 Daly 245, 5 N. Y. Supp. 648; *Mumford v. Hawkins*, 5 Den. 355; *Oakley v. Workington's Union Benev. Society*, 2 Hilt. 487; *American Ins. Co. v. Oakley*, 9 Paige 496, 38 Am. Dec. 561.

Oregon. *Lucky Queen Min. Co. v. Abraham*, 26 Ore. 282, 38 Pac. 65.

Texas. *Dallas Ice Factory & Cold*

Storage Co. v. Crawford, 18 Tex. Civ. App. 176, 44 S. W. 875.

Washington. *Fernald v. Spokane & B. C. Telephone & Telegraph Co.*, 31 Wash. 672, 72 Pac. 462.

West Virginia. *Colman v. West Virginia Oil & Oil Land Co.*, 25 W. Va. 148.

⁵ Not decided but questioned in *Streeten v. Robinson*, 102 Cal. 542, 36 Pac. 946 (employment of attorney); *Lacaze v. Creditors*, 46 La. Ann. 237, 14 So. 601, holding vice president had power to institute suit; *Fernald v. Spokane & B. C. Telephone & Telegraph Co.*, 31 Wash. 672, 72 Pac. 462, holding he could do what president could have done if present. See also Chap. 42, *supra*.

⁶ See also Chap. 42, *supra*.

⁷ See § 2136, *supra*, and see the following: *Institution of litigation. Bristol County Sav. Bank v. Keavy*, 128 Mass. 298 (treasurer of a bank analogous to cashier). *Employment of attorney, Root v. Olcott*, 42 Hun (N. Y.) 536, *aff'd* 115 N. Y. 635, 21 N. E. 1116; *Mumford v. Hawkins*, 5 Den. (N. Y.) 355.

⁸ See also Chap. 42, *supra*.

⁹ *De Zavala v. Daughters of Republic of Texas*, 58 Tex. Civ. App. 19, 124 S. W. 160.

¹⁰ The courts will not try their right to office on a motion to such pleadings. *Mechanics' Nat. Bank v. H. C. Burnet Mfg. Co.*, 32 N. J. Eq. 236.

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the possessor to do other acts in litigation for the corporation.¹¹ A stockholder, as such, is totally lacking in authority to use the corporate name in litigation in its interest, his right and power in that respect being to bring a stockholders' suit on behalf of the corporation if it is unable to do so by reason of a hostile control, or if the directors refuse to do so on request.¹²

§ 2935. Remedies and forms of action in general. Since corporations, as already shown, sue and are sued like natural persons¹³ they may resort to or be subjected to any form of action or remedy appropriate to the right asserted and the redress sought and ordinarily available to any litigant.¹⁴ In addition statutory remedies may be provided.¹⁵ In the federal courts the distinction between equity and law is preserved by the constitution and the general practice is pointed out by statutes and rules of court.¹⁶ Several of the states also preserve in whole or in part the same distinctions in forms, and these will be noted in commenting on the particular phase of practice on which they bear.¹⁷ An equitable character may be given to an action at law by amendment, and vice versa, as in actions between natural persons.¹⁸

§ 2936. Equitable actions in general. As an incident of the right to sue and be sued as natural persons, corporations, to the same extent as natural persons, may maintain suits in equity to protect or enforce their rights. Thus, they may sue to enjoin a trespass upon their property or a nuisance affecting their property,¹⁹ or an invasion of

¹¹ The insurance commissioner's authority is limited to receiving process. Further procedural acts are to be done by regular agents of the foreign corporation (affidavit in garnishment). *Dougan v. Sun Fire Office of London*, 39 Mo. App. 676.

¹² See chapter on Stock and Stockholders, *infra*.

A stockholder cannot sue out a writ of error for the corporation without special authority. *Chicago & S. S. Rapid-Transit R. Co. v. Northern Trust Co.*, 90 Ill. App. 460, *aff'd* as *Wells v. Northern Trust Co.*, 195 Ill. 288, 63 N. E. 136.

¹³ See § 2926, *supra*.

¹⁴ See sections following.

¹⁵ See § 2938, *infra*.

¹⁶ See U. S. Rev. St. §§ 913, 914, conforming to the "principles, rules and usages of" equity on that side, and to the local state practice "as near as may be" on the law side. See also New Equity Rules, 226 U. S. app'x.

¹⁷ See this chapter *passim*, *infra*.

¹⁸ Creditors' suit changed to action on debt. *George H. Taylor Co. v. Wolverton*, 37 Ill. App. 358.

Action for deceit changed to stockholders' suit. *King v. Livingston Mfg. Co.*, 180 Ala. 118, 60 So. 143.

¹⁹ *Central Bridge Corporation v. Lowell*, 4 Gray (Mass.) 474.

franchise rights²⁰ or to restrain others from wrongfully using the corporate name, or from infringing a patent, trade-mark, or copyright²¹ or for any other form of equitable relief which is suitable, there being equity in the bill and no adequate remedy at law.²² For its proper protection it may enjoin threatened unconstitutional action by a state officer²³ or minor public officers.²⁴ While it cannot sue

²⁰ Injunction against nuisance consisting in interference with franchise to take tolls, sustained. *Newburgh & C. Turnpike Road Co. v. Miller*, 5 Johns. Ch. (N. Y.) 101, 9 Am. Dec. 274.

Equitable relief may be given against the unlawful exercise of a franchise in conflict with an exclusive franchise belonging to plaintiff. *Boston & L. R. Corporation v. Salem & L. R. Co.*, 2 Gray (Mass.) 1.

Suit may be maintained by a corporation to restrain interference by municipality with the laying of its gas mains. *Public Service Corp. of New Jersey v. De Grote*, 70 N. J. Eq. 454, 62 Atl. 65.

²¹ *Newby v. Oregon Cent. Ry. Co.*, Deady, 609, Fed. Cas. No. 10,144; *Dental Vulcanite Co. v. Wetherbee*, 2 Cliff. 555, Fed. Cas. No. 3,810; *Holmes, Booth & Haydens v. Holmes, Booth & Atwood Mfg. Co.*, 37 Conn. 278, 9 Am. Rep. 324.

As to injunction against interference with corporate name or unfair competition therewith, see § 725 et seq., supra.

²² Where the stockholders have no equity to annul dealings between the corporation and its officers for fraud, it has none. *Arkansas River Land, Town & Canal Co. v. Farmers' Loan & Trust Co.*, 13 Colo. 587, 22 Pac. 954.

Action to charge stockholders for merchandise furnished is at law. *Grants Pass Hardware Co. v. Calvert*, 71 Ore. 103, 142 Pac. 569.

A bill against a transfer agent for discovery of the amount of spurious stock put out by it and for indem-

nity against such stock issues shows equity. *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Eq. Cas. (Pa.) 180.

Equity will take a bill to recover money lost by an officer in gambling on futures where discovery and accounting will be necessary. *Medlin Milling Co. v. Moffatt Commission Co.*, 218 Fed. 686.

²³ The corporation may sue for injunction to prevent state officers from impairing its franchise under an unconstitutional tax, *Osborn v. Bank of United States*, 9 Wheat. (U. S.) 738, 6 L. Ed. 204; or to prevent execution of an unconstitutional rate regulation confiscatory of its property; *Ex parte Young*, 209 U. S. 123, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; or to prevent insurance commissioner from compelling use of an illegal standard form of policy under unconstitutional law, *Phenix Ins. Co. of Brooklyn, New York v. Perkins*, 19 S. D. 59, 101 N. W. 1110.

²⁴ Although a city may have power to regulate the charges made by a water company, it may be restrained from attempting to enforce rights which would result in depriving a corporation of reasonable profit on its investment. *Palatka Waterworks v. Palatka*, 127 Fed. 161.

Equity may have jurisdiction of a bill to enjoin enforcement of the ordinances unreasonably limiting charges for telephone service. *Ozark-Bell Tel. Co. v. Springfield*, 140 Fed. 666.

A street car company may secure injunction restraining enforcement of the ordinance reducing fares and pro-

for a nuisance of essentially personal injury, e. g., a drinking-place nuisance defined by statute with a right of action so limited that none but natural persons could suffer the contemplated injuries,²⁵ a nuisance to the property of a church corporation unfitting it for worship is not to be regarded as consisting of two causes of action, one to the intangible right of worship suable by the members, and one to the property suable by the corporation; but it may sue for the entire injury.²⁶ In like manner, a suit for an injunction or other equitable remedy may be maintained against a corporation under the same circumstances as against an individual²⁷ if there is not a legal rem-

viding for transfers. *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 46 L. Ed. 592. An injunction will be granted to restrain town authorities from removing the track of a railroad corporation lawfully laid upon its streets. *Belington & N. R. Co. v. Alston*, 54 W. Va. 597, 46 S. E. 612.

²⁵ A drinking place though a public nuisance, which private persons specially injured in their property may enjoin by virtue of statute, cannot be enjoined by a corporation merely because its employees become unfit for work by drinking there. *Northern Pac. R. Co. v. Whalen*, 149 U. S. 157, 37 L. Ed. 686, aff'g 3 Wash. T. 452, 17 Pac. 890. Nor can it sue under a like statute which makes injury to life, health or senses the ground of injunction, nor under one which enables an employer to sue when injured in person, property or means of support by the furnishing of intoxicants to an employee. *Northern Pac. R. Co. v. Whalen*, 149 U. S. 157, 37 L. Ed. 686.

²⁶ A nuisance to the enjoyment of church property may be enjoined by the corporation as well and to as full an extent as if its members were the plaintiffs. *Baltimore & P. R. Co. v. Fifth Bapt. Church*, 108 U. S. 317, 27 L. Ed. 739. See also *First Bapt. Church v. Schenectady & T. R. Co.*, 5 Barb. (N. Y.) 79.

²⁷ See generally chapter on Injunctions, *infra*. See also the following:

United States. *Glucose Sugar Refining Co. v. St. Louis Syrup & Preserving Co.*, 135 Fed. 540; *United States v. Northern Pac. R. Co.*, 134 Fed. 717; *Sidway v. Missouri Land & Live Stock Co.*, 116 Fed. 381; *Kittel v. Augusta, T. & G. R. Co.*, 65 Fed. 859.

Alabama. *Niehaus v. Cooke*, 134 Ala. 223, 32 So. 728.

Colorado. *Farmers' High Line Canal & Reservoir Co. v. White*, 32 Colo. 114, 75 Pac. 415.

Kansas. *Warner v. Imbeau*, 63 Kan. 415, 65 Pac. 648.

New Jersey. *Wilson v. American Palace Car Co.*, 67 N. J. Eq. 262, 58 Atl. 195; *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 56 Am. Rep. 1, 7 Atl. 432.

West Virginia. *Harman v. Caretta R. Co.*, 61 W. Va. 356, 123 Am. St. Rep. 985, 56 S. E. 520.

Equity has jurisdiction of a bill against a corporation and its directors and stockholders containing a prayer for discovery and for repayment of an amount alleged to have been paid over by reason of fraudulent representations, the bill further setting forth that the stockholders had conspired to do business in violation of their charter and that the corporation was insolvent. *Edwards v. Michigan Tontine Inv. Co.*, 132 Mich. 1, 92 N. W. 491.

edy.²⁸ So a corporation may be restrained by order of court from bringing a certain action.²⁹ Equitable remedies are available on its contracts³⁰ or to enforce its trusts.³¹ In numerous cases specific performance has been awarded both for and against corporations, apparently without any question of their capacity for such remedy; and it has been applied not only to land, but also to corporate stock where the legal remedy was inadequate.³² Equity will not try the right of the corporation to be or to exist as such; that is the office of a quo

May be sued as recipient or transferee of trust property, in breach of the trust. *Barksdale v. Finney*, 14 Gratt. (Va.) 338.

Injunction against ultra vires transactions in general, see Chapter 37, "Ultra Vires," supra, and chapter on Injunction, infra.

²⁸ Equity will not take jurisdiction in order to sue a former merged corporation when it can be sued at law through the consolidated corporation. *United New Jersey Railroad & Canal Co. v. Hoppock*, 28 N. J. Eq. 261.

²⁹ *American Press Ass'n v. Brantingham*, 57 N. Y. App. Div. 399, 68 N. Y. Supp. 285.

³⁰ Equitable remedies on or by reason of ultra vires contracts, see Chapter 37, supra.

While ordinarily an agent cannot call its principals to account, a selling and marketing corporation, whose agency is to distribute receipts from sales among its members, may sue for an accounting of overpayments and to adjust and distribute the shares, the members being numerous (2800, of whom 600 were defendants), thereby avoiding multiplicity. *California Raisin Growers' Ass'n v. Abbott*, 160 Cal. 601, 117 Pac. 767.

A corporation, which in effect has been made the trustee of a charitable trust may sue in equity for accounting of the fund remaining in an executor's hands and thence passing to defendant as legatee. Proprietors of

White School House v. Post, 31 Conn. 240.

Member may have an accounting under a contract with corporation. *Edwards v. Michigan Tontine Inv. Co.*, 132 Mich. 1, 92 N. W. 491, 9 Det. L. N. 502.

Suit for rescission and cancellation of land purchase will lie without restitution to stockholders of what they advanced to the corporation in that connection. *Collins Park & Belt R. Co. v. Short Elec. Ry. Co.*, 98 Ga. 62, 25 S. E. 929.

A corporation may maintain a suit in equity against persons holding its negotiable bonds to have same canceled and their transfer enjoined. *Pere Marquette B. Co. v. Bradford*, 149 Fed. 492.

Rescission and cancellation of ultra vires contracts and restitution of thing received, see Chapter 37, supra.

³¹ A corporation thereto authorized may in its own name sue to enforce a charitable trust, as well as the attorney general could. Proprietors of *White School House v. Post*, 31 Conn. 240.

³² As to land or interest therein, see:

Maryland. *Maryland Clay Co. of Baltimore v. Simpers*, 96 Md. 1, 53 Atl. 424 (corporation defendant).

Massachusetts. *Plunkett v. Methodist Episcopal Society*, 3 Cush. 561 (corporation defendant).

Minnesota. *St. Paul Division No.*

warranto,³³ but injunction may prevent the unlawful exercise of a franchise or the commission of a public nuisance.³⁴

§ 2937. Extraordinary legal remedies. From the postulate that a corporation may sue as a natural person could, it would follow that it might, given the requisite special or "beneficial" interest, institute an action of mandamus, prohibition or quo warranto. Indeed it does not seem to have been questioned that a corporation may be the relator in a prohibition proceeding, and the writ has been granted or application entertained in various instances as exemplified in the footnote,³⁵

1, S. of T. v. Brown, 9 Minn. 151, 11 Minn. 356 (corporation plaintiff).

Missouri. Eggert v. Chas. H. Heer Dry-Goods Co., 102 Mo. 512, 15 S. W. 65 (corporation defendant).

New York. St. Regis Paper Co. v. Santa Clara Lumber Co., 173 N. Y. 149, 65 N. E. 967 (both parties corporations).

South Carolina. Campbell v. Virginia-Carolina Chemical Co., 68 S. O. 440, 47 S. E. 716 (corporation defendant).

As to contract for corporate stock, see: Altoona Electrical, Engineering & Supply Co. v. Kittanning & F. C. St. Ry. Co., 126 Fed. 559 (plaintiff and defendant corporations); Treasurer v. Commercial Coal Min. Co., 23 Cal. 390 (corporation defendant); Northern Cent. R. Co. v. Walworth, 193 Pa. St. 207, 74 Am. St. Rep. 683, 44 Atl. 253 (plaintiff a corporation).

³³ **District of Columbia.** Morrow v. Edwards, 20 App. Cas. 475.

Illinois. Benwick v. Hall, 84 Ill. 162 (school district corporation).

New Jersey. National Docks Ry. Co. v. Central Ry. Co. of New Jersey, 32 N. J. Eq. 755.

New York. Clarke v. Brooklyn Bank, 1 Edw. Ch. 361.

Wisconsin. Independent Order of Foresters v. United Order of Foresters, 94 Wis. 234, 68 N. W. 1011.

But recognizing the rule stated in the text, under a constitutional grant

of power to issue writs of injunction, among others, in its original jurisdiction the Supreme Court of Wisconsin entertained an information against railroad companies for an injunction against violations of charter detrimental to the public. Attorney-General v. Stevens, 1 N. J. Eq. 369, 22 Am. Dec. 526 (suit to enjoin erection of bridge without authority); Attorney General v. Chicago & N. W. Ry. Co., 35 Wis. 425. See also chapter on Quo Warranto, *infra*.

³⁴ **Elizabethtown Gas Light Co. v. Green**, 49 N. J. Eq. 329, 24 Atl. 560; and see also Attorney-General v. Stevens, 1 N. J. Eq. 369, 22 Am. Dec. 526; Putnam v. Sweet, 1 Chand. (Wis.) 286, 2 Pin. 302.

As to remedies of the public, see also § 2942, *infra*.

³⁵ Granted at instance of a reclamation district to prevent assumption of jurisdiction to restrain its officers from carrying out the command of a public statute. Reclamation Dist. No. 1500 v. Superior Court Sutter Co., 171 Cal. 672, 154 Pac. 845.

Application by corporation entertained but writ denied on a presumption that respondent court would not proceed further. New Mexico-Colo-rado Coal & Mining Co. v. Eighth Judicial Dist. Court of New Mexico, 21 N. M. 728, 158 Pac. 489.

A de facto corporation may sue out the writ to prevent a receivership beyond the conferred jurisdiction of

but a corporation cannot have prohibition to prevent exercise of jurisdiction over it in the wrong venue. A motion is the proper practice.³⁶ So in mandamus the application has been entertained without question of the corporate capacity to bring the action.³⁷ It has been expressly decided that a corporation is a "private party" entitled under a statute to institute quo warranto.³⁸

Subsequent chapters will treat of mandamus and quo warranto, which are proper remedies against a corporation or for it.³⁹ It suffices here to state that an information in the nature of quo warranto is the proper remedy, at the instance of the state, or of the attorney general on behalf of the state, to forfeit the charter of a corporation for misuser or nonuser of its franchises.⁴⁰ It is also the proper remedy to oust a corporation from the exercise of powers not conferred upon it by its charter;⁴¹ and it is the proper remedy to oust persons from the exercise of corporate powers, when they have not been legally incorporated.⁴² Scire facias will lie, either by or against a corporation,

the court. Such corporation is "beneficially interested" (Laws 1895, p. 119, § 30). The corporate existence of the relator cannot be questioned on such application. *State v. Superior Court Spokane County*, 15 Wash. 668, 37 L. R. A. 111, 55 Am. St. Rep. 907, 47 Pac. 31.

Prohibition will lie against a court attempting to charge a corporate relator on service which was invalid. *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 450, 62 L. R. A. 178, 44 S. E. 300.

³⁶ *Fresno Nat. Bank v. Superior Court*, 83 Cal. 491, 24 Pac. 157.

³⁷ A corporate creditor was awarded a writ to compel payment of its claim by respondent treasurer. *Portland Stone Ware Co. v. Taylor*, 17 R. I. 33, 19 Atl. 1086.

A corporate owner of abutting property was held to have a special interest to sustain application for the writ to compel making of a paving improvement, but the writ was denied on other grounds. *Carey Salt Co. v. Hutchinson*, 72 Kan. 99, 82 Pac. 721.

³⁸ A public service corporation is "a private party" which under Stats. § 3466, may be relator in quo

warranto to test a franchise. *State v. Minahan Bldg. Co.*, 141 Wis. 400, 123 N. W. 258.

³⁹ Mandamus or actions in nature thereof, see chapter on Mandamus, *infra*.

Quo warranto against corporation, see chapter on Quo Warranto, *infra*.

⁴⁰ See chapter on Forfeiture, Dissolution and Winding Up, *infra*. But not to compel performance of a franchised public service according to its terms, which were being violated. *Attorney General v. Salem*, 103 Mass. 138 (public corporation operating waterworks).

⁴¹ Banking powers by an insurance company. *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 353, 358, 8 Am. Dec. 243; banking powers by a railroad company, *People v. River Raisin & L. E. R. Co.*, 12 Mich. 389, 86 Am. Dec. 64.

See chapter on Ultra Vires, *supra*.

⁴² See chapter on Quo Warranto, *infra*.

In New York a statutory remedy takes the place of scire facias, quo warranto, and information in nature of quo warranto, but the distinction

in any case in which it will lie by or against a natural person, unless there is some restriction in its charter. Thus, it may be brought by or against a corporation to revive a judgment. At common law, *scire facias* was the proper remedy against a corporation to enforce a forfeiture of its charter, when there was a legally existing body capable of acting, but which had been guilty of an abuse of its powers, and it is still so in some jurisdictions. In most jurisdictions, however, this remedy has given place to the remedy by information in the nature of the writ of *quo warranto*.⁴³

In the absence of any other adequate legal remedy, *mandamus* will lie against a corporation to compel it to perform a specific duty imposed upon it by its charter or by the general law for the benefit of the public.⁴⁴ Thus, *mandamus* will lie against a railroad company to compel it to restore a public highway, if it is under a duty to do so,⁴⁵ or to compel it to operate its road as required by law;⁴⁶ to compel a canal company to keep its canal in navigable condition;⁴⁷ to compel a railroad company to deliver to a particular elevator whatever grain in bulk may be consigned to it;⁴⁸ to compel a waterworks company to erect necessary fire plugs for the purpose of furnishing a sufficient supply of water to extinguish fires;⁴⁹ or to compel a corporation to furnish to a tax officer or court, as required by law, a list of its stockholders for purposes of taxation.⁵⁰ *Mandamus* is also a

between action against a corporation to annul it and one against individuals usurping the corporate attributes remains. *People v. Ravenswood*, H. C. & W. Turnpike & Bridge Co., 20 Barb. (N. Y.) 518, per Cowles, J.

⁴³ See chapter on Forfeiture, Dissolution and Winding Up, *infra*.

⁴⁴ *United States*. *Northern Pac. R. Co. v. Washington Territory*, 142 U. S. 492, 35 L. Ed. 1092.

Georgia. *Savannah & O. Canal Co. v. Shuman*, 91 Ga. 400, 44 Am. St. Rep. 43, 17 S. E. 937.

Missouri. *State v. Hannibal & St. J. R. Co.*, 86 Mo. 13.

New York. *People v. New York Cent. & H. River R. Co.*, 28 Hun 543.

Pennsylvania. *Com. v. New York, P. & O. R. Co.*, 138 Pa. St. 58, 20 Atl. 951; *Com. v. Phoenix Iron Co.*, 105 Pa. St. 111, 51 Am. Rep. 184.

England. *Rex v. Nottingham Old*

Water Works Co., 6 Adol & E. 355; *Norris v. Irish Land Co.*, 8 El. & Bl. 512.

⁴⁵ *State v. Hannibal & St. J. R. Co.*, 86 Mo. 13; *Com. v. New York, P. & O. R. Co.*, 138 Pa. St. 58, 20 Atl. 951.

⁴⁶ *Chicago & N. W. R. Co. v. Crane*, 113 U. S. 424, 28 L. Ed. 1064; *Union Pac. R. Co. v. Hall*, 91 U. S. 343, 23 L. Ed. 428; *State v. Hartford & N. H. R. Co.*, 29 Conn. 538. Compare *Northern Pac. R. Co. v. Washington Territory*, 142 U. S. 492, 35 L. Ed. 1092.

⁴⁷ *Savannah & O. Canal Co. v. Shuman*, 91 Ga. 400, 44 Am. St. Rep. 43, 17 S. E. 937.

⁴⁸ *Chicago & N. W. R. Co. v. People*, 56 Ill. 365, 8 Am. Rep. 690.

⁴⁹ *Easton v. Lehigh Water Co.*, 97 Pa. St. 554.

⁵⁰ *Firemen's Ins. Co. v. Baltimore*, 23 Md. 297.

proper remedy in many cases to enforce rights of stockholders or members of corporations. Thus, as we shall see in another chapter, mandamus will lie against a corporation to compel it to permit a stockholder or member to inspect its books,⁵¹ or to compel it to restore to the privileges and rights of membership or office one who has been wrongfully excluded or disfranchised.⁵² A duty imposed upon a corporation by statute or its corporate charter⁵³ or a duty incumbent on it as a public service corporation or common carrier,⁵⁴ may be en-

⁵¹ *People v. Pacific Mail Steamship Co.*, 50 Barb. (N. Y.) 280. See also Chapter 46, *supra*.

⁵² Exclusion of members. See *Medical & Surgical Society v. Weatherly*, 75 Ala. 248; *State v. Georgia Medical Society*, 38 Ga. 608, 95 Am. Dec. 408.

Mandamus lies to restore to office a trustee expelled from a charitable corporation. *Fuller v. Plainfield Academic School*, 6 Conn. 532.

⁵³ To compel delivery of the property of an incorporated academy and the compelling of the surrender of the corporate offices to the trustees entitled thereto. *Ward v. Sasscer*, 98 Md. 281, 57 Atl. 208.

To compel it to clear out certain ditches where this duty is laid upon the corporation by its charter. *Lock v. Repaupo Meadow Co.* (N. J. L.), 57 Atl. 423.

To discharge the liabilities of a company purchased, the statute making that a condition of the purchase. *Township of Grosse Pointe v. Detroit & L. St. C. Ry.*, 130 Mich. 363, 90 N. W. 42.

To compel the company to do paving where it has availed itself of the privilege granted on that condition. Mayor, etc., of Borough of Rutherford v. Hudson River Traction Co. (N. J. L.), 63 Atl. 84. See also *Davidson v. Cannabis Mfg. Co.*, 113 N. Y. App. Div. 664, 99 N. Y. Supp. 1018, *San Antonio Traction Co. v. Altgelt* (Tex. Civ. App.), 81 S. W. 106.

To grant a petitioner certain space

in its subway ducts. *Matter of Long Acre Elec. Light & Power Co.*, 51 N. Y. Misc. 407, 101 N. Y. Supp. 460.

To compel restoration of highway to condition for traffic. *Town of Mason v. Ohio River R. Co.*, 51 W. Va. 183, 41 S. E. 418.

To require laying of tracks to conform to a crossing. *Houston & T. C. R. Co. v. Dallas* (Tex. Civ. App.), 78 S. W. 525.

⁵⁴ A public service water corporation may be required by mandamus brought by an individual to supply water to such individual. The court said: "Mandamus lies to enforce the performance of public duties. It does not lie at the suit of an individual for the enforcement of those rights which he holds in common with the public at large, but it does lie when his personal and particular rights have been invaded beyond those that he enjoys as a part of the public, and that are common to everyone." *Robbins v. Bangor R. & Elec. Co.*, 100 Me. 496, 1 L. R. A. (N. S.) 963, 62 Atl. 136.

It will also lie to furnish a citizen with private service by telephone. That public toll stations exist whereat the applicant might transact his business is an insufficient defense to the company. *State v. Kinloch Tel. Co.*, 93 Mo. App. 349, 67 S. W. 684. See also *Crouch v. Arnett*, 71 Kan. 49, 79 Pac. 1086.

Where the supply furnished under contract with a water company is insufficient, the proper remedy of the

forced and performance compelled by mandamus; but the duty must be one imposed by law, and not by contract or ordinance lacking the force of law.⁵⁵

§ 2938. Statutory remedies and special or summary proceedings.

As a general rule, corporations are entitled, to the same extent as a natural person, to remedies provided by statute, though they may not be expressly mentioned in the statute, provided they are within its reason and purpose, for in such a case, as we have seen, the word "person" or other general term in the statute is to be construed as including corporations.⁵⁶ Thus, it has been held that a corporation

municipality is, in such case, by proceedings to compel performance. *Troy Water Co. v. Borough of Troy*, 200 Pa. 453, 50 Atl. 259.

To compel furnishing of gas at reasonable rates to the city where the supply has not yet been commenced, or, if the supply has been commenced, a suit in equity may be maintained to enjoin the corporation from ceasing a supply which the corporation is then furnishing. *Public Service Corporation v. American Lighting Co.*, 67 N. J. Eq. 122, 57 Atl. 482.

Upon refusal by a common carrier to perform such duty, the performance thereof may be enforced by mandamus at the instance of a private party in matters in which the party has a special interest. *Southern Exp. Co. v. Rose Co.*, 124 Ga. 581, 5 L. R. A. (N. S.) 619, 53 S. E. 185.

To compel operation as ordered by railroad commission. *People v. Brooklyn Heights R. Co.*, 172 N. Y. 90, 64 N. E. 788.

To compel switching of cars to a private track. *Mystic Milling Co. v. Chicago, M. & St. P. R. Co.*, 131 Iowa 10, 107 N. W. 943.

A telephone company cannot be required by mandamus or otherwise to install a telephone to be used for the furtherance of immoral purposes. No one could be compelled to aid an unlawful undertaking. *Godwin v. Carolina Telephone & Telegraph Co.*, 136

N. C. 258, 67 L. R. A. 251, 103 Am. St. Rep. 941, 1 Ann. Cas. 203, 48 S. E. 636. See, to the same effect, *Cullen v. New York Tel. Co.*, 106 N. Y. App. Div. 250, 94 N. Y. Supp. 290.

⁵⁵ Where the ordinances of a municipality are without legislative force, the assent of a street railway company to give transfers as therein provided will not sustain a writ of mandamus at the instance of the municipality to enforce the provisions of the ordinance when the corporation has later refused to comply therewith. The court said: "Mandamus is not the appropriate remedy for enforcing private rights growing out of contract." *Mayor, etc., of City of Newark v. North Jersey St. Ry. Co.* (N. J. L.), 62 Atl. 1003.

Where an ordinance grants to a railroad the right to cross a street on condition that it makes safe crossings and there exists a statute of the state making substantially similar provision, the ordinance may be enforced by mandamus. *Vandalia R. Co. v. State*, 166 Ind. 219, 117 Am. St. Rep. 370, 76 N. E. 980.

Not allowed to compel irrigation supply. *Perrine v. San Jacinto Valley Water Co.*, 4 Cal. App. 376, 88 Pac. 293.

⁵⁶ See § 54, *supra*, also § 2923, *supra*.

may proceed against a debtor under the statutes giving a remedy by way of attachment or garnishment; ⁵⁷ that it may file a petition under the bankruptcy law, ⁵⁸ enforce a bond or note by a summary petition and summons, ⁵⁹ or maintain a suit to quiet title to land, ⁶⁰ or an action of "book account." ⁶¹ And it was held that a corporation might sue in the United States Court of Claims under the Abandoned and Captured Property Act of Congress, although not mentioned therein, as the remedy thereby given was not intended to be limited to natural persons. ⁶² Of course, this rule does not apply where it appears from the object of the statute or the nature of the remedy that the legislature could not have intended it to apply to corporations, ⁶³ as where a remedy is given to creditors, stockholders or other directors against wrongdoing directors. ⁶⁴ Eminent domain proceedings under delegated power of the state are usually brought by corporations. ⁶⁵

In like manner, remedies given by statute will lie against corporations, though they may not be expressly mentioned in the statute, if they are within its reason and purpose. For example, where a statute gives a right of action for death caused by the wrongful act or neglect of another, such an action may be maintained against railroad companies and other corporations. ⁶⁶ Corporations may also be proceeded

⁵⁷ *Planters' & Merchants' Bank of Mobile v. Andrews*, 8 Port. (Ala.) 404; *Bank of Augusta v. Conrey*, 28 Miss. 667; *Trenton Banking Co. v. Haverstick*, 11 N. J. L. 171; *Union Bank v. United States Bank*, 4 Humph. (Tenn.) 369.

The fact that the statute requires an affidavit, and that a corporation, in the nature of things, cannot take an oath, does not render the statute inapplicable to corporations, for the affidavit may be made by an officer of the corporation. See the cases above cited. See also chapter on Attachment and Garnishment, *infra*.

⁵⁸ *Ex parte Bank of England*, 1 Swanst. 10, and see also chapter on Bankruptcy, *infra*.

⁵⁹ The statute giving the remedy to "any person" includes corporations. *Kentucky Ins. Co. v. Hawkins*, 7 Ky. (4 Bibb) 470.

⁶⁰ *Proprietors of Jeffries Neck Pasture v. Inhabitants of Ipswich*, 153 Mass. 42, 26 N. E. 239.

⁶¹ *Vermont Mut. Fire Ins. Co. v. Cummings*, 11 Vt. 503.

⁶² *United States v. Home Ins. Co.*, 22 Wall. (U. S.) 99, 22 L. Ed. 816.

⁶³ *Yonge v. Mobile & O. R. Co.*, 31 Ala. 422.

That a corporation cannot sue under a statute as a common informer, see 1 Kyd, *Corporations*, 218; *Weavers' Co. v. Forrest*, 2 Str. 1241.

⁶⁴ The statutory action under Code Civ. Proc. § 1781, is against directors only and cannot lie against the corporation. *Jacobs v. Mexican Sugar Refining Co.*, 104 N. Y. App. Div. 242, 93 N. Y. Supp. 776.

⁶⁵ Eminent domain proceedings in general, see Chapter 36, *supra*.

⁶⁶ *United States Fidelity Insurance, Trust & Safe Deposit Co. v. Norfolk & W. R. Co.*, 114 Fed. 389.

Georgia. Southwestern R. Co. v. Paulk, 24 Ga. 356.

Iowa. Donaldson v. Mississippi & M. R. Co., 18 Iowa 280, 87 Am. Dec. 391.

against under statutes allowing attachment;⁶⁷ and by the weight of authority they may be summoned and compelled to make disclosure as garnishee or trustee under the statutes relating to garnishment and trustee process, though there may be no express provision as to corporations in the statute⁶⁸ and a summary proceeding by a landlord for recovery of possession of the demised premises will lie against a corporation notwithstanding a provision for notice to quit and demand of rent on "the person" owing it.⁶⁹ Statutory actions by the attorney general, by other directors, by stockholders, by creditors, or by receivers for acts of mismanagement or wrongdoing by the officers are given in some states,⁷⁰ and various proceedings, often in the nature of certiorari or writ of review, are given to courts based on orders and decisions of public utility commissions and other like regulative boards.⁷¹ A corporation is also amenable to punishment for contempt as will be shown in a succeeding chapter.⁷²

Whether a given remedy is applicable prospectively to future cor-

New Jersey. *Kane v. Fillmore Avenue Bapt. Church*, 72 N. J. L. 442, 60 Atl. 1099.

Rhode Island. *Chase v. American Steamboat Co.*, 10 R. I. 79, aff'd 16 Wall. (U. S.) 522, 21 L. Ed. 369.

Texas. *Fleming v. Texas Loan Agency*, 87 Tex. 238, 26 L. R. A. 250, 27 S. W. 126.

See also chapter on Torts, *infra*.

⁶⁷ See generally chapter on Attachment and Garnishment, *infra*. See also the following: *Breene v. Merchants' & Mechanics' Bank*, 11 Colo. 97, 17 Pac. 280; *South Carolina R. Co. v. McDonald*, 5 Ga. 531; *Bushel v. Commonwealth Ins. Co.*, 15 Serg. & R. (Pa.) 173; *Union Bank v. United States Bank*, 4 Humph. (Tenn.) 369.

⁶⁸ See also chapter on Attachment and Garnishment, *infra*. And see the following cases:

Connecticut. *Knox v. Protection Ins. Co.*, 9 Conn. 430, 25 Am. Dec. 33.

Iowa. *Taylor v. Burlington & M. River R. Co.*, 5 Iowa 114.

Maryland. *Boyd v. Chesapeake & O. Canal Co.*, 17 Md. 195, 79 Am. Dec. 646.

Missouri. *St. Louis Perpetual Ins. Co. v. Cohen*, 9 Mo. 421.

New Hampshire. *Libby v. Hodgdon*, 9 N. H. 394.

Pennsylvania. *Franklin Fire Ins. Co. v. West*, 8 Watts & S. 350; *Boyle v. Franklin Fire Ins. Co.*, 7 Watts & S. 76.

Virginia. *Baltimore & O. R. Co. v. Gallahue's Adm'rs*, 12 Gratt. 655, 65 Am. Dec. 254.

Contra, *Holland v. Leslie*, 2 Harr. (Del.) 306; *Union Turnpike Road v. Jenkins*, 2 Mass. 37.

⁶⁹ *Facts Pub. Co. v. Felton*, 52 N. J. L. 161, 19 Atl. 123.

The statutes creating this remedy should be carefully consulted, however, lest there be some other provision rendering it inapplicable to a corporation.

⁷⁰ See Chapter 42, *supra*, and chapter on Stock and Stockholders, *subd. Remedies of Stockholders, etc.*, *infra*.

⁷¹ See chapter on Governmental Regulations, *infra*.

⁷² See chapter on Contempt, *supra*. And see also *Golden Gate Hydraulic Const. Min. Co. v. Superior Court*, 65 Cal. 187, 3 Pac. 628.

porations only, or presently to existing corporations as well, is a question of legislative intent.⁷³ It is sometimes enacted that a corporation shall be entitled or subjected to a statutory remedy already conferred on another corporation or class of corporations or natural persons, reference being made generally to other statutes for a description of such remedy. When this is the case the remedy as defined by such other statute without regard to amendments or other legislative change will ordinarily be intended,⁷⁴ but, of course, this will not be true if it appears that the intention was to include amendments as well. None but the questions contemplated can be litigated in a statutory proceeding, and if others are to be investigated another remedy must be chosen appropriate thereto,⁷⁵ nor can such a remedy be extended to a subject-matter not embraced in its terms, though similar in character.⁷⁶ Such remedies have been held not to be a part of the corporate franchise, though given in the charter; hence they are subject to amendment or repeal.⁷⁷ A statutory remedy may be either legal or equitable in nature.⁷⁸

Statutory remedies are not always exclusive. A corporation may

⁷³ A statutory remedy of forfeiture and distribution for nonpayment of a judgment for space of one year was held prospective and inoperative on existing corporations. *Aurora & Laughery Turnpike Co. v. Holthouse*, 7 Ind. 59.

⁷⁴ A statutory proceeding given in the charter as that prescribed in the "Railroad Act," held to refer to the existing railroad act and not a subsequent distinct one though with similar provisions. *Spring Valley Water Works v. San Francisco*, 22 Cal. 434.

It was a common practice in the days of special charters to give the particular corporation the same remedy which another corporation had been given, referring to its charter, and especially was this true of the right and the procedure by which the power of eminent domain was to be exercised. In the case last cited the power of eminent domain as exercised by railroad companies was extended to a water company.

⁷⁵ A statutory taxpayer's bill to investigate whether state indorsed

bonds were sold below 90 cents on the dollar must be limited to that issue, and will not try other questions. *Jones v. Macon & B. R. Co.*, 39 Ga. 138.

⁷⁶ A statutory proceeding by "notice" on paper payable at bank held not to apply to paper payable at a branch office of deposit and discount. *Bank of State v. Bush*, Walk. (Miss.) 265.

⁷⁷ A charter mode of summary process for recovery on notes is no part of the franchise of a chartered bank. *Bank of Columbia v. Okely*, 4 Wheat. (U. S.) 235, 4 L. Ed. 559.

⁷⁸ The statutory suit against the corporation and its stockholders for a debt left unpaid when it ceased business is equitable. *Tabor v. Goss & Phillips Mfg. Co.*, 11 Colo. 419, 18 Pac. 537.

As to nature of proceedings against officers or stockholders based on debts of the corporation, see also Chapter 42, *supra*, and chapter on Stock and Stockholders, subd. Remedies of Creditors, *infra*.

maintain an action at common law to enforce a common-law right or recover damages for its infringement, notwithstanding the fact that its charter gives it a special remedy, provided the remedy existing at common law is not expressly excluded; but where a right is given by the charter of a corporation, and not by the common law, and the charter gives a special remedy for its enforcement, an action at common law will not lie, for the rule is that every duty created by a statute must be enforced specifically by the means, where there are any, provided in the statute itself.⁷⁹ In accordance with these rules it was held in Pennsylvania that where the charter of a turnpike company gave it the right to collect tolls, and provided a special remedy for enforcing the right so given, the company could maintain an action of assumpsit at common law on a special contract for the use of its road, instead of resorting to the special remedy,⁸⁰ but that it could not maintain assumpsit on the theory of an implied contract to pay tolls.⁸¹ The same rule applies to remedies against corporations. If the charter of a corporation or some other statute provides a remedy for failure of the corporation to perform a duty or discharge an obligation existing at common law or by contract such remedy is not exclusive of the common-law remedy unless it is expressly made so by the statute, and an ordinary action or suit will lie against the corporation. Where a "statute creates a special duty, for the neglect of which a common-law action would lie, that action is not forbidden by the fact merely that an extraordinary liability in the nature of a penalty is also provided. The latter is only cumulative."⁸² Thus, an action at common law will lie against a railroad company for negligently running over and killing animals on its track, notwith-

⁷⁹ Per Gibson, C. J., in *Huntington, C. & I. Turnpike Road Co. v. Brown*, 2 Penr. & W. (Pa.) 462.

⁸⁰ *Beeler v. Pittsburgh, F. & M. Turnpike Road Co.*, 14 Pa. St. 162; *Dorman v. Pittsburgh & S. Turnpike Road Co.*, 3 Watts (Pa.) 126.

⁸¹ *Chestnut Hill Turnpike Co. v. Martin*, 12 Pa. St. 361; *Huntington, C. & I. Turnpike Road Co. v. Brown*, 2 Penr. & W. (Pa.) 462.

⁸² A general statute for foreclosure of defaulted railroad mortgages held not a repeal of an act authorizing the state comptroller to take possession in case of a default in a certain contract by which the state accepted a

second lien for a debt owing to it. *Ex parte Dunn*, 8 S. C. 207.

A penal liability for killing animals where the track of a railroad is unfenced does not exclude liability for common-law negligence therein. *Hudson v. St. Louis, K. C. & N. Ry. Co.*, 53 Mo. 525; *Iba v. Hannibal & St. J. R. Co.*, 45 Mo. 469.

A statute for funding existing liabilities of a railroad corporation by enabling it to issue obligations covering them does not exclude a common-law action against it for negligence. *Pollock v. Eastern R. Co.*, 124 Mass. 158.

standing the fact that a statute expressly requires railroad companies to fence their roads, and imposes a liability for failure to do so.⁸³ On the other hand, if the charter of a corporation or some other statute imposes a duty or liability upon the corporation not existing at common law, and provides a special remedy for failure to perform the same, an action at common law will not lie to recover damages for nonperformance, but the special remedy is exclusive.⁸⁴

§ 2939. Actions on or arising from contracts; assumpsit, covenant, etc. The inherent right to sue and be sued includes the right to enforce or defend any contract right of the corporation. Even ultra vires contracts and dealings may give a right of action against the corporation or in its behalf.⁸⁵ A corporation has the right, to the same extent as a natural person, to maintain an action of assumpsit to recover damages for breach of an express or implied simple contract, or an action of covenant to recover damages for breach of a contract under seal, or an action of debt to recover a debt due to it.⁸⁶ It may sue in assumpsit to recover for use and occupation of land,⁸⁷ or for a penalty for not paying tolls⁸⁸ or on the contract of subscription to its stock.⁸⁹

Any of the various common-law actions *ex contractu* may be maintained against a corporation such as debt, covenant, and assumpsit on an express or implied simple contract; and the old rule that only covenant would lie, based on the supposed necessity of contracting

⁸³ *Iba v. Hannibal & St. J. R. Co.*, 45 Mo. 469. For other cases in which this rule has been applied or recognized, see *Norris v. Androscoggin R. Co.*, 39 Me. 273, 63 Am. Dec. 621; *Chittenden v. Wilson*, 5 Cow. (N. Y.) 165, 15 Am. Dec. 462.

⁸⁴ See *In re Manufacturers' Nat. Bank*, 5 Biss. 499, Fed. Cas. No. 9,051; *Stevens v. Proprietors of Middlesex Canal*, 12 Mass. 466; *Iba v. Hannibal & St. J. R. Co.*, 45 Mo. 469.

A statutory mode of ascertaining damages for land taken for a canal held exclusive of common-law remedies. *Stevens v. Middlesex Canal*, 12 Mass. 466.

⁸⁵ Remedies on ultra vires contracts, or arising on the illegality of them, see Chap. 37, *supra*.

Action for rent under ultra vires lease, see Chap. 37, *supra*.

Action on implied contract arising from receipt of money or value through ultra vires transaction, see also Chap. 37, "Effect of Ultra Vires Contracts," *supra*.

⁸⁶ 1 Kyd, Corporations, 187, 191; *Burgesses of Stafford v. Till*, 4 Bing. 75.

⁸⁷ *Burgesses of Stafford v. Till*, 4 Bing. 75.

⁸⁸ Penalty accruing to it for passing its toll gate, the act not being a misdemeanor. *Canal St. Gravel-Road Co. v. Paas*, 95 Mich. 372, 54 N. W. 907.

⁸⁹ Assumpsit lies on contract of subscription or a special contract may be declared on. *Beene v. Cahawba & M. R. Co.*, 3 Ala. 660. See generally § 657 et seq., *supra*.

under the corporate seal, has long been obsolete.⁹⁰ It may be liable in the same manner to the stockholders for a breach of the implied agreement that they may share in new stock issues.⁹¹ The capacity of the corporation to be party to an unsealed contract, or its power to make the particular contract, or the name and manner in which its contract was executed, all substantive questions, are decisive of the form of contract action to be brought or the relief to be administered thereon. The form of action is not dependent, except in this indirect manner, on any principle of practice and procedure peculiar to corporations.⁹² Thus, where the corporation and its members joined in a contract, they with seals and it without, *assumpsit* and not *covenant* was the form of remedy against it.⁹³

§ 2940. Tort actions; case, trespass, replevin, ejectment, etc. As a consequence of the early common-law doctrine, now obsolete, that a corporation was incapable of tort because of its impersonal nature,

90 United States. *Chesapeake & O. Canal Co. v. Knapp*, 9 Pet. 541, 9 L. Ed. 222; *Bank of Columbia v. Patterson's Adm'r*, 7 Cranch 299, 3 L. Ed. 351.

Massachusetts. *Hayden v. Middlesex Turnpike Corporation*, 10 Mass. 397, 6 Am. Dec. 143.

New Jersey. *Antipæda Bapt. Church v. Mulford*, 8 N. J. L. 182.

New York. *Dunn v. St. Andrew's Church*, 14 Johns. 118; *Danforth v. Schoharie & D. Turnpike Road*, 12 Johns. 227.

Vermont. *Stone v. Congregational Society*, 14 Vt. 86; *Poultney v. Wells*, 1 Aiken 180; *Proctor v. Webber*, 1 D. Chip. 371, and note 456.

Virginia. *Dunningtons v. Northwestern Turnpike Road*, 6 Gratt. 160.

As we have seen in another place, it was formerly thought that a corporation must contract under the corporate seal, and, if this were the case, *assumpsit*, which will only lie on a contract not under seal, could not be maintained against it. It is now well settled, however, that a corporation may enter into a simple contract and may be liable on an implied contract. See §§ 754 and 755, *supra*.

Member may sue it in *assumpsit*. *Waring v. Catawba Co.*, 2 Bay (S. C.) 109.

Assumpsit lies against a corporation on its contract made by its officers under their seals, though not thereunto authorized by seal of the corporation. *Bank of Metropolis v. Gutschlick*, 14 Pet. (U. S.) 19, 10 L. Ed. 335.

Assumpsit held not to lie on obligation to pay for land taken for public use. *Breckbill v. Lancaster Turnpike Co.*, 3 Dall. (U. S.) 496, 1 L. Ed. 694.

⁹¹ *Assumpsit* for refusal of right to take new shares, see chapter on Stock and Stockholders, *subd. Increase and Reduction of Stock*, *infra*.

⁹² See the authorities cited *supra* this section.

⁹³ *Mitchell v. St. Andrews Bay Land Co.*, 4 Fla. 200.

On such a contract *assumpsit* lies against it, each party being liable in that form corresponding to its own execution. *St. Andrews Bay Land Co. v. Mitchell*, 4 Fla. 192, 54 Am. Dec. 340.

no common-law action sounding in tort of that quality would lie against it. The tort being regarded as that of the tort-feasant agent or officer must have been redressed, if at all, in action against him.⁹⁴ For a long time since it has been settled that a corporation is liable for its torts and those of its agents and servants in the line and scope of their employment, and that it must answer *ex delicto* in an appropriate form of action⁹⁵ for deceit,⁹⁶ false imprisonment and malicious prosecution,⁹⁷ libel,⁹⁸ negligence,⁹⁹ nuisance,¹ trespass,² and trover.³

⁹⁴ See this doctrine and the modern one which supplants it, chapter on Torts, *infra*.

Trespass for assault and battery will not lie against corporation aggregate. *Orr v. Bank of United States*, 1 Ohio 36, 13 Am. Dec. 588.

⁹⁵ General tort liability of corporation for torts of officers or agents and servants, see Chap. 42, §§ 2534-2562.

Personal liability of officers and agents for torts, see Chap. 42, §§ 2534-2562.

It may be charged *ex delicto*, *McKim v. Odom*, 3 Bland (Md.) 407.

⁹⁶ In sale of land by agent. *West Florida Land Co. v. Studebaker*, 37 Fla. 28, 19 So. 176.

⁹⁷ *Wachsmuth v. Merchants' Nat. Bank*, 96 Mich. 426, 21 L. R. A. 278, 56 N. W. 9; *Hussey v. Norfolk Southern R. Co.*, 98 N. C. 34, 2 Am. St. Rep. 312, 3 S. E. 923; *Lyons v. Davy-Pochontas Coal Co.*, 75 W. Va. 739, 84 S. E. 744.

⁹⁸ *Washington Gaslight Co. v. Lansden*, 9 App. Cas. (D. C.) 508, *Hussey v. Norfolk Southern R. Co.*, 98 N. C. 34, 2 Am. St. Rep. 312, 3 S. E. 923.

⁹⁹ Case lies for negligence. *Riddle v. Proprietors of Locks & Canals on Merrimack River*, 7 Mass. 169, 5 Am. Dec. 35; *Chestnut Hill & S. H. Turnpike Co. v. Rutter*, 4 Serg. & R. (Pa.) 6, 8 Am. Dec. 675.

¹ *Chestnut Hill & S. H. Turnpike Co. v. Rutter*, 4 Serg. & R. (Pa.) 6, 8 Am. Dec. 675.

Followed holding a charitable corporation liable. *McCreedy v. Guardians of Poor of Philadelphia*, 9 Serg. & R. (Pa.) 94, 11 Am. Dec. 667.

² See generally chapter on Torts, *infra*, and see also the following:

Delaware. *Whiteman's Ex'x v. Wilmington & S. R. Co.*, 2 Harr. 514, 515, 33 Am. Dec. 411, citing 1 Bl. Comm., title Corporations, on the common-law rule.

Florida. *Edwards v. Union Bank*, 1 Fla. 136.

Indiana. *Crawfordsville & W. R. Co. v. Wright*, 5 Ind. 252.

Massachusetts. *Hazen v. Boston & M. R. R.*, 2 Gray 574.

Pennsylvania. *McCreedy v. Guardians of Poor*, 9 Serg. & R. 94, 11 Am. Dec. 667.

South Carolina. *White v. City Council of Charleston*, 2 Hill 571; *Main v. Northeastern R. Co.*, 12 Rich. L. 82, 75 Am. Dec. 725.

Vermont. *Lyman v. White River Bridge Co.*, 2 Aikens 255, 16 Am. Dec. 705.

England. *Maund v. Monmouthshire Canal Co.*, 4 Man. & G. 452.

Trespass for assault and battery will lie against a corporation. The same principles apply as in other cases of master's liability for servant's acts. *Moore v. Fitchburg R. Corporation*, 4 Gray (Mass.) 465, 64 Am. Dec. 83; *Brokaw v. New Jersey R. & Transp. Co.*, 32 N. J. L. 328, 90 Am. Dec. 659.

³ *Yarborough v. Bank of England*, 16 East. 6.

It is also amenable to ejectment or writ of right, which presuppose a disseisin by the defendant corporation.⁴ Being jointly and severally liable with its agents for torts by them, the action may join them as defendants.⁵

The converse of the common-law doctrine of incapacity for tort, and consequent nonliability to suit for tort, was not recognized as true. The corporation might use for any tort that it was susceptible of suffering, and as said in a leading case, may maintain actions "in all cases necessary for the preservation of their property and rights, and for the recovery of any damages occasioned by the wrongs of others, but not for those damages to person and character for which an individual may recover unconnected with loss or injury to property";⁶ and any such tort cause of action is property which passes on its insolvency or bankruptcy, but in such torts as malicious prosecution the damages are restricted to those entailed on its property including therein its good will and credit.⁷ Therefore it may maintain actions ex delicto to recover damages for wrongs, as trespass, trespass on the case, and trover.⁸ In accordance with this rule it may also sue

⁴ *Dater v. Troy Turnpike & Railroad Co.*, 2 Hill (N. Y.) 629.

An aggregate corporation can disseise or re-enter by an act in pais; hence writ of right will lie. Inhabitants of Second Precinct in Rehoboth v. Catholic Cong. Church & Society in Rehoboth, 40 Mass. (23 Pick.) 139, note.

⁵ The rule applies that each of two concurrent tort feorsors is liable for the whole damages and they may be sued as co-defendants. *Bryant v. Bigelow Carpet Co.*, 131 Mass. 491.

Slander by its president is a joint act for which he and the corporation are each severally liable. *Nunnamaker v. Smith's*, 96 S. C. 294, 80 S. E. 465.

See also § 3026, *infra*; and see generally treatises on Principal and Agent; Master's Liability for Torts of Servant.

⁶ Libelous statement about bank notes. *Shoe & Leather Bank v. Thompson*, 18 Abb. Pr. (N. Y.) 413, per Ingraham, J., *aff'g* 23 How. Pr. 253.

⁷ While "in the nature of things a corporation, a fictitious being, cannot bring an action ex delicto for a purely personal tort," and cannot "in its own capacity be seduced or falsely imprisoned, nor can it sue for breach of promise of marriage, nor for personal injury, or for damages for anguish of the soul or pain of body"; yet it may sue for malicious civil prosecution by attachment of goods. *Hansen Mercantile Co. v. Wyman, Partridge & Co.*, 105 Minn. 491, 21 L. R. A. (N. S.) 727, 117 N. W. 926, per Jaggard, J.

⁸ 1 Kyd, Corporations, 187; *Town of Stratford v. Sanford*, 9 Conn. 275; *Tilden v. Metcalf*, 2 Day (Conn.) 259; *Mather v. Ministers of Trinity Church*, 3 Serg. & R. (Pa.) 509, 8 Am. Dec. 663; *Conservators of River Tone v. Ash*, 10 Barn. & C. 349.

"No reason of any kind exists against the right of a corporation to maintain such an action." *Greenville & C. R. Co. v. Partlow*, 14 Rich. (S. C.) 237.

A possession of property will sup-

to recover for libel⁹ or slander affecting its business.¹⁰ In order to recover property, real or personal, it may, in proper cases, maintain ejectment, writ of entry, or replevin.¹¹

From the foregoing it appears that the forms of action known to the common law were not primarily concerned with the fact that one of the parties was a corporation. What was material was the capacity of the corporation for the particular tort which the writ and its declaration pleaded, and further whether it or one of its officers or agents was the tortfeasor. These are questions of substantive law, fully treated elsewhere,¹² and once determined the form of the action, or under the codes the nature of the relief sought, is ascertainable according to principles of general law not peculiar to corporations.

§ 2941. Remedies against promoters, officers or stockholders.

Against promoters the corporation may have any proper remedy to

port suit by the corporation for trespass without any statutory authority to sue. *Conley v. Daughters of Republic of Texas* (Tex. Civ. App.), 151 S. W. 877.

Action for conversion by corporation of certificates or stock, see chapter on Stock and Stockholders, subd. Nature of Certificates, *infra*.

⁹ A corporation may be libeled, and it may maintain an action on the case to recover damages.

Illinois. *Hahnemannian Life Ins. Co. v. Beebe*, 48 Ill. 87, 95 Am. Dec. 519.

Kentucky. *Pennsylvania Iron Works Co. v. Voght Mach. Co.*, 29 Ky. L. Rep. 861, 8 L. R. A. (N. S.) 1023, 96 S. W. 551.

New Jersey. *Trenton Mut. Life & Fire Ins. Co. v. Perrine*, 23 N. J. L. 402, 57 Am. Dec. 400.

New York. *Reporters' Ass'n of America v. Sun Print & Pub. Co.*, 186 N. Y. 437, 79 N. E. 710, 112 App. Div. 246, 98 N. Y. Supp. 294; *Town Topics Pub. Co. v. Collier*, 114 App. Div. 191, 99 N. Y. Supp. 575, where the corporation sued by reason of having been charged with blackmail; *Knickerbocker Life Ins. Co. v. Ecclesine*, 42 How. Pr. 201, 34 N. Y. Super. Ct. 76; *Shoe & Leather Bank v. Thompson*, 23 How. Pr. 253, *aff'd* 18 Abb. Pr. 413.

Wisconsin. *Gross Coal Co. v. Rose*, 126 Wis. 24, 2 L. R. A. (N. S.) 741, 110 Am. St. Rep. 894, 5 Ann. Cas. 549, 105 N. W. 225.

England. *Metropolitan Saloon Omnibus Co. v. Hawkins*, 4 Hurl. & N. 146.

Any business corporation injured in its business, and not merely those known as "moneyed" corporations, may sue for libel. *Mutual Reserve Fund Life Ass'n v. Spectator Co.*, 50 N. Y. Super. Ct. 460. See also *Knickerbocker Life Ins. Co. v. Ecclesine*, 34 N. Y. Super. Ct. 76, *aff'd* 11 Abb. Pr. N. S. 385.

While domestic corporations may sue for libel, it is questionable whether comity will be extended so as to permit a foreign one to do so. *Hahnemannian Life Ins. Co. v. Beebe*, 48 Ill. 87, 95 Am. Dec. 519.

¹⁰ *Gross Coal Co. v. Rose*, 126 Wis. 24, 2 L. R. A. (N. S.) 741, 110 Am. St. Rep. 894, 5 Ann. Cas. 549, 105 N. W. 225.

¹¹ 1 Kyd, *Corporations*, 185, 187; *Society for Propagation of Gospel v. Wheeler*, 2 Gall. 105, Fed. Cas. No. 13,156; *Chedington's Case*, 1 Coke 153.

¹² See general discussion, chapter on Torts, *infra*.

cancel and rescind with restitution, or for an accounting of secret or unlawful profits, or by *assumpsit*, or for damages.¹³ The remedies of the corporation against its stockholders and officers are various, corresponding to the various rights which it has against them. These are fully treated elsewhere in so far as they are distinct from the general matters of practice which pertain to all corporate actions. Thus it may have remedies on the contract of subscription¹⁴ or for assessments (if the stock is assessable) or other obligations running from them to the corporation.¹⁵ A lien on shares may be enforced by equitable procedure, or action may lie on the debt.¹⁶ The corporation has an action at law for damages or in equity for appropriate relief as against officers who have mismanaged affairs in a way amounting to a legal wrong and not being a mere error of judgment or excusable mistake,¹⁷ as for instance where they have taken or permitted secret profits¹⁸ and such a right of action may pass to a receiver or assignee,¹⁹ or be asserted in a stockholders' suit for the corporation.²⁰ Where unlawful dividends are threatened or have been paid, the corporation may recover the money from the stockholders who had and received it; or the directors, if there was any negligence or wrongdoing, may be suable by the corporation; but usually the remedies are enforced in a stockholders' suit brought in right of the corporation, or a statutory suit by a director or creditor, or by a receiver's or creditors' suit, in any of which injunction or other equitable relief may be af-

¹³ Actions against promoters, see Chapter 5, *supra*.

There may also be actions by stockholders, either as individuals or suing derivatively in stockholders' suits, for wrongs by the promoters. The essential cause of action in the former case must be one to the individual and not to the corporation, and vice versa in the latter case. See Chapter 5, *supra*, also chapter on Stock and Stockholders, *subd.* Stockholders' Suits, *infra*.

¹⁴ Actions against stockholders or members on subscriptions, see Chapter 17, *supra*.

¹⁵ Actions or remedies for recovery of assessments other than calls on subscriptions, see chapter on Stock and Stockholders, *infra*.

¹⁶ See chapter on Stock and Stock-

holders, *subd.* Lien of Corporation on Shares, *infra*.

¹⁷ General rules as to their liability, and actions against officers and directors for mismanagement, see Chapter 42, *supra*.

Right to set aside transactions by officers and directors, see Chapter 42, *supra*.

¹⁸ Right as against officers and directors to recover secret profits, see Chapter 42, *supra*.

¹⁹ Receivers' and assignees' suits against officers for mismanagement or on statutory liability, see Chapter 42, *supra*, chapters on Insolvency; Receivers, *infra*.

²⁰ Stockholders' suits, see chapter on Stock and Stockholders, *subd.* Remedies of Stockholders, etc., *infra*.

forded.²¹ The corporation has a remedy in damages against one who procured the wrongful transfer of shares, and it may also sue for cancellation, if the certificate has not come into the hands of a bona fide holder.²² And similar remedies are available where fictitious, fraudulent or illegal issues have been made.²³ As against promoters it is not obliged to sue within the domicile, but may go to another state where the remedy available admits a fuller recovery of the amount for which the promoters are severally liable,²⁴ and this, it seems, could be done against officers and stockholders as well.²⁵

§ 2942. Remedies of state or members of public against the corporation. When the corporation is assuming to be such without right or is unlawfully exercising a franchise the usual remedy of the public is by an information in the nature of quo warranto.²⁶ If a public duty is owing, which it will not perform, mandamus will lie, and the same remedy may be available to an individual to whom a special duty is owing as a member of the public.²⁷ A breach of public duty may be prevented in proper cases or the performance of it enforced negatively by an injunction bill on information by the attorney general, who may also sue for an injunction if the corporation commits a public nuisance.²⁸ Thus there may be an injunction against

²¹ It cannot often happen, if ever, that the corporation will be so freed from the control of the directors who declare or threaten to declare and pay unlawful dividends as to enable it to sue. Changes in the personnel must usually take place first, and then the remedy is to recover payments or for damages or for an accounting, etc. See generally chapter on Stock and Stockholders, subd. Dividends, and also Chapter 42 on Officers and Directors. As to creditors' suits and suits by receivers or other liquidators, see chapters on Creditors' Bills; Receivers; Bankruptcy.

²² See chapter on Stock and Stockholders, subd. Forged and Unauthorized Transfers, *infra*.

Equitable cancellation and re-execution or reissue of certificates, see chapter on Stock and Stockholders, subd. Issue and Cancellation, etc., *infra*.

²³ Remedies of the corporation where fictitious or fraudulent issues are put out, see chapter on Stock and Stockholders, subd. Rights, etc., Under Fictitious Certificates, *infra*.

²⁴ The corporation may go to another state and there sue one of two fraudulent promoters to recover the entire secret profits made in concert with a co-promoter. And the promoter cannot object that if sued in the domicile less could be recovered from him. *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 74 N. J. Eq. 457, 71 Atl. 153.

²⁵ Right of foreign corporation to sue, and causes of action maintainable by it, see chapter on Foreign Corporations, *infra*.

²⁶ See generally chapter on Quo Warranto, *infra*.

²⁷ See chapter on Mandamus, *infra*.

²⁸ See chapter on Injunctions, *infra*.

rebating in violation of law²⁹ or other maladministration of the public service.³⁰ And such an injunction bill is cumulative to other remedies by penal action or quo warranto.³¹ These are the more ordinary remedies, but there may be others given by statutes as a part of the governmental regulations especially those pertaining to public service and rates and to the issue of securities.³²

§ 2943. Remedies of stockholders, members or officers against corporation. Each right of the stockholder as against the corporation

An information lies in equity to restrain a public nuisance about to be done in violation of the franchise. It may be brought by the attorney general or other public law officer ex officio or on private relation. *District Attorney v. Lynn & B. R. Co.*, 16 Gray (Mass.) 242.

The fact that an act done is beyond a franchise and therefore the subject of a quo warranto does not prevent a bill to redress it as a private nuisance and to recover past damages. The legal remedy is inadequate because conditioned on leave and because no damages could be awarded. *Fall River Iron Works Co. v. Old Colony & F. R. R. Co.*, 5 Allen (Mass.) 221.

²⁹ *United States v. Milwaukee Refrigerator Transit Co.*, 145 Fed. 1007.

³⁰ Equity will restrain ultra vires acts prejudicial to the public service at suit of the attorney general, though it does not redress mere usurpations. *McCarter v. Pittman*, *Glassboro & Clayton Gas Co.*, 74 N. J. Eq. 255, 69 Atl. 211.

Injunction, not mandamus, is the proper remedy, if a remedy exists, to have a natural gas company restrained from taking up a pipe line by which gas is furnished to one of its customers. *State v. Connersville Natural Gas Co.*, 163 Ind. 563, 71 N. E. 483.

Where it clearly appears that a quasi public water company is making unlawful discrimination between

parties who properly apply for water in that it is refusing water to certain applicants, a mandatory injunction restraining such discrimination will be granted by the court, where such injunction is the only available remedy which is adequate to meet the conditions. *Wiemer v. Louisville Water Co.*, 130 Fed. 251.

Suit may be maintained by a private individual to enjoin a telephone company from charging him higher rates than the limit provided by an ordinance binding on the company. *Charles Simons Sons Co. v. Maryland Telephone & Telegraph Co.*, 99 Md. 141, 63 L. R. A. 727, 57 Atl. 193.

A quasi public water corporation may be restrained from cutting off the public supply of water pending the determination of the reasonableness of a demand of such corporation that the municipality pay a higher rate for its water. *Borough of Washington v. Washington Water Co.*, 70 N. J. Eq. 254, 62 Atl. 390.

³¹ A chancery bill will lie by the insurance superintendent as the organ of the state to restrain foreign corporations from doing an insurance business without compliance with law. The existence of a remedy of penal nature and nonexistence of any property to be protected is no obstacle. *North American Ins. Co. v. Yates*, 214 Ill. 272, 73 N. E. 423, aff'g 116 Ill. App. 217.

³² See chapter on Governmental Regulation, *infra*.

and its officers and other stockholders has its correlative remedies; but since the scope of this chapter could include actions by stockholders only when they were "against" the corporation, and since many of the actions that a stockholder may have are against officers or directors or other stockholders, convenience dictates the exclusion of all of them from this chapter and treatment of them in chapters dealing with the particular subject-matter of the actionable right. A similar reason has provided a separate chapter for stockholders' suits brought in right of a corporation that cannot or will not sue.³³

Mandamus is the legal remedy to compel the issuance of a certificate, and specific performance the equitable one; or there may be an action for damages for breach of the implied contract to issue it, or in replevin or trover as for a conversion; or there may be an action to recover the money paid on the subscription, electing to rescind it.³⁴ When the subscriber is deceived or defrauded into subscribing, he may rescind in equity, or sue for recovery of what he has paid treating it as rescinded, or may sue for deceit, or may set up the fraud as a defense or by way of counterclaim.³⁵ If one is expelled or excluded wrongfully from membership in a corporation, his remedy is ordinarily mandamus to compel reinstatement, though in exceptional cases equity might relieve him, or damages be recovered.³⁶ It is a conversion by the corporation which wrongfully sells or declares a forfeiture of stock or of the certificate,³⁷ or equity may set aside or enjoin the forfeiture.³⁸

The remedy for refusing to transfer shares is damages for breach of the implied promise of the corporation, or for a conversion; and a suit in equity to compel recognition and transfer will also lie; but ordinarily mandamus will not because of the adequacy of the other

³³ See generally chapter on Stock and Stockholders, subds. Actions by Stockholders to Enforce Individual Rights, etc.; Remedies of Stockholders for Injuries to the Corporation, etc., *infra*.

³⁴ See chapter on Stock and Stockholders, *infra*.

Actions in replevin or trover for refusal to deliver certificate of stock to stockholder, see chapter on Stock and Stockholders, *infra*.

Recovery of money paid on subscriptions, see Chapter 17, § 628, *supra*.

³⁵ See Chap. 17, *supra*.

³⁶ Actions for wrongful expulsion, disfranchisement or exclusion of members, see chapter on Stock and Stockholders, *infra*.

³⁷ Stockholder's action for conversion of, or to recover certificate of stock from other person, see chapter on Stock and Stockholders, subd. Nature of Stock, *infra*.

³⁸ Suit to set aside the forfeiture, or for a conversion, or in equity for injunction against it, see Chapter 17, *supra*.

remedies.³⁹ If a certificate has been lost and has come into possession of another or has been wrongfully transferred to him, the person aggrieved may sue for a retransfer or reinstatement of his rights, and may join the corporation with the wrongdoer or the holder.⁴⁰ If fictitious or fraudulent stock be issued, the corporation must respond in damages to the person ignorantly taking it for value.⁴¹ A denial of the right to share in new issues may be redressed by an action for damages or by an injunction against defeating it by imposing unlawful conditions.⁴²

In proper cases not trenching on the discretion of the directors in that regard equity may compel them to declare proper dividends on preferred as well as on common stock. Preferred holders have the additional remedy of a suit to prevent or redress payment to common stockholders in violation of the preference. After declaration the remedy is by assumpsit against the corporation, not the directors or officers unless circumstances of a personal liability have intervened. Mandamus is not the proper remedy either to compel declaration or payment.⁴³

For a denial of the right to inspect books and papers the usual remedy is mandamus against the corporation and the officers, or either, or else by statutory remedy for like relief, or in exceptional cases equitable relief will be afforded. Action for damages will also lie; and a penalty is sometimes imposed to be recovered by the stockholder or the public.⁴⁴ A stockholder who stands as a creditor,⁴⁵ or who has a con-

³⁹ See chapter on Stock and Stockholders, subd. Refusal to Transfer, *infra*.

⁴⁰ See chapter on Stock and Stockholders, subd. Forged and Unauthorized Transfers, *infra*.

⁴¹ See chapter on Stock and Stockholders, subd. Rights, etc., on Fictitious Certificates, *infra*.

⁴² May sue for damages for refusal of privilege of sharing in new issue unless an illegal premium be paid. *De la Cuesta v. Insurance Co. of North America*, 136 Pa. St. 62, 658, 9 L. R. A. 631, 20 Atl. 505, 26 Wkly. Notes Cas. 377.

May have injunction against execution of unlawful premium on right to share in new issue. In re

Cunningham's Appeal, 108 Pa. St. 546.

Remedies of stockholders as to rights in new stock, see chapter on Stock and Stockholders, subd. Increase and Reduction of Stock, *infra*.

⁴³ See chapter on Stock and Stockholders, subd. Dividends, *infra*.

⁴⁴ See Chapter 46, Inspection of Books and Papers, and chapter on Stock and Stockholders, subd. Right to Inspect Books and Papers, *infra*.

⁴⁵ A stockholder who is also a creditor may sue as such to enforce his debt in priority to a mortgage made by it. *Langston v. Greenville Land & Improvement Co.*, 120 N. C. 132, 26 S. E. 644. See also § 2944, *infra*.

tract with the corporation ⁴⁶ may have the usual remedies for the enforcement of his rights in that respect.

§ 2944. Remedies of creditors. It has already been seen that the corporation is amenable to the ordinary actions for the recovery of debts.⁴⁷ Hence a creditors' bill will lie against a corporation,⁴⁸ and its judgment purchasers who took subject to plaintiff's lien.⁴⁹ The remedies of creditors of natural persons are equally available to creditors of corporations with the addition of remedies against the stockholders and officers to follow stock liabilities or official liabilities, given by the common law or by statutes; but, ordinarily, these remedies do not take over the management of the corporation except as that is incidentally interfered with by receivership or other like custody or by liquidation and dissolution.⁵⁰ Generally if the corporation is insolvent or being liquidated the remedies of creditors are worked out through the receiver or other liquidator.⁵¹ In some states, as in New York, a remedy by sequestration of assets is given against certain kinds of corporations, and is applied for by petition or by suit as the statute

⁴⁶ A member who has a contract with the corporation incident to membership may have an accounting of money paid into the corporation thereon, though the scheme is illegal, he not being in equal wrong. *Edwards v. Michigan Tontine Inv. Co.*, 132 Mich. 1, 92 N. W. 491, 9 Det. L. N. 502.

The fact that on learning of defendant's fraud plaintiff ceased payments does not affect his remedy. *Bale v. Michigan Tontine Inv. Co.*, 132 Mich. 479, 93 N. W. 1071, 9 Det. L. N. 707.

⁴⁷ See § 2939, *supra*.

⁴⁸ See generally chapter on Execution, Supplementary Proceedings, and Creditors' Suits, *infra*; and see also, *Kittel v. Augusta, T. & G. R. Co.*, 65 Fed. 859.

A creditor's bill will lie against the corporation and its stockholders where its assets have been divided among them and it is solvent but execution proof leaving plaintiff unpaid. *Brewer v. Michigan Salt Ass'n*, 58 Mich. 351, 25 N. W. 374.

⁴⁹ A creditor of a defunct railroad corporation may sue in equity to subject the railroad in the hands of execution purchasers to his claim for work done in construction of the road, it being by law a charge or lien which follows the property to a successor. *Shamokin Valley & P. R. Co. v. Malone*, 85 Pa. St. 25.

⁵⁰ Creditors' actions to reach unpaid subscriptions, see chapter on Insolvency, *infra*.

Creditors' actions to reach statutory liability of stockholders, see chapter on Stock and Stockholders, subd. Personal Liability to Creditors, *infra*.

Creditors' actions to hold officers for debts, see Chapter 42, *supra*.

⁵¹ Receivers' and assignees' suits against stockholders, on subscription or on statutory liability, see Chapter 17, *supra*, chapters on Insolvency; Receivers; Bankruptcy; Forfeiture and Dissolution, *infra*.

admits of.⁵³ Statutory proceedings by a creditor to wind up and dissolve the corporation at the suit of a creditor also are prescribed in some of the states.⁵³ When a creditor's suit is based on a judgment against a foreign corporation, it is important to distinguish between judgments in personam and those in rem by attachment only. The latter are not binding as to any personal liability and charge only the property attached and thus subjected to the judgment. Other assets cannot be subjected without establishing the debt and exhausting legal remedies.⁵⁴ A single bond holder may sue on his bond in assumpsit although it is one of an issue equally and without priority secured by mortgage to a trustee as recited in both bond and mortgage; but the judgment recovered, if any, cannot be enforced against the security.⁵⁵

§ 2945. **Ancillary remedies and proceedings; discovery, injunction, receivers, etc.** Where the corporation is plaintiff the incidental and ancillary remedies may be invoked without raising any question of corporation law, but where it is defendant and they are invoked against it questions arise of its capacity to be subjected to the process by which such remedies are applied, and of the propriety of applying them when visitation and management would be involved. It is well settled that while the corporation itself is incapable of making a discovery, or a disclosure before trial which is the modern statutory substitute, yet its officers and stockholders may be joined or subpoenaed for that purpose, provided there is a case made in the bill for equity, or a suit shown to be pending or about to be brought, to which such discovery is necessary or proper.⁵⁶ The remedies of in-

⁵³ See N. Y. Code Civ. Proc. §§ 1784, 1793, now Gen. Corp. Law, §§ 100, 112.

The statutory remedy of sequestration extends only to corporations of the kind specified, not to a library corporation. *In re Brooklyn Lyceum*, 3 Edw. Ch. (N. Y.) 392.

A sequestration may be sought by bill through the statute allowed it to be prayed for by petition. *Judson v. Rossie Galena Co.*, 9 Paige (N. Y.) 598, 38 Am. Dec. 569.

⁵³ See N. Y. Code Civ. Proc. § 1785 et seq., now Gen. Corp. Law, § 101 et seq., and see also chapter on Forfeiture, Dissolution and Winding Up, *infra*.

⁵⁴ *Thomas v. Merchants' Bank*, 9 Paige (N. Y.) 216.

⁵⁵ *Western Pennsylvania Hospital v. Mercantile Library Hall Co.*, 189 Pa. St. 269, 42 Atl. 183, 43 Wkly. Notes Cas. 340; *Com. v. Susquehanna & D. R. R. Co.*, 122 Pa. St. 306, 1 L. R. A. 225, 15 Atl. 448.

⁵⁶ Though it cannot take an oath, discovery and an answer under oath binding on it may be had by joining members as co-defendants for that purpose. *McKim v. Odom*, 3 Bland (Md.) 407.

The bill must be one for relief against the corporation. *Many v. Beekman Iron Co.*, 9 Paige (N. Y.) 188.

Discovery may be had against members and officers even though no relief is asked against them. *Wright*

junction and receivership as against the corporation are fully discussed elsewhere, and reference thereto will show when and how such remedies are to be had.⁵⁷ They will not be allowed *pendente lite* if full, adequate and complete relief can be had without.⁵⁸ A receiver will not be appointed merely to make a defense for the corporation against its majority stockholders suing it, but the minority applying for such receiver will be relegated to their right to make such defense by a stockholders' suit anticipating the threatened litigation or by an intervention to defend therein, if it shall be brought.⁵⁹

§ 2946. Intervention and interpleader. The right and practice in intervention is governed either by equity practice or by statute, neither of which it seems treats corporations in any way different from natural persons.⁶⁰ Corporations may file a bill of interpleader in a proper case, as where there are adverse claims to a dividend.⁶¹ When the corporation is sued and cannot or will not make a proper defense because of hostile control or adverse interest of officers or of the majority, a stockholder may intervene in its behalf on a proper showing and make the defense.⁶²

v. Dame, 42 Mass. (1 Metc.) 237.

Discovery may be had of stockholders on a bill to charge them for the corporate debts; but if the case for relief fails the bill will not be retained for other relief purely legal. It will be retained when a case of fraud, account, accident or mistake appears. *Middletown Bank v. Russ*, 3 Conn. 135, 8 Am. Dec. 164.

Discovery as to corporate matters will not be allowed before judgment as a pure bill for discovery unless it is required to prosecute or defend a law action and also to be used therein. *United New Jersey Railroad & Canal Co. v. Hoppock*, 28 N. J. Eq. 261.

Joining parties for discovery, see § 3026, *infra*.

Making discovery and effect thereof, see § 3110, *infra*.

⁵⁷ See chapters on Injunction and Receivers, *infra*.

⁵⁸ Injunction and receivership against transfer of stocks by a defendant corporation will not be decreed *pendente lite* if without its aid plaintiff can obtain full adequate

and complete relief. *Hunnswell v. New York Cent. & H. River R. Co.*, 196 Fed. 543.

⁵⁹ On a bill by minority stockholders against the corporation to regulate its affairs and defend it against a suit threatened by majority stockholders, a receiver will not be appointed on motion solely to defend such suit. The minority may do so. *Blake v. Blake & Knowles Steam Pipe Works* (N. J. Ch.), 94 Atl. 419.

See generally chapter on Stock and Stockholders, subd. Remedies of Stockholders, etc., *infra*.

⁶⁰ A bill of intervention for receiver may be regarded as an original bill and tried and determined as such. *Farwell v. Great Western Tel. Co.*, 161 Ill. 522, 44 N. E. 891.

Parties in intervention, see § 3037, *infra*.

⁶¹ *Salisbury Mills v. Townsend*, 109 Mass. 115.

Parties on interpleader, see § 3037, *infra*.

⁶² See chapter on Stock and Stockholders, *infra*.

§ 2947. **Admiralty and probate proceedings.** Corporations have the same right as a natural person to maintain a libel in admiralty, in rem or in personam, to recover for salvage services or to enforce any other maritime contract, or to recover for a maritime tort. It appears to have been questioned only in the case of *The Camanche*, cited below, and the question there was not upon the capacity of the corporation to stand as a party in admiralty but as to the right of any but a person actually laboring or furnishing services to recover as a salvor. The books abound with cases where corporations have been libelants and also libelees in admiralty,⁶³ and it may be assumed as settled that they may be libelees. But a libel will not lie to enforce a penalty under a statute which provides its own penal action.⁶⁴ There also appears to have been no question that a corporation might prosecute or defend such rights as it may have in the courts of probate.⁶⁵

§ 2948. **Actions and proceedings of a penal nature.** The capacity of the corporation to incur penalties is settled as has been shown in another chapter,⁶⁶ and the procedure in penal actions will be governed by the rules applicable to natural persons, unless the penal statute itself defines a special procedure. At common law debt or a special action on the case is the appropriate form of remedy according to the nature of the penalty.⁶⁷ A libel in admiralty will not lie to enforce a

⁶³ *The Camanche*, 8 Wall. (U. S.) 448, 19 L. Ed. 397.

A corporation may perform salvage services in the same way that an owner of a vessel may by using his vessel though not personally laboring. *The Camanche*, 8 Wall. (U. S.) 448, 19 L. Ed. 397, citing *The Island City*, 1 Black (U. S.) 121, 17 L. Ed. 70. The court cites a number of other cases in which owners recovered salvage. Of them the following from England show that corporations were owners. *The Pensacola*, 1 Browning & Lush. 306; *The Paul*, Law Rep. 1 Ad. & Ec. 57; *The Minnehaha*, 1 Lush. 335.

Libel by corporation was entertained without question in *The Guy C. Goss*, 53 Fed. 839.

⁶⁴ A libel in admiralty will not lie to recover a penalty under a statute providing a remedy, and if it might,

the corporation, it seems, ought to be a party with the vessel. *Virginia & M. Steam Nav. Co. v. United States*, Taney 418, Fed. Cas. No. 16,973.

⁶⁵ A church alleged to be a corporation, which is not denied, may sue for construction of a will containing a bequest to petitioner. *First Bapt. Church v. Robberson*, 71 Mo. 326.

⁶⁶ Penalties, liability and capacity of corporation to incur, see chapter on Penalties and Crimes, *infra*.

⁶⁷ 3 Bl. Comm. 161.

For an example of a penal liability for damages under a statute requiring the fencing of railways, and of a procedure thereon, see *Iba v. Hannibal & St. J. R. Co.*, 45 Mo. 469, wherein it was held that the statutory remedy was not exclusive of a common-law action for damages for negligence.

penalty for infraction of the navigation laws if one is provided by the penal act.⁶⁸

§ 2949. Conditions precedent to actions—In general. A formation of the corporation to at least a de facto existence is, of course, a necessary predicate of any action or defense, though incorrectly referred to sometimes as a condition precedent.⁶⁹ Any prerequisite fact or condition that would be required of natural persons, either to enable them to sue or defend generally or to sue on particular causes or make particular defenses, will also apply to corporations as a necessary consequence of their assimilation to natural persons in litigation.⁷⁰ Various filings and the like may be required of corporations as the foundation of a right, e. g., the filing of a location map for a railroad. These are not conditions to the right to sue but to the substantive right.⁷¹ Some statutes require as a condition to suing or defending the filing of copies of articles or by-laws or other corporate data,⁷² or the filing of reports,⁷³ or the payment of license or franchise, or other taxes⁷⁴ and declare abatement or a forfeiture for noncom-

⁶⁸ *Virginia & M. Steam Nav. Co. v. United States*, Taney 418, Fed. Cas. No. 16,973.

⁶⁹ As to organization, see Chapter 9, *supra*.

De facto existence, see Chapter 10, *supra*.

⁷⁰ As to these matters general treatises on procedure and practice should be consulted and also the local statutes.

⁷¹ The filing of the map and profile of a railroad required by statute is not a condition precedent to a condemnation proceeding, but it may be required as evidence therein. *Wheeling Bridge & T. Ry. Co. v. Camden Consol. Oil Co.*, 35 W. Va. 205, 13 S. E. 369.

⁷² It is not necessary that the clerk be sworn or that he file a certificate of his appointment with the register of deeds. The statute (c. 76, § 3) does not so require. *South Bay Meadow Dam Co. v. Gray*, 30 Me. 547.

⁷³ When a banking corporation has surrendered its banking license and is merely winding up, it is not obliged

to render statements of financial condition to the banking department, nor is it "doing business" within the statute requiring such statements from other corporations before they can "maintain" any action. *Royal Fraternal Union v. Crosier*, 70 Kan. 85, 78 Pac. 162.

⁷⁴ A provision that a corporation shall not have or exercise any corporate power until a bonus tax is paid makes such payment prerequisite to the right to sue (former statutes explained). *Maryland Tube & Iron Works v. West End Improvement Co.*, 87 Md. 207, 39 L. R. A. 810, 39 Atl. 620.

"No corporation shall be permitted to commence or maintain any suit * * * in any court of this state without alleging and proving that it has paid its annual license fee last due." Rem. & Bal. Code, § 3715. Under this statute it is the fee last due that must be paid, and for this purpose the last one before the complaint on which the action stands is taken rather than an abandoned

pliance. If such forfeiture results ipso facto or if the legislative prohibition is absolute, abatement of the action will result; but not if some further act is to follow before forfeiture or if the failure to comply is merely a defense.⁷⁵ Thus, in California it is provided that a corporation shall not maintain or defend any action relating to its property, or the rents, issues, or profits thereof, unless it shall have previously filed a certified copy of its articles of incorporation in the county in which such property is held; and, if the objection is seasonably and properly raised, no suit in relation to its property, or the rents, issues, or profits thereof, can be maintained by a corporation until it has complied with the statute.⁷⁶ This statute applies only to actions of the kind named, not to actions for work and labor,⁷⁷ not where no property is "held in the county,"⁷⁸ and not to foreign corporations, it seems,⁷⁹ and it is not retroactive.⁸⁰ The Washington statute requiring a license fee applies only to stock corporations.⁸¹ If the statute, like that of Washington, merely disables the corporation to maintain an action, there is no obstacle to its making a defense,⁸² or a counterclaim,⁸³ or a defense against a counterclaim.⁸⁴ The effect

earlier complaint. *Wilson Case Lumber Co. v. Mountain Timber Co.*, 200 Fed. 181.

⁷⁵ See §§ 2954 and 2955, *infra*.

⁷⁶ Cal. Civ. Code, § 299.

⁷⁷ An action for work done at request is not one "in relation to such property [held in the county], its rents, issues, or profits"; hence without any filing defense can be made. *Weeks v. Garibaldi South Gold Min. Co.*, 73 Cal. 599, 15 Pac. 302.

⁷⁸ Taking of a mortgage on land is not the holding of it, etc., and no copy need be filed. *Anglo-Californian Bank v. Field*, 146 Cal. 644, 80 Pac. 1080.

⁷⁹ Query, whether Civ. Code, § 299, applies to foreign corporations because of Const. Art. XII, § 15. *Anglo-Californian Bank v. Field*, 146 Cal. 644, 80 Pac. 1080; *South Yuba Water Min. Co. v. Rosa*, 80 Cal. 333, 22 Pac. 222.

⁸⁰ The statute requiring the filing of articles does not apply to a corporation whose organization and title to the property in question antedates

the statute. *San Diego Gas Co. v. Frame*, 148 Cal. 252, 82 Pac. 1049.

⁸¹ *Mutual Home Ass'n v. Joe's Bay Trading Co.*, 73 Wash. 486, 131 Pac. 1140.

⁸² The Washington statute does not prevent maintenance of a defense to an action or of a counterclaim to one. *Boston Towboat Co. v. John H. Sesnon Co.*, 199 Fed. 445.

Failure pendente lite to pay tax held not to deprive defendant of right to defend. *J. T. Stark Grain Co. v. Harry Bros. Co.*, 57 Tex. Civ. App. 529, 122 S. W. 947.

⁸³ Statute does not prevent defense or counterclaim. *North Star Trading Co. v. Alaska-Yukon-Pacific Exposition*, 68 Wash. 457, 123 Pac. 605; *Rothchild Bros. v. Mahoney*, 51 Wash. 633, 99 Pac. 1031.

⁸⁴ The corporation may defend against a cross complaint without payment but may not do more and have judgment on the main claim. *North Star Trading Co. v. Alaska-Yukon-Pacific Exposition*, 68 Wash.

of noncompliance is to abate and not to forfeit the cause of action or any rights.⁸⁵ The objection that the statute has not been complied with must be raised by a plea in abatement, or it is waived, for the statute affects the capacity to sue, and not the cause of action,⁸⁶ and does not prevent a corporation from commencing an action, but merely suspends its right to "maintain" it, if proper objection is made "until it is filed"; and if a corporation complies with the statute after commencement of an action, but before the filing of a plea in abatement, the plea should be overruled.⁸⁷ Under another statute which made payment of a tax precedent to any exercise of corporate powers, a payment subsequent to commencement of suit was held unavailing,⁸⁸ but in a majority of the cases considering the question the statute was satisfied by a payment pendente lite.⁸⁹

§ 2950. — Demand and notice, etc. When the suit is against the corporation, it has been enacted in some states that a notice of the claim or a demand shall be presented to the corporation before or at

457, 123 Pac. 605, rev'g on rehearing 63 Wash. 376, 115 Pac. 855. Especially is this true where a counterclaim is made against it and judgment rendered thereon. *Northwest Motor Co. v. Braund*, 89 Wash. 593, 154 Pac. 1098.

⁸⁵ *California Savings & Loan Society v. Harris*, 111 Cal. 133, 43 Pac. 525.

Judgment will not be reversed for omission to have it filed. *Labory v. Los Angeles Orphan Asylum*, 97 Cal. 270, 32 Pac. 231.

If the fee is in default action abates until it is paid. *Eastman & Co. v. Watson*, 72 Wash. 522, 130 Pac. 1144.

⁸⁶ *California Savings & Loan Society v. Harris*, 111 Cal. 133, 43 Pac. 525; *Labory v. Los Angeles Orphan Asylum*, 97 Cal. 270, 32 Pac. 231.

Nonpayment of license fee before suing is waived by failure to demur or plead it. *North Star Trading Co. v. Alaska-Yukon-Pacific Exposition*, 68 Wash. 457, 123 Pac. 605, rev'g on rehearing 63 Wash. 376, 115 Pac. 855; *Rothchild Bros. v. Mahoney*, 51 Wash. 633, 99 Pac. 1031.

⁸⁷ *California Savings & Loan Society v. Harris*, 111 Cal. 133, 43 Pac. 525.

Filing a copy of its articles after trial began and after amendment of the answer to plead in abatement but before any ruling on such plea, all being held open by understanding, saves the case. *Riverdale Min. Co. v. Wicks*, 14 Cal. App. 526, 112 Pac. 896.

⁸⁸ *Maryland Tube & Iron Works v. West End Improvement Co.*, 87 Md. 207, 39 L. R. A. 810, 39 Atl. 620.

⁸⁹ It may be done pending writ of error to prevent dismissal. *Ohio-Colo. Mining & Milling Co. v. Elder*, 47 Colo. 63, 99 Pac. 42.

Payment of annual license tax before hearing and after plea is in time to save the suit. *Rollins v. Fearnley*, 45 Colo. 319, 101 Pac. 345.

Under the Washington statute the annual license fee is paid in time if before judgment. (The statute, *Rem. & Bal. Code*, § 3715, is a revenue measure.) *Northwest Motor Co. v. Braund*, 89 Wash. 593, 154 Pac. 1098, or before trial. *Eastman & Co. v. Watson*, 72 Wash. 522, 130 Pac. 1144.

the time of suing. In the absence of such a statute none is required unless the nature of the demand requires it to mature the cause of action.⁹⁰ A notice and demand may be required by statute or terms of the subscription before the corporation may sue for calls.⁹¹ Some statutes require that a notice of claim be previously served on the corporation, and these must be complied with as to causes of action covered by the statute,⁹² by service on the proper officer or agent,⁹³ unless the defense of failure to give is not urged.⁹⁴ Under statutes requiring presentment of a claim in order to sue, the bringing of the action is a sufficient claim unless the terms of the statute require a presentment with an interval before suit is begun.⁹⁵

⁹⁰ An order by the secretary of the corporation on its treasurer for payment of money may be regarded as a promissory note of the corporation and sued on without previous demand on the treasurer. *Indiana & I. C. Ry. Co. v. Davis*, 20 Ind. 6, 83 Am. Dec. 303.

Where nondelivery of stock is made the basis of an action for conversion of it by defendant corporation, there must have been a demand for issuance and a refusal. *Teeple v. Hawk-eye Gold Dredging Co.*, 137 Iowa 206, 114 N. W. 906. See more fully chapter on Stock and Stockholders, *infra*.

Failure to apply through the administrative officers before suing a railroad company for wages withheld for a relief department, is not ground for abatement when the whole department is assailed as invalid. *Baltimore & O. S. W. R. Co. v. Miles*, 184 Ind. 719, 112 N. E. 524.

As to the making of demands on commercial paper, or to fix a liability for conversion, or the like, see generally treatises on appropriate subjects.

⁹¹ See Chap. 17, *supra*.

⁹² Notice to a railroad company under the statute is not necessary before suing it in the county where the cause of action (killing an ani-

mal) originated. *Georgia Railroad & Banking Co. v. Monroe*, 49 Ga. 373.

Such an act when not effective until a day subsequent to its passage and containing a special provision as to injuries sustained "prior to the passage" of the act leaves injuries occurring during the interim unprovided for. *Gumpper v. Waterbury Traction Co.*, 68 Conn. 424, 36 Atl. 806.

⁹³ Notice of injury required to be given to the "clerk" may be given to the secretary if there is no titular clerk (Conn. Gen. St. § 2673); and a notice to the president does not meet the statute. *Mack v. New York, N. H. & H. R. Co.*, 172 Mass. 185, 51 N. E. 1076.

On any depot agent or person in charge of a station. *Dowell v. Chicago, R. I. & P. R. Co.*, 83 Kan. 562, 112 Pac. 136. See also § 3016, *infra*.

A notice preliminary to suit for a penalty for overcharge may be served on an agent of the company though its road is in possession of bondholders. *Woodhouse v. Rio Grande Ry. Co.*, 67 Tex. 416, 3 S. W. 323.

⁹⁴ *Bulkley v. Norwich & W. R. Co.*, 81 Conn. 284, 129 Am. St. Rep. 212, 70 Atl. 1021.

⁹⁵ Code, § 2164, providing "no action for the recovery of such damages

§ 2951. **Limitations of actions; laches and estoppel.** It is now unquestioned that all of these may be pleaded in actions either by or against a corporation. Some questions arise as to their application due to the impersonal and aggregate nature of a corporation. The statutes of limitations are in terms applicable to all actions, though the disabilities which toll them are in terms applicable to persons. It was therefore argued before Chief Justice Marshall, sitting on the circuit, that there was an implication that corporations could not come within their operation; but his reasoning demonstrated the fallacy of this contention and it has since remained a settled question.⁹⁶ Limitations will run for or against a state or nationally owned corporation as for or against any other.⁹⁷ The particular corporation, if specially chartered, may be subject to a scheme of limitations peculiar to itself,⁹⁸ and special statutes are found which apply from the time of ceasing business.⁹⁹ The cause of action against the corporation as responsible superior for the act of its agent or officer is the same cause which might lie against him and the same period applies; it cannot be regarded as a different one and thus put among the "other actions"

shall be maintained unless a claim therefor is presented to such company officer or agent thereof within sixty days" after accrual, does not require an interval between claim and action. Action is a claim. *Seddon v. Western U. Tel. Co.*, 146 Iowa 743, 126 N. W. 969.

⁹⁶ It is not to be reasoned that a general statute of limitations applicable to all actions is inapplicable to corporations merely because the exceptions and disabilities tolling the statute speak literally of natural persons only. *Bank of United States v. McKenzie*, 2 Brock. 393, Fed. Cas. No. 927.

A corporation is a person which may plead limitations. *People v. Trinity Church*, 22 N. Y. 44, aff'g 30 Barb. (N. Y.) 537.

⁹⁷ A publicly owned corporation does not partake of the sovereignty in the sense that the statute of limitations is inapplicable to the state or the nation. *Bank of United States v. McKenzie*, 2 Brock. 393, Fed. Cas. No. 927.

⁹⁸ A charter limitation to the *Easton & Amboy R. Co.* was not repealed by a general statute fixing a longer period (and hence the consolidated successor to all its rights, privileges, etc., could avail of the bar under its charter complete when consolidation occurred). *Lehigh Valley R. Co. v. Comar*, 151 Fed. 559, following *Vail v. Easton & A. R. Co.*, 44 N. J. L. 237.

⁹⁹ A state law applicable to state banks "closing the business of banking" has no application to a nationalized state bank which continued the business of banking with all old liabilities. *Metropolitan Nat. Bank v. Claggett*, 141 U. S. 520, 35 L. Ed. 841.

A railroad corporation "ceased from the ordinary business for which it was created" (Act April 25, 1850, P. L. 570) by sheriff's sale of its road; and by reason of that fact under terms of such statute limitations ceased to run in its favor. *Shamokin Valley & P. R. Co. v. Malone*, 85 Pa. St. 25.

not specially provided for and assigned a different period.¹ Like a natural person, a corporation may sue as a trustee regardless of the fact that in another capacity it might have been barred had it sued.²

The statute may be tolled or suspended as to corporations by disabilities or exemptions.³ Thus, a receivership or state of judicial control during insolvency may operate as a suspension of the statute.⁴ Mere nonuser or dormancy is not a concealment⁵ and with respect to foreign corporations, it has been held that they may plead the statute where they were within the state submitting to its laws and jurisdiction.⁶ A few states following the lead of New York established the judicial doctrine that a foreign corporation was a nonresident not capable of pleading limitations, though all the time present and doing business in the state.⁷ The overwhelming majority is against

¹ An action for assault by a servant is the same action against both servant and master. Hence as to the corporation it is not "any other injury to the person * * * not hereinafter enumerated" (Code Civ. Pr., § 91) for which a different period is fixed. *Priest v. Hudson River Co.*, 32 N. Y. Super. Ct. 595, 40 How. Pr. 456, 10 Abb. Pr. (N. S.) 60.

² A corporation suing for a fund as trustee is not barred because it might also have proceeded upon a claim filed with defendant as executor if it had done so in time. *Proprietors of White School House v. Post*, 31 Conn. 240.

³ A corporation, being exempt from the obligation to file a suitor's test oath on a cause of action accrued during the Civil War, could not claim that inability to take it tolled the statute. *Bank of Virginia v. Handley*, 14 W. Va. 823.

⁴ Effect of receivership to toll statute where receiver is substituted as defendant, see *Lehigh Coal & Navigation Co. v. Central R. Co. of New Jersey*, 42 N. J. Eq. 591, 8 Atl. 648.

Prescription does not run against claims while the corporation is in liquidation and not suable. *Gas Light & Banking Co. v. Haynes*, 7 La. Ann. 114.

⁵ *Ft. Scott v. Schulenberg*, 22 Kan. 648.

⁶ When foreign corporation has become a "resident" by coming into the state the statute applies. *Pennsylvania Co. v. Sloan*, 1 Ill. App. 364.

A foreign corporation is not a "person" out of the state and for that reason excepted from operation of the statute as to actions against him while so absent. *Faulkner v. Delaware & R. Canal Co.*, 1 Den. (N. Y.) 441. But an act extending for a time the right to sue to "all persons who reside beyond the limits of the state" was held to include it. *Clarke v. Bank of Mississippi*, 10 Ark. 516, 52 Am. Dec. 248.

As to residence for the purpose of applying the statutes of limitation, see § 398, p. 859, *supra*.

⁷ *Blossburg & C. R. Co. v. Tioga R. Co.*, 5 Blatchf. 387, Fed. Cas. No. 1,563; *North Missouri R. Co. v. Akers*, 4 Kan. 453, 96 Am. Dec. 183; *Boardman v. Lake Shore & M. S. Ry. Co.*, 84 N. Y. 185; *Mallory v. Tioga R. Co.*, 42 N. Y. 354, 355, 3 Abb. Dec. (N. Y.) 139, 142, 1 Trans. App. 203, 5 Abb. Pr. N. S. (N. Y.) 420, 423, 36 How. Pr. (N. Y.) 202, 203; *Olcott v. Tioga R. Co.*, 20 N. Y. 210, 75 Am. Dec. 393; *Wehrenberg v. New York, N. H. & H.*

this doctrine⁶ and in New York it was abrogated by statute.⁹ The directors undoubtedly have power to waive the statute or to extend its running by acknowledgment or new promise¹⁰ and it would seem that any officer with authority to contract or extend time of payment of debts could by a promise toll the statute,¹¹ but it has been held that neither officers nor members have authority to toll the statute and extend it against the corporation by mere admissions.¹²

The bar is prevented if the corporation be served in an action brought in time, though there is a mistake or it is misnamed in the pleadings which are not corrected until after the period has run; but it could not be brought in as a new party after the bar was complete.¹³ If by amendment the corporation is impleaded as a new party the bar having already become complete will defeat the action as in ordinary cases.¹⁴

R. Co., 124 N. Y. App. Div. 205, 108 N. Y. Supp. 704; *Robeson v. Central R. Co. of New Jersey*, 76 Hun (N. Y.) 444, 447, 28 N. Y. Supp. 104, *Thompson v. Tioga R. Co.*, 36 Barb. (N. Y.) 79, 80; *Connecticut Mut. Life Ins. Co. v. Duerson's Ex'r*, 28 Gratt. (Va.) 630.

⁶ See chapter on Foreign Corporations, *infra*.

⁹ See the New York Code of Civil Procedure.

¹⁰ *Leavitt v. Oxford & G. Silver Min. Co.*, 3 Utah 265, 1 Pac. 356.

¹¹ As to such authority, see Chapter 42, *supra*.

¹² Neither admissions of members, nor of an officer of a college corporation can toll the statute on its debt. *Lyman v. Norwich University*, 28 Vt. 560.

¹³ Amendment to correct misnomer does not let in the bar of the statute. *Southern Pac. Co. v. Graham*, 12 Tex. Civ. App. 565, 34 S. W. 135.

A petition seasonably filed against the corporation and its receivers, but alleging the cause against it and impleading them under a mistaken belief that they were its representatives who could be served, will arrest the running of the statute, even

if the receivers are misjoined. *International & G. N. R. Co. v. McCulloch* (Tex. Civ. App.), 24 S. W. 1101.

Where a judgment against a receiver was ineffectual because of his previous discharge, a so-called "supplemental petition" to bring in the corporation, which was stricken out as a supplemental pleading but docketed as a new suit, was merely a continuation in substance of the original suit and was not barred. *Texas & P. R. Co. v. Watson* (Tex. Civ. App.), 24 S. W. 952.

Defendant was not impleaded until after the bar was complete, but it was in fact merely described under another name by an amendment but not as a new party. *Pennsylvania Co. v. Sloan*, 125 Ill. 72, 8 Am. St. Rep. 337, 17 N. E. 37.

In a suit in equity to cancel land patents service on individuals within time saves the bar, and a corporation controlled by one of defendants so served cannot plead the bar though it was brought in afterwards. *Linn & Lane Timber Co. v. United States*, 196 Fed. 593, *aff'g* decree *United States v. Smith*, 181 Fed. 545.

¹⁴ See § 3080, *infra*.

When charged with notice through its officers and agents¹⁵ the bar of laches may arise against the corporation, and this even though limitations is not yet complete.¹⁶ Even the New York cases seem to have recognized that a corporation could plead laches, though it was foreign, and could not plead limitations.¹⁷ Both laches and estoppel have been invoked in a great variety of ways in favor of, as well as against, corporations. They will be discussed in other parts of this work treating of the subject-matter to which the laches or estoppel relates.¹⁸

§ 2952. Defenses by or against corporation—In general. Another corollary to the proposition that the corporation may sue or defend like a natural person, is that it may have the same defenses as far as the facts allow. When the corporation has a defense to a pending action, and by reason of wrongful control or fraud will not make it, the stockholder may intervene on a proper showing and be admitted to make it for the corporation.¹⁹ One who deals with a corporation as

¹⁵ See Chap. 42, *supra*.

That such laches as would bar a stockholders' suit will also bar one by the corporation for their benefit, see *Fox v. Robbins* (Tex. Civ. App.), 62 S. W. 815.

There is no laches imputable to the corporation to sue for annulment of a decree for fraud, where it was in the hands of the wrongdoers who alone knew of it. *Fox v. Robbins* (Tex. Civ. App.), 62 S. W. 815.

A bank held not estopped by lapse of time and silence from claiming as its own stocks placed in a person's name as trustee for it. *Hemphill v. Monongahela Nav. Co.*, 19 Pa. 351.

¹⁶ Laches may apply even if statute of limitations has not yet run; and the neglect of the president to see that defendant was operating the corporation's mines and to make objection charges it with laches. *Loomis v. Missouri Pac. R. Co.*, 165 Mo. 469, 65 S. W. 962.

¹⁷ *Kirby v. Lake Shore & M. S. R. Co.*, 14 Fed. 261.

In the foregoing case the court states that the bill does not disclose laches. It thus implies that laches

might be pleaded, the bill having been demurred to. *Id.*

¹⁸ As to corporate existence and powers, see Chapters 11 and 37, *supra*.

As affecting rights on subscriptions, see §§ 525, 599, 634, 667, 679, 687, 704-706, 715-720, *supra*.

As affecting rights of or defenses against creditors, see chapters on Insolvency; Bankruptcy; Receivers; Forfeiture, Dissolution and Winding Up, *infra*.

As affecting rights of stockholders other than on subscriptions, see chapter on Stock and Stockholders, *infra*.

Stockholders suing to prevent enforcement of a decree against the corporation may be defeated by their laches. *Wilson v. Seymour*, 76 Fed. 678.

Stockholder may be barred by laches from claiming rights in stock. *Cunningham v. Independence Consol. Min. Co.*, 58 Wash. 371, 108 Pac. 956.

¹⁹ Defenses by stockholders in right of the corporation, see chapter on Stock and Stockholders, subd. Remedies of Stockholders for Injuries to the Corporation, *infra*.

a corporation is estopped to deny that character in an action by it²⁰ and since a de facto existence is all that is required, except in an action to try that very question brought by the state or in an action founded on a de jure existence as an element in the cause of action, no defense can be made by collateral attack on the corporate existence.²¹ Ultra vires is a defense only when the action rests on the asserted power and when the defendant is in a position to question it. The question therefore takes on the form of an inquiry as to the effect of ultra vires transactions, which is fully treated in another chapter.²² Misuser or nonuser of franchise,²³ or any departure from the conditions thereof,²⁴ or change of name,²⁵ or want of legally elected officers²⁶ are not ordinarily defenses against its suit. It is no defense that the legislature has failed to prescribe modes of service or procedure in the charter or laws creating the corporation.²⁷ A stockholder may have any defense against the corporation suing him which is special to him and not a general one affecting only the whole body of stockholders, as for instance, mismanagement by officers.²⁸ The defense

²⁰ Estoppel to deny corporate existence, see Chaps. 11 and 14, supra.

²¹ See §§ 274-277, supra.

A landowner sued for an assessment for drainage may plead null corporation at the time of assessment since until full organization no assessment could be levied. *New Eel River Draining Ass'n v. Durbin*, 30 Ind. 173. This appears to have been a quasi public corporation exercising a power to make local drainage assessments.

²² See Chap. 37, supra.

A stranger to a contract cannot plead ultra vires unless it violates a duty owing to him. *State Ins. Co. of Des Moines v. Farmers' Mut. Ins. Co.*, 65 Neb. 34, 90 N. W. 997.

Ultra vires held not material in action of forcible entry by corporation. *Woodlawn Social Entertainment Ass'n v. Anderson*, 187 Ill. App. 507.

In an action on a contract it is no defense that it failed to conform to the foreign charter of defendant if within the general franchise, and if plaintiff did not know and assent to

the charter terms. *City Fire Ins. Co. v. Carrugi*, 41 Ga. 660. See also Chap. 37, supra, and chapter on Foreign Corporations, *infra*.

²³ Misuser or nonuser cannot be shown in defense (misuser by wrongly locating the line); the state only can complain of that. *Hammett v. Little Rock & N. R. Co.*, 20 Ark. 204.

²⁴ Conditions in a franchise granted by charter are pleadable defensively by a private person only when imposed for his benefit, and not when for public benefit. *Southwest Bend Bridge v. Hahn*, 28 Me. 300.

²⁵ Mere change of name without change of identity is no defense (answer held insufficient). *Wilhit v. Convent of Good Shepherd*, 117 Ky. 251, 25 Ky. L. Rep. 1375, 78 S. W. 138.

²⁶ Illegal election of officers is no defense to liability on a contract. *Carrothers v. Newton Mineral Spring Co.*, 61 Iowa 681, 17 N. W. 43.

²⁷ *Penobscot Boom Corporation v. Lamson*, 16 Me. 224, 33 Am. Dec. 656.

²⁸ When a stockholder is sued on a contract with the corporation he may

to a foreign corporation's action that it was not entitled to do business in the state will be considered in its own connection.²⁹

§ 2953. — Statutory provisions; usury, etc. A restrictive statute is not a defense available to a person in whose favor the restriction does not operate and where the transaction sued on is not made wholly void or prohibited by it.³⁰ In some of the earlier banking corporations special rates of interest were permitted to be taken, and nothing within that rate was usury.³¹ If a usurious rate has been taken by a corporation, it should be urged as a defense by appropriate pleading³² and not anticipated by bill to enjoin suit on the contract.³³ By statute in New York it has been provided that corporations shall not make the defense of usury on contracts made by them.³⁴ This applies to a corporation formed for the specific purpose of carrying on a testator's business and to a loan made by it for the benefit of the estate only and not for the corporate account,³⁵ also to foreign corporations,³⁶ and to

make any defense of fraud, mistake or imposition which tends to show that its claim alleged is unlawful and that nothing is due, but he cannot urge mismanagement injurious to him as a stockholder. *Whittington v. Farmers' Bank*, 5 Harr. & I. (Md.) 489.

See generally chapter on Stock and Stockholders, *infra*.

²⁹ See chapter on Foreign Corporations, *infra*.

³⁰ A statute providing for protection of insured persons that the insurer's investments shall not exceed 50 per cent. of the value of the security, does not invalidate mortgages for a greater margin of value so as to be a defense available to the mortgagor. *Washington Life Ins. Co. v. Clason*, 162 N. Y. 305, 56 N. E. 755.

³¹ Under statutes allowing corporations to charge a given rate of interest, usury within that rate is no defense. *McKiel v. Real Estate Bank*, 4 Ark. 592.

³² A New York corporation's want of power to take above a certain rate must be pleaded defensively in another state. *Bennington Iron Co. v.*

Rutherford, 18 N. J. L. 153.

³³ A bill will not lie to stay action on a note on the ground that usury has been taken beyond the charter limit or in violation of law, such being a defense in the action if brought. *Minturn v. Farmers' Loan & Trust Co.*, 3 N. Y. 498.

³⁴ *Belmont Branch of State Bank v. Hoge*, 35 N. Y. 65; *Frazier v. Trow's Printing & Bookbinding Co.*, 24 Hun (N. Y.) 281, *aff'd* 90 N. Y. 678 (corporation's own check taken at discount).

The statute does not apply to usury in a note indorsed by it for accommodation or where its own contract is not avoided. *Merchants' Exch. Nat. Bank v. Commercial Warehouse Co.*, 49 N. Y. 635; *Strong v. New York Laundry Mfg. Co.*, 37 N. Y. Super. Ct. 279.

³⁵ *De Moltke-Huitfeldt v. Garner & Co.*, 145 N. Y. App. Div. 766, 130 N. Y. Supp. 558, holding an agreement to make good any loss incurred by lending credit was not usurious.

³⁶ *Southern Life Insurance & Trust Co. v. Packer*, 17 N. Y. 51.

receivers, accommodation indorsers, sureties, and others in privity to the corporation.³⁷

§ 2954. Abatement and revival—In general. The term abatement has been loosely used in its application to actions, especially where a corporation is party. Thus (a) the power to institute suits may be “abated,” or (b) pending actions may be abated, or (c) the cause of action may abate and not survive, or (d) the judgment or verdict may “abate.” The first and last of these are foreign to this section.³⁸ Pending actions by or against a corporation may abate either by reason of a defect in parties caused by death, extinction or want of capacity to sue, or by a defect in jurisdiction due to improper proceedings to acquire it or to priority of jurisdiction in another action then pending. The cause of action may abate and not survive on the death of a natural person who is party to it, and also as hereafter discussed on the extinction of a corporation party to it. Except for some questions of the method of process and service on corporations, almost all cases germane to this work turn on the question of extinction of the corporation, or its incapacitation to sue or defend the particular action or any action. Whether or not the court has jurisdiction is the question raised by a plea in abatement thereto, and this is hereinafter discussed.³⁹ The action may be abated because of a bad writ but not because of a bad service thereof on the corporation.⁴⁰

If by any means it becomes extinct, all actions by or against it abate, unless they are saved by reason of some statute, as and from the time of the extinction.⁴¹

³⁷ *Stewart v. Bramhall*, 74 N. Y. 85^o (accommodation indorser); *Union Nat. Bank v. Wheeler*, 60 N. Y. 612, *aff'd* 96 U. S. 268, 24 L. Ed. 833 (indorser); *Rosa v. Butterfield*, 33 N. Y. 665 (sureties, but see *Hungerford's Bank v. Dodge*, 30 Barb. (N. Y.) 626; *Hungerford's Bank v. Potsdam & W. R. Co.*, 10 Abb. Pr. (N. Y.) 24, 19 How. Pr. (N. Y.) 39); *Butterworth v. O'Brien*, 23 N. Y. 275 (receiver); *Curtis v. Leavitt*, 15 N. Y. 9 (receiver); *Weinreb v. Coleman Stable Co.*, 70 N. Y. Misc. 535, 127 N. Y. Supp. 343 (accommodation indorser).

³⁸ Thus, whether the corporate power to institute an action or carry on a defense has been lost in its extinction or suspension is a pure question of the

effect of a forfeiture, dissolution, suspension or nonuser; and “abatement” after verdict or after judgment nearly always presents a question how it shall be enforced when against the corporation since dissolved, or on whom it shall devolve and be realized when in favor of the corporation since dissolved. See the chapter on Forfeiture and Dissolution, etc., where this is discussed in full.

³⁹ See § 2956 et seq., *infra*.

⁴⁰ *Conner v. Southern Exp. Co.*, 37 Ga. 397, holding that further time for proper service should be given on such a plea; *Protection Life Ins. Co. v. Palmer*, 81 Ill. 88. See § 2985 et seq.

⁴¹ See the cases in notes following.

Incapacitation most often occurs through the appointment of a receiver or the 'like, who may either receive title to the subject-matter of the action and thereby abate it, or in other way displace its control over the action or defense.⁴² Where the abatement is grounded on a defect in the jurisdiction consisting in an invalid process or service thereof, or an unauthorized appearance, or a priority in jurisdiction by reason of another action pending, the cases have developed nothing which requires treatment in this connection.⁴³ Numerous actions may be pending at one time in circumstances where the corporation is insolvent and pursued by creditors, or where there are factional disputes among stockholders, or where the corporation is being wound up or dissolved. There is seldom such identity in these that one of them pending is a ground of abatement of others, but even then they may be consolidated or some of them may be stayed in proper cases or other relief against multiplied or vexatious suits may be given.⁴⁴

Though a transfer of interest by the corporation in the subject-matter would ordinarily be ground for abatement, it will not have that effect if the statute saves the pending suit to close up the corporation and if the transfer was in the course of winding up.⁴⁵

When an action is maintainable against the corporation by one standing in a special capacity and not as an individual, as where a director brings a suit authorized by statute, a loss of the character in which he sues will abate the action.⁴⁶

The death of the member individually liable to creditors may abate

⁴² See also § 2955, *infra*.

As these questions are really upon the effect of receivership, see chapters on Insolvency; Bankruptcy; Forfeiture and Dissolution, etc.; Receivers, *infra*.

⁴³ General treatments of the law of abatement and revival should be consulted.

As to the process by which jurisdiction is obtainable and service thereof, see § 2985 et seq., *infra*.

⁴⁴ See chapters on Insolvency; Forfeiture, Dissolution, etc., *infra*.

See principles governing such a stay discussed in *Bedell v. North America Life Ins. Co.*, 7 Daly (N. Y.) 273.

A federal suit for a receiver will not be stayed because of the pendency of a state suit affecting the same

property but not adequate to give full relief. *Hay v. Alexandria & W. R. Co.*, 4 Hughes 331, Fed. Cas. No. 6,254a.

⁴⁵ A transfer of interest in the subject of the action by a corporation does not abate the action (ejectment) under the Delaware statute giving corporations forfeited or dissolved time to close their business, dispose of their property, etc. *Nome & Sinook Co. v. Ames Mercantile Co.*, 187 Fed. 928.

⁴⁶ A statutory action by a director to redress wrongs by co-directors may abate if he loses that character. *Hamilton v. Gibson*, 145 N. Y. App. Div. 825, 130 N. Y. Supp. 684.

an action of a penal nature, but not one of a contractual nature: this, however, is not an action either "by" or "against" the corporation, and hence is not germane to this chapter.⁴⁷

Since any extinction of the corporation will abate actions pending by or against it, if by a consolidation,⁴⁸ or a reincorporation,⁴⁹ the former constituents are regarded as ceasing to exist, then an abatement follows, but if the result is merely a changed organization with an unchanged existence then no abatement takes place.⁵⁰ A mere

⁴⁷ Abatement of creditors' action against stockholder, see chapter on Stock and Stockholders, subd. Personal Liability, etc., *infra*.

Abatement of actions by creditors against officers, see Chap. 42, *supra*.

The repeal of a purely penal liability for corporate debts will abate an action thereon pending. *Hogue v. Capital Nat. Bank of Lincoln*, 47 Neb. 929, 66 N. W. 1036; *Globe Pub. Co. v. State Bank of Nebraska*, 41 Neb. 175, 29 L. R. A. 854, 59 N. W. 683.

Action of a penal nature for failure to file annual statement does not survive. *Mitchell v. Hotchkiss*, 48 Conn. 9, 40 Am. Rep. 146; *Diversey v. Smith*, 103 Ill. 378, 42 Am. Rep. 14; *Moies v. Sprague*, 9 R. I. 541.

⁴⁸ By consolidation the old corporation ceases to exist and a condemnation suit abates. *Kansas, O. & T. Ry. Co. v. Smith*, 40 Kan. 192, 19 Pac. 636; *Wagner v. Atchison, T. & S. F. R. Co.*, 9 Kan. App. 661, 58 Pac. 1018. And see *Swartwout v. Michigan Air Line R. Co.*, 24 Mich. 389.

Contra Evans v. Interstate Rapid Transit Ry. Co., 106 Mo. 594, 17 S. W. 489.

⁴⁹ Incorporation in one jurisdiction will not dissolve a prior corporation in another jurisdiction. *United States Elec. Lighting Co. v. Leiter*, 19 App. Cas. (D. C.) 575.

Speaking of a municipal corporation it was said, "the modern doctrine is that the identity of a municipal corporation is not changed by the

repeal of its charter and the substitution of a new municipal organization for substantially the same inhabitants and locality." *Mobile Transp. Co. v. Mobile*, 128 Ala. 335, 64 L. R. A. 333, 86 Am. St. Rep. 143, 30 So. 645, *aff'd* 187 U. S. 479, 47 L. Ed. 266. To same effect, holding that county corporation was not abolished by new charter giving changed name to be used in actions, see *Town of Ottawa v. La Salle County*, 11 Ill. 654, and see also *O'Connor v. Memphis*, 6 Lea (Tenn.) 730, where municipality was reincorporated.

In Wisconsin, however, it was held that a supervisors' ordinance abolishing a town and consolidating its territory with another of different name, and ordering that a judgment should be binding on the successor, did not enable the old town to take an appeal in its own name. *Supervisors of La Pointe v. O'Malley*, 47 Wis. 332, 2 N. W. 632.

⁵⁰ Consolidation held to work no extinction and action did not abate. *Baltimore, etc., R. Co. v. Musselman*, 2 Grant (Pa.) 348. Followed on similar facts in *East Tennessee & G. R. Co. v. Evans*, 6 Heisk. (Tenn.) 607; *Thomas v. Ogden Rapid Transit Co.*, 47 Utah 595, 155 Pac. 436.

On consolidation the constituents remain existing for purpose of pending suits, at least. *Calvert, W. & B. V. Ry. Co. v. Driskill*, 31 Tex. Civ. App. 200, 71 S. W. 997.

As to reorganization not affecting

change of name does not abate a pending suit, especially where by subsequent act it is declared that it shall not have that effect.⁵¹ Statutes may and do prevent abatement by consolidation.⁵²

It has been gravely questioned whether at common law a cause of action against a business corporation with stock and assets abated when the corporation became civilly extinct, though the assumption is general that such was the common-law rule.⁵³ However that may be, it is said in New York that no such rule was adopted as part of the common law, or if so was never applied and has been abrogated.⁵⁴ To other than business corporations the common-law rule applies and the cause abates in New York.⁵⁵ In an early case it was held with

cause of action, see *Jones v. Francis*, 70 Wash. 676, 127 Pac. 307.

⁵¹ It was decided that the subsequent act had such effect, over an objection that it merely empowered a newly-created successor to carry on litigation in its new name. The constitutionality of such retrospective operation appears not to have been questioned. *Thomas v. Frederick County School*, 7 Gill & J. (Md.) 369.

⁵² *Wells v. Missouri-Edison Elec. Co.*, 108 Mo. App. 607, 84 S. W. 204.

Consolidation under New York statute works no abatement because of N. Y. L. 1884, c. 367, § 6, which expressly saves pending actions. *Edison Elec. Light Co. v. United States Elec. Lighting Co.*, 52 Fed. 300; *Edison Elec. Light Co. v. Westinghouse*, 34 Fed. 232.

Consolidation does not abate eminent domain proceedings where the statute vests all rights in the new company. In *re Metropolitan El. R. Co.*, 12 N. Y. Supp. 506.

⁵³ Formerly a tort cause of action did not survive, but now by statutes it may do so. See chapter on Forfeiture, Dissolution, etc., *infra*.

The rule was evolved when corporations were either municipal, ecclesiastical or eleemosynary with reversion of all realty to the grantor or donor and all personal estate of such corporations to the King. *Shayne v. Even-*

ing Post Pub. Co., 168 N. Y. 70, 55 L. R. A. 777, 85 Am. St. Rep. 654, 61 N. E. 115, rev'g 56 N. Y. App. Div. 426, 67 N. Y. Supp. 937.

In an early Virginia case it was held that when no statute regulates it, the succession is according to common-law principles, all property and rights reverting to donors or resulting to the state. The court observed that it would be "grossly unjust" to absolve persons of their liabilities and deny their rights merely because of dissolution. *Rider v. Nelson & Albemarle Union Factory*, 7 Leigh (Va.) 154, 30 Am. Dec. 495. See also to same effect, *Miller v. Newburg Orrel Coal Co.*, 31 W. Va. 836, 13 Am. St. Rep. 903, 8 S. E. 600, where the corporation continuing *de facto* was held liable.

Debt owing to corporation is extinguished by expiration of its charter without assignment of such debt. *Commercial Bank v. Lockwood's Adm'r*, 2 Harr. (Del.) 8.

⁵⁴ *Shayne v. Evening Post Pub. Co.*, 168 N. Y. 70, 55 L. R. A. 777, 85 Am. St. Rep. 654, 61 N. E. 115, rev'g 56 N. Y. App. Div. 426, 67 N. Y. Supp. 937.

⁵⁵ In an earlier case it was said that at common law a personal injury action would abate on dissolution of defendant. Explaining that the Business Corporations Law saved such ac-

apparently sound reasoning that any cause accruing to the successor as such does not abate,⁵⁶ and in consideration of the public interest underlying them condemnation rights of action are not abated by a consolidation of the corporation which instituted the proceedings.⁵⁷ Aside from statutes, the maxim *actio personalis moritur cum persona* does not apply to civil death, and does not extinguish such actions against corporations becoming organically extinct.⁵⁸

Legislation may and does provide for the survival of causes of action when the corporation becomes extinguished,⁵⁹ or consolidated,⁶⁰ either by statute applying specially to corporate extinction,⁶¹ or by

tions when pending against "business" corporations, the court held that if there was no showing that defendant was such a corporation the cause of action abated. *In re D. G. Yuengling Brewing Co.*, 24 N. Y. App. Div. 223, 49 N. Y. Supp. 12.

⁵⁶ *Louisville v. Bank of United States*, 3 B. Mon. (Ky.) 138.

Assuming that there must always have been some succession to the corporate property either by the stockholders, or by escheat or by reversion to the donors, it would seem that the successor might always have enforced the right or been subjected to the liability if it was incident to a right of property coming to him, and if it was not of a personal nature (or analogous thereto) which died with the corporation, and if the common-law doctrines of champerty and non-assignability of choses in action did not interfere.

⁵⁷ In case of condemnation proceedings, wherein the corporation as plaintiff is an agent of the public interest, a consolidation does not abate the cause of action and the consolidated corporation may be substituted as plaintiff. *California Cent. Ry. Co. v. Hooper*, 76 Cal. 404, 18 Pac. 599, construing statutes relating to substitution. This was also held under a statute vesting all rights in the new company. *In re Metropolitan El. R. Co.*, 12 N. Y. Supp. 506.

⁵⁸ Cause of action for libel does not abate. *Shayne v. Evening Post Pub. Co.*, 168 N. Y. 70, 55 L. R. A. 777, 85 Am. St. Rep. 654, 61 N. E. 115, rev'g 56 N. Y. App. Div. 426, 67 N. Y. Supp. 937.

⁵⁹ *Robinson v. Lane*, 19 Ga. 337.

Trover for abstraction of ore from place survives both at common law and under Colorado statutes (Rev. St. 1908, § 7258). *Portland Gold Min. Co. v. Stratton's Independence*, 196 Fed. 714.

⁶⁰ Cause of action held to have antedated consolidation, and hence under statute suit was not abated. *Chicago, S. F. & C. R. Co. v. Ashling*, 56 Ill. App. 327, aff'd 160 Ill. 373, 43 N. E. 373.

⁶¹ "Liabilities incurred previous to its dissolution" survive. This includes a liability for personal injuries. *Marstaller v. Mills*, 143 N. Y. 398, 38 N. E. 370.

Cause of action on bond given by a federal contractor under Act of Congress of 1905 is survivable. *In re People's Surety Co. of New York*, 82 N. Y. Misc. 518, 144 N. Y. Supp. 131.

Action for death by wrongful act does not abate. *People v. Troy Steel & Iron Co.*, 82 Hun (N. Y.) 303, 24 N. Y. Civ. Proc. 201, 1 N. Y. Ann. Cas. 138, 31 N. Y. Supp. 337.

Cause of action for assault survives where charter makes corporation liable for its servant's misfeasance.

application of the statutes which provide generally which causes of action shall survive the death of a natural person,⁶² but it cannot revive a cause that is gone.⁶³ Actions for slander of the corporate business has been held not to be an injury to "person" or "property," and hence not survivable.⁶⁴ This decision seems open to serious question, and in another case a so-called malicious civil prosecution of the corporation was regarded as surviving because it really was an injury to property.⁶⁵

After expiration a de facto existence may continue the corporation so as to carry with it a liability accruing them.⁶⁶ A formal reorganization or succession does not abate the cause of action. It follows to the new organization.⁶⁷

The weight of authority, as well as of reason, is that attachments and garnishments abate with the action,⁶⁸ though the contrary has

Hepworth v. Union Ferry Co., 62 Hun (N. Y.) 257, 16 N. Y. Supp. 692, 22 N. Y. Civ. Proc. 407, 16 N. Y. Supp. 692, 19 N. Y. Supp. 968.

Cause of action for personal injuries survives. Gordon v. Evening Post Pub. Co., 66 N. Y. Supp. 828.

⁶² Arkansas Life Ins. Co. v. American Nat. Life Ins. Co., 110 Ark. 130, 161 S. W. 136.

⁶³ After a cause of action is abated the legislature cannot revive the corporation and reinstate it. Commercial Bank v. Lockwood's Adm'r, 2 Harr. (Del.) 8.

⁶⁴ The statutes providing for the survival of actions for injury to "person" or "property" apply to corporations in Arkansas but do not include actions for slander of the corporate business; and such an action does not survive its dissolution and pass to its assignee and successor. Arkansas Life Ins. Co. v. American Nat. Life Ins. Co., 110 Ark. 130, 161 S. W. 136.

⁶⁵ An action called malicious prosecution, but really one for trespass to property under color of attachment, survives under Florida Rev. St. 1892, § 989, not being one for personal injuries. L. Bucki & Son Lumber Co. v. Atlantic Lumber Co., 128 Fed. 332.

⁶⁶ Miller v. Newburg Orrel Coal Co., 31 W. Va. 836, 13 Am. St. Rep. 903, 8 S. E. 600.

Where, as in Arkansas, no statute limits the corporate existence, it continues as a de facto corporation after expiration of the time fixed in its articles. Its contracts do not thereby abate. Arlington Hotel Co. v. Rector, 124 Ark. 90, 186 S. W. 622.

⁶⁷ Reorganization by transferring all the assets to the new corporation and issuing all the stock pro rata to old stockholders, held to be a mere continuance of the old; and a cause accruing while the old was forfeited for nonpayment of tax was good against the new one. Jones v. Francis, 70 Wash. 676, 127 Pac. 307.

⁶⁸ Farmers' & Mechanics' Bank v. Little, 8 Watts & S. (Pa.) 207, 42 Am. Dec. 293, per Gibson, C. J.

Attachment abates. Stiles v. Laurel Fork Oil & Coal Co., 47 W. Va. 838, 35 S. E. 986.

Attachment is dissolved. Morgan v. New York Nat. Building & Loan Ass'n, 73 Conn. 151, 46 Atl. 877; Wilcox v. Continental Life Ins. Co., 56 Conn. 468, 16 Atl. 244.

Attachment defendant cannot appear and defend. Whitman v. Cox, 26 Me. 335.

obtained in the decisions rendered in some jurisdictions.⁶⁹

Where the case has passed into judgment dissolution does not abate it,⁷⁰ especially not where the public is the real judgment plaintiff and the corporation a nominal one,⁷¹ but a revivor to enforce the judgment may be necessary,⁷² or enforcement may be restricted to winding up proceedings,⁷³ and a foreign judgment, though rendered within the period of continued existence, will not be allowed to prevail in the administration of domiciliary assets.⁷⁴

The law of the domicile by which corporate existence is determined will be applied and may prevent abatement,⁷⁵ but the procedural law

Garnishment abates. *Walters v. Western & A. R. Co.*, 69 Fed. 679, aff'd 74 Fed. 656, on other grounds.

⁶⁹ Attachment and garnishment in suit begun before expiration of defendant corporation is not dissolved by its dissolution as against garnishees. *Lindell v. Benton & Kennerly*, 6 Mo. 361.

Attachment of property of foreign corporation is not abated by its dissolution. *City Ins. Co. of Providence v. Commercial Bank of Bristol*, 68 Ill. 348.

⁷⁰ *Steinhauer v. Colmar*, 11 Colo. App. 494, 56 Pac. 291. See *Chew v. Peale*, 12 Smedes & M. (Miss.) 700; *Commercial Bank v. Chambers*, 8 Smedes & M. (Miss.) 9, 44; *Nevitt v. Bank of Port Gibson*, 6 Smedes & M. (Miss.) 513.

Dissolution pending appeal does not abate it where previously the cause of action was assigned by the corporation. *Bank of Alexandria v. Patton*, 1 Rob. (Va.) 499.

Effect on writ of error or appeal, see also § 3124, *infra*.

⁷¹ The ordinary rule does not apply where the public school fund is the real beneficiary of the fund for which the corporation sues, and judgment is rendered during its existence. *Ingraham v. Terry*, 11 Humph. (Tenn.) 572.

⁷² But if dissolution occurred before judgment, execution thereafter should

be quashed on motion. *May v. State Bank of North Carolina*, 2 Rob. (Va.) 56, 40 Am. Dec. 726.

⁷³ Under a statute making "person" include corporation, the statute forbidding execution if a person "dies" after judgment applies to a corporation dissolved after judgment. It should be paid in course of administration by directors. *Allison v. Richardson*, — Tex. Civ. App. —, 171 S. W. 1021.

Surrender of charter after judgment prevents scire facias to revive it, especially where the statutes provide a method of distributing the corporate assets among creditors. *Mumma v. Potomac Co.*, 8 Pet. (U. S.) 281, 8 L. Ed. 945.

⁷⁴ A foreign judgment against a New York corporation within the extended period will not be recognized as affecting New York assets. *Rodgers v. Adriatic Fire Ins. Co.*, 148 N. Y. 34, 42 N. E. 515. To same effect, see *Insurance Com'r v. United Fire Ins. Co.*, 22 R. I. 377, 48 Atl. 202.

⁷⁵ New Jersey statute continuing existence after forfeiture applies to save action in New York. *Sinnott v. Hanan*, 214 N. Y. 454, 108 N. E. 858, rev'g 156 N. Y. App. Div. 323, 141 N. Y. Supp. 505.

The statutes of the forum continuing corporate existence do not apply to foreign corporations. Suits against them abate on dissolution. *Marion*

of the foreign state regulating such suits does not apply;⁷⁶ hence statutes of revivor have no extraterritorial effect on abated suits.⁷⁷ A federal statute extending existence of a federal corporation applies in state courts.⁷⁸ The law of the forum extending such existence has also been applied on the presumption indulged in a few states, that the law of the domicile was the same⁷⁹ and also on the theory that the corporation continued de facto where it was doing business.⁸⁰ The substantive law of abatement as fixed by the local statutes will be applied in the federal courts,⁸¹ such as the effect of a forfeiture for nonpayment of a tax⁸² and the right to revive the suit.⁸³ All procedure is arrested by an abatement,⁸⁴ and judgment cannot be

Phosphate Co. v. Perry, 74 Fed. 425, 33 L. R. A. 252.

⁷⁶ Provision for notice to trustees or receivers before entry of judgment held not applicable. *Sinnott v. Hannan*, 214 N. Y. 454, 108 N. E. 858, rev'g 156 N. Y. App. Div. 323, 141 N. Y. Supp. 505.

⁷⁷ Laws of the domicile subsequent to abatement in the forum have no effect to revive the suit. *Bank of Gallipolis v. Trimble*, 6 B. Mon. (Ky.) 599.

⁷⁸ The federal statutes (5 Stat. 211) and the 21st section of the charter of the Bank of the United States enabled the prosecution of pending suits to judgment and satisfaction in state as well as in federal courts. *Bank of United States v. Leathers*, 8 B. Mon. (Ky.) 126.

⁷⁹ Foreign law presumed same as statute of forum. *Schmitt & Bro. Co. v. Mahoney*, 60 Neb. 20, 82 N. W. 99. But that there is no presumption that foreign laws are same as those of forum in respect to dissolution, see *Olds v. City Trust, Safe Deposit & Surety Co.*, 185 Mass. 500, 102 Am. St. Rep. 356, 70 N. E. 1022.

⁸⁰ The statutes which treat the corporation as continuing for winding up purposes apply to foreign corporations. They may be regarded as de facto corporations within the state after dissolution at home. *Life Ass'n*

of America v. Fassett, 102 Ill. 315; and see also *American Exch. Bank v. Mitchell*, 179 Ill. App. 612.

⁸¹ The New Jersey statute continuing corporations for the purpose of "prosecuting or defending suits by and against" the corporation prevents abatement of an action by the corporation in Florida in a federal circuit court. *L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.*, 128 Fed. 332.

⁸² *United States v. Spokane Mill Co.*, 206 Fed. 999.

Accordingly a Delaware corporation failing to pay a tax and forfeited thereby, but continued by statute for three years to sue or be sued, is within such time suable in another federal jurisdiction. *Scott v. Stockholders' Oil Co.*, 142 Fed. 287.

⁸³ *Portland Gold Min. Co. v. Stratton's Independence, Ltd.*, 196 Fed. 714.

⁸⁴ The authority of counsel for the dissolved corporation ceases ipso facto. *Wamsley v. H. L. Horton & Co.*, 87 Hun (N. Y.) 347, 34 N. Y. Supp. 306.

An abated action may under New York county practice be marked "abated" on the calendar and stand thus until on revival it resumes its place on the day calendar. *Gordon v. Evening Post Pub. Co.*, 66 N. Y. Supp. 828.

rendered thereafter unless the case was already under submission, in which event entry may be *nunc pro tunc*,⁸⁵ but if the suit does not abate its incidents follow notwithstanding dissolution.⁸⁶ Where the action abates but the cause of action survives,⁸⁷ revivor or substitution can and must be had⁸⁸ by or against the person on whom the title or liability falls in succession,⁸⁹ and if he be receiver of another

⁸⁵ In case dissolution pendente lite appears it is proper to refuse to enter verdict and to grant a new trial on terms, though the pleadings make no issue of corporate existence. *Eagle Chair Co. v. Kelsey*, 23 Kan. 632.

No judgment can thereafter be entered. *Rankin v. Sherwood*, 33 Me. 509; *Merrill v. Suffolk Bank*, 31 Me. 57, 50 Am. Dec. 649.

When it expired pending trial, judgment cannot be entered on the verdict. *Eagle Chair Co. v. Kelsey*, 23 Kan. 632.

Taking judgment after dissolution held mere irregularity under statute which enabled officers to have been substituted. *Kansas City Hotel Co. v. Sauer*, 65 Mo. 279.

Where dissolution occurs after submission, the findings and judgment held under advisement will be dated and filed *nunc pro tunc* of the day of submission. *Shakman v. United States Credit System Co.*, 92 Wis. 366, 32 L. R. A. 383, 53 Am. St. Rep. 920, 66 N. W. 528.

⁸⁶ A cross-complaint may be filed after forfeiture in an action begun before and not abated thereby. *Lowe v. Superior Court of Los Angeles County*, 165 Cal. 708, 134 Pac. 190.

⁸⁷ Cause of action for subscriptions survives. Objection, if good, was waived by not pleading in abatement. *Swartwout v. Michigan Air Line R. Co.*, 24 Mich. 389.

⁸⁸ *Shayne v. Evening Post Pub. Co.*, 168 N. Y. 70, 55 L. R. A. 777, 85 Am. St. Rep. 654, 61 N. E. 115, rev'g 56 N. Y. App. Div. 426, 67 N. Y. Supp. 937, which held such revivor impos-

sible; *Phillips v. American Union Fire Ins. Co. of Philadelphia*, 168 N. Y. App. Div. 938, 153 N. Y. Supp. 99; *Printograph Sales Co. v. American Addressing & Mailing Co.*, 161 N. Y. App. Div. 917, 146 N. Y. Supp. 312.

Creditor may continue action against directors as trustees of assets. *Sturges v. Vanderbilt*, 73 N. Y. 384.

N. Y. Code Civ. Proc. §§ 755, 756, contain the same provisions as Laws, 1832, c. 295, and enable the court to continue actions against the corporation if they are not of the kind where the cause abates. *People v. Troy Steel & Iron Co.*, 82 Hun (N. Y.) 303, 31 N. Y. Supp. 337.

Trustees of foreign corporation substituted. President, etc., of New Jersey Protection & Lombard Bank v. Thorp, 6 Cow. (N. Y.) 46.

Under statute a revivor and substitution must be had within a year after consolidation unless the corporation consents to more time. *Chicago, K. & W. R. Co. v. Butts*, 55 Kan. 660, 41 Pac. 948; *Cunkle v. Interstate R. Co.*, 54 Kan. 194, 40 Pac. 184.

Directors should not be substituted when the corporation still presumably exists. *Rippstein v. Haynes Medina Valley R. Co.* (Tex. Civ. App.), 85 S. W. 314.

⁸⁹ The receiver need not be substituted. *Knaue v. Globe Mut. Life Ins. Co.*, 46 N. Y. Super. Ct. 370.

A receiver in voluntary dissolution does not assume liabilities, and the action will not be continued against him under the statute. *Owen v. Kellogg*, 56 Hun (N. Y.) 455, 10 N. Y. Supp. 75.

court, its leave thereto may be required.⁹⁰ If the suit does not abate no revivor against a receiver is necessary,⁹¹ but a substitution upon consolidation may be allowed even where there is no abatement.⁹²

§ 2955. — Effect of insolvency, bankruptcy, receivership or dissolution. Abatement by reason of incapacitation to sue or defend due to displacement of the corporate functions and lodgment of them temporarily in a receiver or the like, or due to devolution of title to the subject-matter on such receiver, really turns on the extent and effect of the receivership, bankruptcy or insolvency.⁹³ At common

A cause of action on a replevin bond and for foreclosure of a landlord's lien does not abate, and may be revived by the successors of the corporation in equity (in this case a new corporation). *Kelly v. Rochelle* (Tex. Civ. App.), 93 S. W. 164.

In foreclosure suits where the corporate owner of the fee becomes extinct the successor in title must be brought in. *Hawley v. Bonanza Queen*, Min. Co., 61 Wash. 90, 111 Pac. 1073.

A new company which did not come into possession of ore or its proceeds tortiously taken by a former company cannot be substituted for the purpose of revivor. *Portland Gold Min. Co. v. Stratton's Independence, Ltd.*, 196 Fed. 714.

A new corporation does not necessarily become subject to a possessory action for recovery of lands where they were transferred pendente lite by judicial sale. *Moseley v. Albany Northern R. Co.*, 14 How. Pr. (N. Y.) 71. Substitution denied on such a showing. *Id.*

Names of parties for whose use an expired corporation sues may be inserted by amendment as plaintiffs to the bill. *Frye v. Bank of Illinois*, 10 Ill. (5 Gilm.) 332.

⁹⁰ A domiciliary receiver could not have been substituted in an action in a federal circuit court in a foreign state without leave of the appointing court so as to bind assets in his

hands; nor does his employment of attorneys to argue an appeal pending make him a party or substitute him. *Pendleton v. Russell*, 144 U. S. 640, 36 L. Ed. 574.

⁹¹ Under the Ohio statute, which saves pending suits from abatement, a revivor in a federal court against a state receiver is not necessary. *Lake Superior Iron Co. v. Brown, Bonnell & Co.*, 44 Fed. 539, *aff'd* *Leadville Coal Co. v. McCreery*, 141 U. S. 475, 35 L. Ed. 824.

Since the statute (License Tax Act, § 10a) does not require suits after forfeiture to wind up the corporate affairs to be in the names of the trustees, a substitution of them in an action begun after forfeiture of the corporation by it will be denied. *Kehrlein-Swinerton Const. Co. v. Rappen*, 30 Cal. App. 11, 156 Pac. 972.

⁹² Where consolidation effects no abatement because the statute saves pending actions, the consolidated corporation may be substituted. *Edison Elec. Light Co. v. Westinghouse*, 34 Fed. 232. And see *Kinion v. Kansas City, Ft. S. & M. R. Co.*, 39 Mo. App. 574.

Procedure to effect substitution, see § 3036, *infra*.

⁹³ See chapters on Insolvency; Bankruptcy; Receivers, *infra*, and particularly those parts of the respective chapters treating of effect on pending suits.

law and now, unless the statute otherwise provides, a dissolution abates all pending actions by⁹⁴ or against it,⁹⁵ and this applies alike whether the dissolution is by expiration or by judicial decree of forfeiture,⁹⁶ or the corporation is domestic or foreign⁹⁷ and in equity

⁹⁴*Bank of United States v. McLaughlin*, 2 Cranch C. C. 20, Fed. Cas. No. 928; *National Pahquioque Bank v. First Nat. Bank*, 36 Conn. 325, 4 Am. Rep. 80, aff'd 14 Wall. (U. S.) 383, 20 L. Ed. 840; *Singer & Talcott Stone Co. v. Hutchinson*, 176 Ill. 48, 51 N. E. 622, rev'g 72 Ill. App. 366; *Torry v. Robertson*, 24 Miss. 192; *Bank of Mississippi v. Wrenn*, 11 Miss. (3 Smedes & M.) 791.

Suit by nationalized foreign state bank on cause accruing to the state banking corporation held abated. *American Exch. Bank v. Mitchell*, 179 Ill. App. 612.

Cause of action assigned after dissolution of building and loan association. *Van Pelt v. Home Building & Loan Ass'n*, 87 Ga. 370, 13 S. E. 574.

A pending suit being thus abated is not pleadable as another action pending to abate an action by its assignee. *Thurman v. Walraven*, 16 Ga. App. 521, 85 S. E. 685.

Replevin suit abates. *MacRae v. Kansas City Piano Co.*, 69 Kan. 457, 77 Pac. 94.

⁹⁵*United States. Pendleton v. Russell*, 144 U. S. 640, 36 L. Ed. 574; *United States v. Spokane Mill Co.*, 206 Fed. 999 (denying a motion to reinstate a dismissed action because of dissolution meanwhile); *Greeley v. Smith*, 3 Story 657, Fed. Cas. No. 5,748.

California. Lowe v. Superior Court of Los Angeles County, 165 Cal. 708, 134 Pac. 190; *Newhall v. Western Zinc Co.*, 164 Cal. 380, 128 Pac. 1040; *Crossman v. Vivienda Water Co.*, 150 Cal. 575, 89 Pac. 335.

Connecticut. Wilcox v. Continental Life Ins. Co., 56 Conn. 468, 16 Atl. 244.

Illinois. Life Ass'n of America v. Fassett, 102 Ill. 315.

Louisiana. Musson v. Richardson, 11 Rob. 37.

New York. People v. Knickerbocker Life Ins. Co., 106 N. Y. 619, 13 N. E. 447, aff'd 144 U. S. 640, 36 L. Ed. 574; *McCulloch v. Norwood*, 58 N. Y. 562.

Dissolution under National Bank Act. *National Bank v. Colby*, 21 Wall. (U. S.) 609, 22 L. Ed. 687.

It cannot be regarded as continuing a de facto existence merely because the controlling stockholders assume to continue the defense. *Venable Bros. v. Southern Granite Co.*, 135 Ga. 508, 32 L. R. A. (N. S.) 446, 69 S. E. 822.

⁹⁶*Newhall v. Western Zinc Co.*, 164 Cal. 380, 128 Pac. 1040.

But see dictum that it applies only in case of judicial decree or legislative repeal. *National Pahquioque Bank v. First Nat. Bank*, 36 Obnn. 325, 335, 4 Am. Rep. 80, aff'd 14 Wall. (U. S.) 383, 20 L. Ed. 840.

On expiration by time no decree is necessary or possible, and the corporation cannot be treated as going until the contrary is found. *Sturges v. Vanderbilt*, 73 N. Y. 384.

Abatement does not take place where no statute limits the duration of the corporation and only the time named in the articles has expired. *Arlington Hotel Co. v. Rector*, 124 Ark. 90, 186 S. W. 622.

⁹⁷Expiration abates action by foreign bank. *Bank of Gallipolis v. Trimble*, 6 B. Mon. (Ky.) 599; *President, etc., of New Jersey Protection & Lombard Bank v. Thorp*, 6 Cow. (N. Y.) 46; *Life Ass'n of America v. Goode*, 71 Tex. 90, 8 S. W. 639.

As to a foreign corporation, the

as well as in law, except where the proceeding is strictly in rem.⁹⁸ A surrender of the charter and acceptance by the legislature,⁹⁹ or a repeal of the charter,¹ also has that effect; but a mere winding up² or insolvency alone is not equivalent in effect.³ Even a suit by the state may abate by dissolution.⁴

The dissolution must be a legally effective one terminating corporate existence.⁵ Therefore a cause for forfeiture and dissolution without a decree establishing it,⁶ such as nonpayment of license

law of the domicile may prevent abatement. See § 2954, *supra*, and see *infra* note 27.

⁹⁸ The Washington court explains that in equity the suit might have proceeded against other parties if in court or if substituted; but without them it could not. *Hawley v. Bonanza Queen Min. Co.*, 61 Wash. 90, 111 Pac. 1073.

The exception made in the foregoing case of proceedings in rem seems to be unreal. As a proceeding in rem is not essentially inter partes but rather inter omnes and against the res only, extinction of a party cited into court ought not to affect the proceeding.

Equity enforces rights in the assets under the theory of a trust. *Nelson v. Hubbard*, 96 Ala. 238, 17 L. R. A. 375, 11 So. 428.

⁹⁹ *Greeley v. Smith*, 3 Story 657, Fed. Cas. No. 5,748.

¹ *Board of Councilmen City of Frankfort v. Deposit Bank of Frankfort*, 120 Fed. 165, *aff'd* 124 Fed. 18; *Merrill v. Suffolk Bank*, 31 Me. 57, 50 Am. Dec. 649; *Whitman v. Cox*, 26 Me. 335; *Read v. Frankfort Bank*, 23 Me. 318.

² The liquidation act for the State Bank merely wound it up and did not extinguish its existence totally. *Underhill v. State Bank*, 6 Ark. 135.

³ Effect of insolvency on action or suit, see also chapter on Insolvency, *infra*, and see this section note 6, *infra*.

A sale under a state owned lien of

a railroad corporation's properties with a reservation of some of them from sale did not dissolve it. *Bump v. Butler County*, 93 Fed. 290.

⁴ *State v. Arkansas Cotton Oil Co.*, 116 Ark. 74, Ann. Cas. 1917 A 1178, 171 S. W. 1192.

⁵ Statutes, declaring that the charter "is" repealed, construed and held not to have effected an immediate extinction, where it also provided that its railroad should be operated for a time. *State v. Port Royal & A. Ry. Co.*, 45 S. C. 413, 23 S. E. 363.

A mere voluntary resolution to dissolve did not accomplish it and abate a pending action. *New York Marbled Iron Works v. Smith*, 11 N. Y. Super. Ct. 362.

Mere cessation of business and sale of property is not dissolution. *Kansas City Hotel Co. v. Sauer*, 65 Mo. 279; *Butchers' & Drovers' Bank v. Pulitzer*, 11 Mo. App. 594.

⁶ *Consolidated Ass'n of Planters of Louisiana v. Lord*, 35 La. Ann. 425, 434; *Regents of University v. Williams*, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72; *Moore v. Schoppert*, 22 W. Va. 282.

A decree is necessary to effect forfeiture for nonuser; hence until it, action does not abate and judgment is good. *West v. Carolina Life Ins. Co.*, 31 Ark. 476; *Mickles v. Rochester City Bank*, 11 Paige (N. Y.) 118, 42 Am. Dec. 103. So held where the statute declares forfeiture (Code, § 1273) and also provides a procedure

tax⁷ or mere receivership or insolvency leaving the corporation in existence,⁸ especially a receivership in another court,⁹ or a mere non-

to vacate the charter and annul the corporation (Code, § 3417). *Bloch v. O'Connor Min. & Mfg. Co.*, 129 Ala. 528, 29 So. 925.

Mere dormancy and failure to elect officers does not show extinction without a decree of forfeiture. *Trustees of Vernon Society v. Hills*, 6 Cow. (N. Y.) 23, 16 Am. Dec. 429.

Kansas Gen. St. c. 23, § 40, providing how a corporation is dissolved and also that one in suspense for one year "shall be deemed to be dissolved for the purpose of" suits to enforce stockholders' liability to creditors, is limited to that purpose. It remains going for the purpose of other suits. *Whitman v. Citizens' Bank of Reading*, 110 Fed. 503, following *Sleeper v. Norris*, 59 Kan. 555, 53 Pac. 757.

Except in case of expiration the continuation of existence after "forfeiture or other cause" means forfeiture or some other cause ascertained by decree. *Klamath Lumber Co. v. Bamber*, 74 Ore. 287, 145 Pac. 650, 142 Pac. 359.

Long nonuser after judicial sale of all property held to show dissolution. *Combes v. Keyes*, 89 Wis. 297, 27 L. R. A. 369, 46 Am. St. Rep. 839, 62 N. W. 89.

⁷A failure to pay license tax does not forfeit the corporation without the further statutory proclamation by the governor and the acts required of the secretary of state. *Alaska Salmon Co. v. Standard Box Co.*, 158 Cal. 567, 112 Pac. 454; *Kaiser Land & Fruit Co. v. Curry*, 155 Cal. 638, 103 Pac. 341.

The proclamation by the governor called for by the statute is precedent to extinction so as to absolve it from further license fees. *Klamath Lumber Co. v. Bamber*, 74 Ore. 287, 145 Pac. 650, 142 Pac. 359.

Decree is necessary in case of non-payment of tax. The secretary of state cannot declare forfeiture (*Sayles' Ann. Civ. St.* 1897, art. 5243i). *Rippstein v. Haynes Medina Valley R. Co.* (Tex. Civ. App.), 85 S. W. 314.

The entry of a notation on the record by the secretary of state of the word "Forfeited" (*Sayles' Civ. St.* art. 5243i) does not accomplish it. *Fox v. Robbins* (Tex. Civ. App.), 62 S. W. 815.

Laws 1911, p. 135, extending the time for applying for reinstatement after default in payment of license tax to "any time after its name has been stricken" from the records repealed, *Rem. & Bal. Code, § 3715d*, providing for a dissolution. *State v. Howell*, 67 Wash. 377, 121 Pac. 861.

In West Virginia a forfeiture declared for nonpayment of tax and an official proclamation thereof was held not to work a dissolution without some judicial hearing. *Greenbrier Lumber Co. v. Ward*, 30 W. Va. 43, 3 S. E. 227.

Judicial decree is necessary to declare forfeiture for failure to file report and designate agent for service. *St. Louis Stearns Auto Co. v. Singers*, 179 Ill. App. 556; *Gilmer Creamery Ass'n v. Quentin*, 142 Ill. App. 448; *Spreyne v. Garfield Lodge No. 1 of United Slavonian Benev. Society*, 117 Ill. App. 253.

* *Rooney v. Southern Building & Loan Ass'n*, 119 Ga. 941, 47 S. E. 345; *People v. Troy Steel & Iron Co.*, 82 Hun (N. Y.) 303, 31 N. Y. Supp. 337; *Auburn Button Co. v. Sylvester*, 68 Hun (N. Y.) 401, 22 N. Y. Supp. 891; *Del Valle v. Navarro*, 21 Abb. N. Cas. (N. Y.) 136.

⁹A pending foreclosure action against the corporation is not so af-

user,¹⁰ or a judicial sale of its property,¹¹ does not abate the action.

Without a statute authorizing it a trustee or assignee cannot revive an abated action,¹² nor even with it unless a legal title passes to him,¹³ but it has been held that pending actions in the corporate name to the use of the real party are not affected.¹⁴

After judgment of forfeiture and institution of action on a debt by the trustees to wind up under a statute authorizing them to sue in the corporate name, a reversal of the forfeiture decree will not abate their action by reinstating the corporation,¹⁵ and a repeal of their authority to settle up its affairs would not abate a suit carried on in the bank's name by their assignee to his own use.¹⁶

Statutes now very generally provide in some way against the abatement of the action or for its revivor in case of an extinction of the corporation party.¹⁷ The most common type of statute is that which

affected by appointment of a foreign and his reappointment as a federal receiver, as to disable corporate officers to defend and entitle the receivers to do so of right, unless the terms of the receivership or an injunction dissolve or suspend corporate functions. *Farmers' Loan & Trust Co. v. Hoffman House*, 7 N. Y. Misc. 358, 27 N. Y. Supp. 634.

Appointment of a receiver in the domicile could not be pleaded in abatement of a subsequent foreclosure suit against it in a foreign state where the property lies. *Venner v. Denver Union Water Co.*, 40 Colo. 212, 122 Am. St. Rep. 1036, 90 Pac. 623.

¹⁰ Mere insolvency or nonuser does not dissolve it. *United States Elec. Co. v. Leiter*, 19 App. Cas. (D. C.) 575.

A misfiling of the articles by a clerk followed by commencement of business and later by cessation does not show a dissolution, the corporate term being unexpired. *San Diego Gas Co. v. Frame*, 137 Cal. 441, 70 Pac. 295.

¹¹ *Chesapeake & N. Ry. v. Hammer*, 23 Ky. L. Rep. 1846, 66 S. W. 375.

¹² *Torry v. Robertson*, 24 Miss. 192.

¹³ Though such a statute exists with

respect to choses devolved on him, he cannot revive a suit pending in its name on causes previously assigned by the corporation. There was no title to devolve. *Grand Gulf Bank v. Wood*, 12 Smedes & M. (Miss.) 482.

¹⁴ Expiration of charter of plaintiff suing to use in equity does not abate suit. Substitution of real party was allowed. *Frye v. Bank of Illinois*, 10 Ill. (5 Gilm.) 332.

A filed statement of voluntary dissolution under the statute, if assumed to abate actions by the corporation then pending (this was questioned but not decided), does not have that effect on an action by the corporation as assignor for the benefit of its assignees on an earlier assignment. *St. Albans Granite Co. v. Elwell & Co.*, 88 Vt. 479, 92 Atl. 974.

¹⁵ *Jemison v. Planters' & Merchants' Bank*, 23 Ala. 168.

¹⁶ *Jemison v. Planters' & Merchants' Bank*, 23 Ala. 168.

¹⁷ *St. Louis & S. Coal & Mining Co. v. Sandoval Coal & Mining Co.*, 111 Ill. 32; *Ramsey v. Peoria Marine & Fire Ins. Co.*, 55 Ill. 311; *Central Stock & Grain Exchange v. Pine Tree Lumber Co.*, 140 Ill. App. 471; *Hamilton v. Glenn*, 85 Va. 901, 9 S. E. 129.

provides that the corporate existence shall continue for a time for the purpose of prosecuting and defending actions and suits,¹⁸ or less commonly that the stockholders, directors or officers shall continue as trustees for the corporation, or for its creditors and stockholders,¹⁹ or that the corporation shall continue in existence for such indefinite time as may be necessary to close up litigation.²⁰ An early New York statute saved actions by the corporation from abatement but not those against it unless they were properly continued.²¹ Such a statute is valid though enacted after incorporation.²² A statute on this subject specially applicable to suits by and against corporations will govern, though the general statutes upon abatement are without any saving clause for such actions,²³ and permissive language will receive an imperative construction if required.²⁴ Pending suits in the language of such

Statute saves suit at any stage. *Steinhauer v. Colmar*, 11 Colo. App. 494, 56 Pac. 291.

¹⁸ Statute gave three years after proclamation of forfeiture. *Huntsville Bank v. McGehees' Ex'x*, 1 Stew. & P. (Ala.) 306.

Statute gives five years. *Tuska-loosa Scientific & Art Ass'n v. Green*, 48 Ala. 346.

See also the text and notes following.

Kentucky statutes construed and clause held to have been repealed which extended existence for purpose of suits. *Board of Councilmen City of Frankfort v. Deposit Bank of Frankfort*, 120 Fed. 165. But another statute saving "rights previously vested" would save pending suits. Same case on review affirmed 124 Fed. 18, disagreeing in this particular.

¹⁹ See this section, text and footnotes, *infra*.

The act continuing the Planters' & Merchants' Bank saved pending suits from abatement as well as authorized continuance of the corporation by trustees to bring and defend new ones. *Crawford v. Planters' & Merchants' Bank*, 6 Ala. 289.

²⁰ Under a statute continuing it for purpose of closing up its business,

it continues suable until all its debts are paid. *Economy Building & Loan Ass'n v. Paris Ice Mfg. Co.*, 113 Ky. 246, 68 S. W. 21.

²¹ Action by corporation is not abated under Laws 1832, c. 295. *New York Marbled Iron Works v. Smith*, 11 N. Y. Super. Ct. 362. That statute distinguishes between actions "by" and those "against" corporations. The latter abate unless continued by order. See *McCulloch v. Norwood*, 58 N. Y. 562.

²² An act subsequent to incorporation extending the corporate existence for purpose of suits is constitutional. *Foster v. Essex Bank*, 16 Mass. 245, 8 Am. Dec. 135.

²³ By express provision (Comp. Stat. c. 16, § 63), dissolution of domestic corporations does not abate an action by or against the corporation. It goes on in the corporate name, and in absence of proof the same law is deemed to prevail in a foreign state where the corporation is domiciled. *Schmitt & Bro. Co. v. Mahoney*, 60 Neb. 20, 82 N. W. 99.

²⁴ A provision that it "may continue" for three years means "must" so continue. *Blake v. Portsmouth & C. R. R. Co.*, 39 N. H. 435.

statutes means actions both at law and in equity.²⁵ "Debts" has been construed as excluding penal actions.²⁶ Such statutes do not apply to foreign corporations,²⁷ or to voluntary dissolutions where provisions regulating them imply that none of the purposes for which existence is continued shall exist,²⁸ or where a legislative repeal is manifestly against such a construction;²⁹ but a repeal may contain a saving clause for pending actions,³⁰ and a saving clause for such as should "expire or be dissolved" has been held to include ipso facto forfeitures as well as judicial dissolutions.³¹

If the corporate existence and capacity for suit is extended by the statute, then the suit or defense should be in its name conducted by its officers or representatives,³² and such is the better, but not un-

²⁵ A saving clause in favor of "any suits now pending" includes actions at law where the writ is dated before the act took effect (statute declaring forfeitures). *Worcester Color Co. v. Henry Wood's Sons Co.*, 209 Mass. 105, 95 N. E. 392.

²⁶ A statute giving jurisdiction over a corporation "to pay its debts" when it shall have surrendered its charter, does not save a penal action. Voluntary dissolution abates it. *State v. Arkansas Cotton Oil Co.*, 116 Ark. 74, Ann. Cas. 1917 A 1178, 171 S. W. 1192.

²⁷ *Fitts v. National Life Ass'n*, 130 Ala. 413, 30 So. 374; *Olds v. City Trust, Safe Deposit & Surety Co.*, 185 Mass. 500, 102 Am. St. Rep. 356, 70 N. E. 1022.

Revival statutes of Texas do not apply to foreign corporations. *Life Ass'n of America v. Goode*, 71 Tex. 90, 8 S. W. 639.

On the other hand it has been held that a foreign insurance corporation having submitted to local laws on admission to do business is continued after its dissolution in the domicile by Code, § 1866, applying to "all corporations." *Frink v. National Mut. Fire Ins. Co.*, 90 S. C. 544, Ann. Cas. 1913 D 221, 74 S. E. 33.

³² The voluntary dissolution allowed by statute in Alabama provides a

complete scheme for winding up, leaving nothing for the other statute to work on. *Nelson v. Hubbard*, 96 Ala. 238, 17 L. R. A. 375, 11 So. 428.

²⁸ Statutes continuing existence for purpose of suit do not apply to corporations dissolved by legislative repeal of the charter. *Board of Councilmen City of Frankfort v. Deposit Bank of Frankfort*, 120 Fed. 165, aff'd 124 Fed. 18, on other grounds.

³⁰ A legislative repeal of the charter will not abate actions pending against it where there is a saving clause, and another clause of the act provides that it shall not "take away or impair any remedy * * * for any liability previously incurred." *Blake v. Portsmouth & C. R. R. Co.*, 39 N. H. 435.

³¹ Under a statute providing that "when a corporation shall expire or be dissolved, suits may be brought, continued or defended in the corporate name, in like manner and with like effect as before" (Code, c. 53, § 59), a forfeiture for nonpayment of tax abates no suits then pending. *Greenbrier Lumber Co. v. Ward*, 30 W. Va. 43, 3 S. E. 227.

³² Receiver may sue in the corporate name within the statutory two years of continued existence (statute construed). *Ramsey v. Peoria Marine & Fire Ins. Co.*, 55 Ill. 311. And a

varying, rule where trustees are continued as trustees "for the corporation" to sue and be sued.³³ But when the statute makes the directors continue as trustees for "creditors and stockholders" suits by or against them are not in representation of the corporation but of the cestuis que trust; and the continuance of the suit is accomplished by a substitution of parties,³⁴ although such a statute omitting any provision for a motion to substitute has been construed as allowing the suit to go on without that formality.³⁵ Statutes empowering the receiver to sue or be sued do not recognize the continued existence of the corporation.³⁶ In Illinois it is held as matter of general law that existence is continued after dissolution for the purpose of winding up pending suits by the corporation, though a statute giving a limit of two years applies to some corporations,³⁷ but on suits against the corporation on prior liabilities that state imposes no time limit except the general statute of limitations.³⁸ After the corporation is defunct or has failed to elect new officers, the old ones

sue by trustees in liquidation authorized to sue in the name of an expired bank is deemed to be one by the corporation. *Plea of null tiel corporation held untenable. State v. Bank of Washington*, 18 Ark. 554.

Suit may be in name of a bank for benefit of its trustees who are liquidating its affairs and to whom it has assigned the note sued on. *Crews v. Farmers' Bank*, 31 Gratt. (Va.) 348.

³³ That the corporation does not continue to be and exist as a cestui que trust even though its trustees are described as "trustees of such corporation" by the statute enabling them to sue or be sued after expiration of term, see *Sturges v. Vanderbilt*, 73 N. Y. 384. In that case the statute, however, empowered the trustees to sue or be sued as trustees of the corporation or in their individual names, thus rebutting any continued corporation. *Id.*

³⁴ *Lowe v. Superior Court of Los Angeles County*, 165 Cal. 708, 134 Pac. 190.

³⁵ See Act of March 20, 1905, § 10a, as amended March 20, 1907, relating to forfeiture for nonpayment of

license tax. *Lowe v. Superior Court of Los Angeles County*, 165 Cal. 708, 134 Pac. 190.

³⁶ On the contrary they enable him to sue in his own name where otherwise the corporate name must have been used. *Wilcox v. Continental Life Ins. Co.*, 56 Conn. 468, 16 Atl. 244.

³⁷ The corporation may prosecute to judgment after dissolution a suit begun before it. *Graham & Morton Transp. Co. v. Owens*, 165 Ill. App. 100.

The limitation of two years in Rev. St. c. 32, § 10, applies only to corporations "organized under this law"; and the general law of the state enables others to sue for winding up purposes without regard to that limitation. *Commercial Loan & Trust Co. v. Mallers*, 242 Ill. 50, 134 Am. St. Rep. 306, 17 Ann. Cas. 224, 89 N. E. 661.

³⁸ Under the statute the right to sue it on pre-existing causes is unimpaired by dissolution and the continuance of existence for that purpose is not limited to two years as in case of suits by it (statutes con-

may be served as its representatives whenever its existence is continued for winding up or it has become a suspended one without actual extinction, subject of course to the possibility of a statutory substituted method of serving it.³⁹

The time of such continued existence should be reckoned from dissolution date,⁴⁰ or date of resolution to dissolve,⁴¹ and time allowed to "prosecute" means to prosecute to conclusion.⁴² At the end of the extended time given, if the intentment of the statute is that all litigation shall be concluded within it, the action will abate though uncompleted;⁴³ otherwise, if the statute merely requires a commencement within the extended time.⁴⁴

If the statute saves the suit from abatement only on condition of a proceeding to continue or revive it, such proceeding is indispensable,⁴⁵ and the same is true where it devolves all rights of action

strued). *Singer & Talcott Stone Co. v. Hutchinson*, 176 Ill. 48, 51 N. E. 622, rev'g 72 Ill. App. 366.

³⁹ See § 3002, *infra*.

⁴⁰ Action begun in 1905 by corporation which expired 1907 is not abated in 1908, where statute continues existence for three years to wind up. *Muncie & Portland Traction Co. v. Citizens' Gas & Oil Min. Co.*, 179 Ind. 322, 100 N. E. 65.

⁴¹ Two statutes construed to give bank time to accept an act providing for winding up and a fixed period of three years after that. *Cunningham v. Clark*, 24 Ind. 7.

⁴² L. O. L. § 6699, continuing dissolved corporations for five years, if necessary to "prosecute" or "defend" pending actions requires that they be brought to final decision within that time. Accordingly action begun after voluntary dissolution abated when the period was complete while appeal was pending. *Service & Wright Lumber Co. v. Sumpter Valley Ry. Co.*, 81 Ore. 32, 152 Pac. 262, setting aside judgments 81 Ore. 32, 149 Pac. 531, and 67 Ore. 63, 135 Pac. 539.

⁴³ The Oregon statute giving five years to prosecute or defend actions

after dissolution, abates pending ones not brought to a conclusion within that time. *Dundee Mortgage & Trust Inv. Co. v. Hughes*, 77 Fed. 855.

⁴⁴ The action if commenced within the three years can be concluded thereafter (statutes construed). *Bewick v. Alpena Harbor Improvement Co.*, 39 Mich. 700.

Under Michigan statute an assignment and suit within three years by the assignee in the corporate name may be prosecuted to effect thereafter. *Michigan State Bank v. Gardner*, 15 Gray (Mass.) 362.

Statute gave two years to commence suits in corporate name and as much time as was necessary to prosecute them to judgment. *Franklin Bank v. Cooper*, 36 Me. 179.

At end of the extended time no action can be brought. *Thornton v. Marginal Freight Ry. Co.*, 123 Mass. 32.

⁴⁵ The suit abates unless statutory proceedings to continue it are had. *Sinnott v. Hanan*, 214 N. Y. 454, 108 N. E. 858, rev'g 156 N. Y. App. Div. 323, 141 N. Y. Supp. 505; *Sturges v. Vanderbilt*, 73 N. Y. 384; *McCulloch v. Norwood*, 58 N. Y. 562; *Wamsley*

on the receivers who are charged with the duty of liquidation.⁴⁶

II. JURISDICTION AND VENUE OR "PLACE OF TRIAL"

§ 2956. Jurisdiction and its requisites—In general. Jurisdiction is the power to hear and determine a cause,⁴⁷ and that is the sense in which the term is used in this chapter. In its simplest terms this requires a subject-matter which the court is competent to adjudicate upon, and the submission or subjection of the parties to its judicial power; and the competency of the court will not depend on the corporate or nonincorporate character of the parties unless a statute has so provided.⁴⁸ The other requisite, that of submission to the jurisdiction or subjection to it, has called forth nearly all of the decisions upon the question of jurisdiction over corporations; for when a corporation defendant did not voluntarily appear, which was comparatively seldom, the plaintiff and the court were obliged to consider whether process existed and could be executed in conformity with the law of the land to make it subject to the jurisdiction. In the earliest times when actual appearance was essential it could only be coerced indirectly by distringas, as will be seen hereafter,⁴⁹ and when later the process of summons was devised and actual appearance became unnecessary, the problem remained of executing the process by service on a person with authority to represent the corporation for that purpose so that it would be bound. Domestic corporations ordinarily presented no difficulty, because they could be found and their chief officer served;⁵⁰ hence the court had jurisdiction over them, that is to say had the means to acquire it. As to wholly foreign and absent corporations the court had no means of serving them in personam and has none now, whence the saying that there was no jurisdiction over them. But when a foreign corporation was present in the territory of the jurisdiction by its agents there for the general purpose of doing business and competent to represent it in receiving service such as the law authorized, the obstacle to exercising the jurisdiction was gone. From all of which it appears that, in the absence

v. H. L. Horton & Co., 87 Hun (N. Y.) 347, 34 N. Y. Supp. 306; In re Norwood, 32 Hun (N. Y.) 196.

⁴⁶ Miami Exporting Co. v. Gano, 13 Ohio 269.

⁴⁷ See Cyclopedic Law Dictionary; Bouvier's Law Dict., title "Jurisdiction."

⁴⁸ The existence of the subject-matter and of a cause of action respecting it may both depend on the fact of a corporation, but not the competency of the court.

⁴⁹ See § 2985, *infra*.

⁵⁰ See §§ 2991, 2993, *infra*.

of a statute otherwise providing, all that is necessary to jurisdiction over any corporation from the court's point of view is that it shall be present in its corporate character within the territory over which the power of the court extends, and that process be there executed or the corporation appear. To say that jurisdiction exists over existing domestic corporations, is only to say that they are present by original creation and existence. To say that jurisdiction over foreign corporations does or does not exist, is merely to say that they are or are not present in their corporate character by coming in with agents competent for service. Without this historical and somewhat elementary explanation the factor of domicile, residence and presence within the state as elements in jurisdiction cannot be so readily presented.⁵¹

The foregoing applies where the action is brought upon a cause seeking a judgment binding in personam on the corporation; but if nothing more than an adjudication affecting its property before the court is involved, which is the case in attachment suits, libels in admiralty by arrest of the vessel, and the like, then the essential thing is a res in court by virtue of its process duly executed, and the jurisdiction is in rem or quasi in rem, to which the presence of the corporation is not essential though the law may require notice to the corporation even in such proceedings and hold them erroneous if such notice be not given.⁵² This in brief is the same law as applies to all suitors and defendants, whether natural persons or corporations.⁵³ The concrete subjects involved in jurisdiction, but separately treated are: citizenship, domicile and inhabitancy,⁵⁴ presence or the doing of business within the state,⁵⁵ process, service of same, and appearance,⁵⁶ venue or place for trial.⁵⁷

⁵¹ See § 2957 et seq., *infra*.

⁵² As to the modes of acquiring these several kinds of jurisdiction, see § 2977, *infra*.

⁵³ See generally Freeman on Judgments, § 120 et seq., and see quotations therefrom in this chapter, § 2977, *infra*.

⁵⁴ See Chap. 13, *supra*, and chapter on Foreign Corporations, *infra*.

⁵⁵ See chapter on Foreign Corporations, *infra*.

⁵⁶ See § 2985 et seq., *infra*.

⁵⁷ See generally § 2978 et seq., *infra*.

In a sense the selection of the proper venue or place for bringing

the action is one of the jurisdictional requisites of a suit, and as will be seen hereafter there are statutes which make the venue actually jurisdictional in suits against a corporation, so that if the wrong venue be chosen the judgment will be void. These statutes are exceptional, however, and aside from them the right to a certain place for trial is one which the defendant may waive. In other words the rules for laying the venue merely determine where and by which of coequal courts the jurisdiction shall be exercised.

It is sometimes said inaccurately that the courts have or have not jurisdiction to appoint a receiver, or grant an injunction, or try title to office or to corporate franchises in a collateral proceeding, or to regulate the internal affairs of the corporation, and so on. In all these instances the so-called jurisdiction is questioned on the ground that the particular relief is not warranted by the facts, or is not within that which the particular remedy suffices to apply. In courts which preserve the formal distinctions between law and equity the term is used in differentiating equitable "jurisdiction" from that of the law side. In all of the remedies last above mentioned the courts have repeatedly exercised jurisdiction whenever the facts presented were sufficient or the action was of a character that would sustain the proposed relief. The various chapters in this work which treat of these remedies and of the extraordinary remedies fully discuss the whole question, and reference is made to them.⁵⁸

§ 2957. — Domicile and citizenship of corporation. For the purposes of jurisdiction in general, as well as federal jurisdiction discussed in an ensuing section, the corporate citizenship, habitancy and residence are in the state or country which created it; and it may sue or be sued in the courts of general jurisdiction there constituted, or in any courts of special jurisdiction endowed with power thereto,⁵⁹ whenever an individual could. Thus a domestic corporation and a trust sustained by it in property within the state is within the jurisdiction though it arises from a foreign estate.⁶⁰ Under the now exploded doctrine that the citizenship was that of the stockholders, a statutory requirement of citizenship would have barred jurisdiction over a domestic corporation if its stockholders were not citizens.⁶¹

⁵⁸ See chapters on Injunctions; Receivers; Mandamus; Quo Warranto; Forfeiture, Dissolution and Winding Up, *infra*. The existence of jurisdiction over internal affairs of corporations is exemplified in all of these chapters. Another illustration of jurisdiction over internal rights is afforded by a stockholders' suit to prevent wrongdoing or mismanagement by officers or by the majority. See generally Chapters 40 and 42, *supra*, and chapter on Stock and Stockholders, *subd.* Remedies of Stockholders, *etc.*, *infra* (stockholders' suits for abuse of discretion

or for fraud of majority or officers).

An eleemosynary corporation is subject to jurisdiction within the limits of visitation, such as the restoration of an expelled trustee. *Fuller v. Plainfield Academic School*, 6 Conn. 532.

⁵⁹ See § 387 *et seq.*, *supra*.

⁶⁰ Especially where the foreign state could not get jurisdiction without voluntary appearance by the corporation. *Farmers' Loan & Trust Co. v. Ferris*, 67 N. Y. App. Div. 1, 78 N. Y. Supp. 475.

⁶¹ Thus under statute a nonresident though a citizen could sue only when

In courts of limited or inferior jurisdiction the local residence or place of business is often made jurisdictional even as to domestic corporations.⁶³ The privilege of being sued in a given county or federal district may be asserted to narrow the jurisdiction to one or more of the courts which might otherwise take cognizance of both the subject-matter and the person; but this privilege may be waived if only a privilege.⁶³ Where the venue is jurisdictional, the place of business or locus of the corporation is an essential fact.⁶⁴ The corporate place of business or domicile may be a factor operating indirectly on jurisdiction by reason of statutes fixing that as the place where its officers or agents are to be served; and a service at that place will then be essential.⁶⁵ Jurisdiction over foreign corporations will be more fully treated hereafter and from a somewhat different standpoint.⁶⁶ But the law of jurisdiction over corporations is almost wholly educed from decisions in actions where the corporation or one of them was foreign; and therefore a sufficient number of such cases and their doctrines must be considered to afford a complement to the few and somewhat barren decisions on the subject where the corporation was domestic. Taken as a whole they will show that in a general sense the jurisdiction of the subject-matter is independent of the corporate character of the parties, while the jurisdiction over the corporate entity or being is founded on the place of its existence or presence and activities. Beyond this there must be a means (process) for acquiring jurisdiction or a voluntary consent thereto by appearance.

It is a settled rule that a foreign corporation may sue in virtue of the comity of states.⁶⁷ It is equally true that a foreign corporation may be sued.⁶⁸ Although text statements may be found, and some judicial dicta, that there was no common-law jurisdiction over foreign corporations, yet those dicta properly limited to the subject-matter of the case mean simply that no common-law means existed by which

the other party was a citizen. Accordingly a domestic corporation could be sued in the general court if its members appeared to be citizens. *Lexington Mfg. Co. v. Dorr*, 12 Ky. (2 Litt.) 256.

⁶³ See § 2968, *infra*.

⁶³ See § 2978 et seq., *infra*.

⁶⁴ See §§ 2978, 2979, *infra*.

⁶⁵ See §§ 3007, 3008, *infra*.

⁶⁶ See chapter on Foreign Corporations, *infra*.

⁶⁷ See chapter on Foreign Corporations, *infra*, and see also *Savage Mfg. Co. v. Armstrong*, 17 Me. (5 Shep.) 34, 35 Am. Dec. 227; *Bank of Michigan v. Williams*, 5 Wend. (N. Y.) 478; *Taylor's Adm'r v. Bank of Alexandria*, 5 Leigh (Va.) 471; *Bank of Marietta v. Pindall*, 2 Rand. (Va.) 465; *Henriques v. Dutch West India Co.*, 2 Ld. Raym. 1532.

⁶⁸ See chapter on Foreign Corporations, *infra*.

jurisdiction might have been obtained;⁶⁹ and one case to which such a doctrine has been ascribed implies the contrary by assuming that jurisdiction might have been had by voluntary appearance.⁷⁰ The correct rule, which will be expounded fully in the chapter on Foreign Corporations, is that the courts have the same inherent power to hear and determine causes in which one of the parties is a foreign corporation as they have in actions where one of them is a domestic corporation; but in some states the impolicy of entertaining suits between nonresidents over a foreign cause of action has taken the form of doctrines or statutes denying jurisdiction in such cases where one of the nonresidents is a foreign corporation. When it comes to exerting this jurisdiction against a foreign corporation by process of the court to bring it in, it is then found that while the jurisdiction of the subject-matter is unquestioned, that over the defendant cannot be acquired because it is not within the territory where the process of the court is effective. There is no "jurisdiction" over the foreign corporation in that situation in the same sense and for the same reasons that there is none over any persons not served or otherwise in court, whether they be residents or nonresidents; but a voluntary appearance by such corporation just as by natural non-resident persons, would enable the court to exert such adjudicative power as it possessed over the subject-matter and the cause of action.⁷¹ Therefore when the cause of action is transitory, jurisdic-

⁶⁹ Among cases sometimes incorrectly cited thus are: *Swarts v. Christie Grain & Stock Co.*, 166 Fed. 338, itself citing *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222; *Strain v. Chicago Portrait Co.*, 126 Fed. 831 (in all of which the case turned on incompetency of the person served to give jurisdiction in personam); and *Westinghouse Mach. Co. v. Press Pub. Co.*, 110 Fed. 254, where action was dismissed because service was on one who did not represent the corporation.

⁷⁰ "Unless it voluntarily appears" courts have no jurisdiction apart from statute. *Potter v. Lapointe Mach. Tool Co.*, 201 Mass. 557, 88 N. E. 418.

⁷¹ *McCormick v. Pennsylvania Cent. R. Co.*, 49 N. Y. 303.

In the case of a foreign corpora-

tion as in that of a nonresident natural person "the court has general jurisdiction of the person, so that the want of service of process may be waived." *Young v. Providence & S. S. Co.*, 150 Mass. 550, 23 N. E. 579.

Even if it was not doing business in a state a company might consent to be served on an agent therein, and such service would be binding, it seems. *Swann v. Mutual Reserve Fund Life Ass'n*, 100 Fed. 922, at page 928.

A corporation is "liable to suit in a foreign jurisdiction to the same extent and under the same circumstances as an individual. * * * The only difficulty in the way is a practical one. * * * If a company were to locate an office in another state, and its principal officer were to do business there, there could be

tion may be taken in a proper venue though both parties are non-resident, one or both being foreign corporations,⁷² unless, as in some

no question of his liability to be served." *City Fire Ins. Co. v. Carugi*, 41 Ga. 660.

In *Ogdensburgh & C. R. Co. v. Vermont & C. R. Co.*, 16 Abb. Pr. N. S. (N. Y.) 249, 255, aff'd 4 Hun (N. Y.) 712, the statement that the courts at common law "had no jurisdiction of the persons of foreign corporations," is followed by one that the statutes have provided no means "whereby the personal appearance" of them can be compelled, and this by a statement that "it is only in cases of voluntary appearance that our courts can have jurisdiction of the persons of foreign corporations." Obviously this means that the courts have the power to hear and determine if a process or appearance brings, or can bring, the corporation into court. See also on the impossibility of acquiring jurisdiction by process, *McQueen v. Middletown Mfg. Co.*, 16 Johns. (N. Y.) 5.

By statute (Hill's Ann. Laws, § 516) no jurisdiction over foreign corporations exists unless they are doing business in the state or appear generally in the action. This is said by the court to be declaratory of the common law. *Farrell v. Oregon Gold-Min. Co.*, 31 Ore. 463, 50 Pac. 186, 49 Pac. 876. See also *Goldey v. Morning News*, 156 U. S. 518, 39 L. Ed. 517; *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222; *Carpenter v. Westinghouse Air-Brake Co.*, 32 Fed. 434; *United States v. American Bell Tel. Co.*, 29 Fed. 17; *Aldrich v. Anchor Coal & Development Co.*, 24 Ore. 32, 41 Am. St. Rep. 831, 32 Pac. 756.

The difficulty of serving a foreign corporation is technical rather than substantial, says the Virginia court; and, speaking of one admitted to the state on an equality with domestic

corporations and subject to the same liabilities, it was held suable on service made, as in case of a domestic corporation with its head office in another state but having property where the cause of action arose. *Baltimore & O. R. Co. v. Gallahue's Adm'rs*, 12 Gratt. (Va.) 655, 65 Am. Dec. 254.

⁷² *United States*. *Olson v. Buffalo Hump Min. Co.*, 130 Fed. 1017; *Hills v. Richmond & D. R. Co.*, 37 Fed. 660; *Northern Indiana R. Co. v. Michigan Cent. R. Co.*, 5 McLean 444, Fed. Cas. No. 10,321.

Arkansas. *St. Louis, I. M. & S. Ry. Co. v. Brown*, 67 Ark. 295, 54 S. W. 865.

Illinois. *Frank Simpson Fruit Co. v. Atchison, T. & S. F. R. Co.*, 245 Ill. 596, 92 N. E. 524, rev'g 152 Ill. App. 235.

Michigan. *National Coal Co. v. Cincinnati Gas, Coke, Coal & Mining Co.*, 168 Mich. 195, 131 N. W. 580.

New Jersey. *Ewald v. Ortynsky*, 77 N. J. Eq. 76, 75 Atl. 577.

New York. *McCormick v. Pennsylvania Cent. R. Co.*, 49 N. Y. 303, the law being changed afterwards by Code Civ. Proc. § 1780.

Texas. *Atchison & C. R. Co. v. Keller*, 33 Tex. Civ. App. 358, 76 S. W. 801; *Sorkin v. Houston, E. & W. T. R. Co.* (Tex. Civ. App.), 53 S. W. 608; *American Well Works v. De Aguayo* (Tex. Civ. App.), 53 S. W. 350. Courts have jurisdiction over corporation doing business in state when sued by nonresident, though proceeding is in personam for a debt. *Mutual Life Ins. Co. v. Nichols* (Tex. Civ. App.), 124 S. W. 910, aff'd 26 S. W. 998; *Western U. Tel. Co. v. Shaw*, 33 Tex. Civ. App. 395, 77 S. W. 433.

West Virginia. Foreign cause of

states, the statute excludes or limits such jurisdiction,⁷³ or leaves it to a measure of judicial discretion,⁷⁴ or the public policy forbids.⁷⁵ It

action arising from contract made in state before withdrawal. *S. M. Smith Ins. Agency v. Hamilton Fire Ins. Co.*, 69 W. Va. 129, 71 S. E. 194. Contra, it was assumed that a non-resident could not sue a corporation which had no local existence within the state, in the early case of *Wood v. Hartford Fire Ins. Co.*, 13 Conn. 202, 33 Am. Dec. 395.

Injury to personal property in another state is transitory. *Reeves v. Southern Ry. Co.*, 121 Ga. 561, 70 L. R. A. 513, 2 Ann. Cas. 207, 49 S. E. 674; *Southern Pac. Co. v. Graham*, 12 Tex. Civ. App. 565, 34 S. W. 135.

Damages to property partly personal is transitory as to the latter. *Southern Pac. Co. v. Graham*, 12 Tex. Civ. App. 446, 34 S. W. 135.

Action for personal injury is transitory. *Atchison, T. & S. F. R. Co. v. Worley* (Tex. Civ. App.), 25 S. W. 478.

Action on insurance policy is transitory. The statutes fixing venue (Code, §§ 71, 78) do not localize it. *Barnes v. Union Cent. Life Ins. Co.*, 168 Ky. 253, 182 S. W. 169. To same effect, where the statute permits them to be sued in any county where doing business, etc., see *Mutual Life Ins. Co. v. Nichols* (Tex. Civ. App.), 24 S. W. 910, aff'd 26 S. W. 998.

A bill to prevent construction of a railroad in Indiana violative of contract rights and to prevent use of lands in Indiana is local and cannot lie in the circuit court for Michigan. *Northern Indiana R. Co. v. Michigan Cent. R. Co.*, 15 How. (U. S.) 233, 14 L. Ed. 674.

⁷³ See §§ 2959, 2960, *infra*.

N. Y. Code Civ. Proc. § 1780, provides that "action against a foreign corporation may be maintained by another foreign corporation or by a

nonresident in one of the following cases only"⁷⁴

1. Where the action is brought to recover damages for breach of a contract made within the state or relating to property situated within the state at the time of the making thereof.

2. When it is brought to recover real property situated within the state, or a chattel which is replevied within the state.

3. When the cause of action arose within the state. * * *

The following was added in 1913 by Laws 1913, c. 60:

"4. Where a foreign corporation is doing business in this state."

(The earlier provision was found in Code of Proc. § 427.)

⁷⁴ The statute is permissive, the words "may be maintained" implying a discretion to take or refuse jurisdiction where the cause of action is a foreign tort and the corporation is merely doing business here. *Waisikoski v. Philadelphia & R. Coal & Iron Co.*, 173 N. Y. App. Div. 538, 159 N. Y. Supp. 906. (In the foregoing case one judge dissented from this conclusion but concurred in reversal of an order which dismissed the action in supposed obedience to a reversed case.) See also *Pietraroia v. New Jersey & H. Railway & Ferry Co.*, 197 N. Y. 434, 91 N. E. 120, aff'g 131 N. Y. App. Div. 829, 116 N. Y. Supp. 249.

⁷⁵ *Reeves v. Southern Ry. Co.*, 121 Ga. 561, 70 L. R. A. 513, 2 Ann. Cas. 207, 49 S. E. 674.

Suing on contract made out of state in evasion of laws regulating foreign corporations. *Bankers' Casualty Co. v. Richland County Banking Co.*, 31 Ohio Cir. Ct. 428.

May not enforce a contract ob-

is, of course, essential that the foreign or nonresident corporation be present or have been present within the jurisdiction in the persons of its agents there carrying on business and be well served, in order to give any jurisdiction in personam over it,⁷⁶ but it need not be a citizen, resident or inhabitant in addition to being thus present, if the jurisdiction of the court can attach either because of the citizenship or residence of the other party⁷⁷ or because the subject-matter of the case of action is physically or legally within the jurisdiction,⁷⁸ provided that the character of the proceeding or the relief sought is such as the court can entertain and administer, and provided that the cause of action is not local to some other jurisdiction.⁷⁹ Coming into the state to do business there implies a consent and submission to the jurisdiction thereof and to the local methods of process and service.⁸⁰

noxious to public policy of the state. Rev. Codes 1899, § 5756, declaring the right of foreign corporations to sue "in the same manner as" domestic ones, with an express exception of any suit on an act "which the laws of this state forbid," is declaratory of the general rule. *Walker v. Rein*, 14 N. D. 608, 106 N. W. 405.

⁷⁶ *International Harvester Co. v. Kentucky*, 234 U. S. 579, 58 L. Ed. 1479; *Hoffman v. Washington-Virginia R. Co.*, 44 App. Cas. (D. C.) 418; *Lathrop v. Union Pac. Ry. Co.*, 7 App. Cas. (D. C.) 111, 1 MacArthur 234.

Foreign corporation is not suable in a state where it had no business and had not gone, service being had only on its president casually there. Judgment accordingly held void. *Moulin v. Trenton Mut. Life & Fire Ins. Co.*, 24 N. J. L. 222.

No personal judgment but only one in rem against property can be rendered against a foreign corporation which does not appear and where no process to compel personal appearance is provided. *Ogdensburgh & C. R. Co. v. Vermont & C. R. Co.*, 16 Abb. Pr. N. S. (N. Y.) 249, aff'd 4 Hun (N. Y.) 712.

A jurisdiction in rem (or quasi in rem) may be had over the property of a foreign corporation, including debts owing to it, which may be and is

attached by valid process of foreign attachment. No judgment in personam can result from such process. If the corporation is not doing business within the state, or is not otherwise present in the persons of one or more of its officers or agents who are there in representation of it and are there served as its agents or officers, no jurisdiction in personam is required. See § 2977, *infra*, and chapter on Foreign Corporations, *infra*.

⁷⁷ See § 2958, *infra*.

⁷⁸ See § 2959, *infra*.

⁷⁹ See § 2960, *infra*.

The local or transitory nature of the cause of action often determines where the action shall be brought or the venue laid. See § 2982, *infra*.

It may be said that equitable relief is beyond the jurisdiction of a law court, and vice versa, but this is a special and limited sense of the term jurisdiction; and the doctrine involved contains nothing peculiar to the law of corporations. The appropriate relief for various wrongs internal and external to the corporation is discussed elsewhere in this work in the proper connection. Chapters treating of the particular right affected should be consulted to ascertain what relief can be had.

⁸⁰ See generally chapter on Foreign Corporations, *infra*, and see also

The more logical rule is that by submitting to the jurisdiction it does so for all purposes and not merely those acts done within the state; and it may be sued on causes not related to such business or not arising within the state.⁸¹ In a late federal case the doctrine was announced that by doing business within a state the foreign corporation consents to be sued and served under the statute only in respect to business there done. Accordingly not only must the foreign corporation be doing business in the state where it is sued, but the cause of action must be one arising out of the business there done, else the state court, or a federal court to which removal is had, is without jurisdiction if both parties be foreign.⁸² This was decided on the authority ascribed to decisions of the United States Supreme Court,⁸³ but they do not support it, and it ought not to be regarded as a precedent for the rule broadly stated by it, but should be limited to the doctrine as explained in the footnote.⁸⁴ Generally speaking, the doing

Shields v. Union Cent. Life Ins. Co., 119 N. C. 380, 25 S. E. 951.

⁸¹ By entering the state and undertaking business therein, "it becomes amenable to our laws, and subject to the jurisdiction of our courts exactly as a private individual or a domestic corporation." *State v. Cumberland Telephone & Telegraph Co.*, 114 Tenn. 194, 86 S. W. 390, citing *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519, 10 L. Ed. 274. See also *International Harvester Co. v. Kentucky*, 234 U. S. 579, 58 L. Ed. 1479; *Pennsylvania Co. v. Sloan*, 1 Ill. App. 364.

When a corporation comes into the state it "subjects itself to the same legal environments that encompass other litigants." *Chesapeake & O. R. Co. v. Cowherd*, 96 Ky. 113, 27 S. W. 990. May be sued on foreign cause of action. *Id.*

When actual consent to be served through service on the state auditor has been filed by a foreign insurance corporation (Mansf. Dig. § 3834) with "the same effect as if served personally," etc., such a service will confer jurisdiction to try causes not arising out of the business of insurance, e. g., libel. *American Casualty Ins. Co. v. Lea*, 56 Ark. 539, 20 S. W. 416.

Although insurance is the only business carried on in the state, jurisdiction is not limited to actions growing out of it. A foreign insurance company may be sued to enforce its liability as a stockholder in a domestic corporation. *German Ins. Co. of Freeport v. First Nat. Bank*, 58 Kan. 86, 62 Am. St. Rep. 601, 48 Pac. 592.

Not limited to causes of action which arose within the state. *Handy v. Insurance Co.*, 37 Ohio St. 366; *Cunningham v. Klamath Lake R. Co.*, 54 Ore. 13, 101 Pac. 1099, 101 Pac. 213.

⁸² *Fry v. Denver & R. G. R. Co.*, 226 Fed. 893.

⁸³ *Simon v. Southern Ry. Co.*, 236 U. S. 115, 59 L. Ed. 492; *Old Wayne Mut. Life Ass'n v. McDonough*, 204 U. S. 8, 51 L. Ed. 345.

⁸⁴ Those cited were cases wherein the service was constructive on a person not actually an agent or organ of the corporation by its voluntary choice. Hence the question was whether jurisdiction was acquired by the service in question not whether state jurisdiction could extend to such matters. In fact by entertaining a question of the sufficiency of service, the possibility of obtaining juris-

of business within the state by the corporation is merely one of the ways, and the most usual one, in which it can be present within the state; and its presence there, rather than the fact that the transaction whence came the cause of action was done there, gives jurisdiction in personam.⁸⁵ After the corporation has withdrawn from the state and is no longer in any way present, the courts have no way of obtaining personal jurisdiction over it, unless agencies for service are regarded as continuing with respect to its former presence and consent to be sued⁸⁶ or it thereafter returns or voluntarily appears;⁸⁷ and the casual return of an officer for a single transaction though related to its former contracts is not such a return enabling him to be served.⁸⁸ Some difference of opinion exists in federal courts as to

diction by valid service is conceded. It does not appear what service was had in the Fry case, *supra*. In the cases cited by it, the facts were: A statute required foreign insurance companies to designate the insurance commissioner as an agent for service before doing business "in the state." This was not done but some insurance was effected in the state. Afterwards a suit on a policy effected in Indiana was brought and service was made only on the insurance commissioner. This was held to give no jurisdiction, the defendant defaulting. *Old Wayne Mut. Life Ass'n v. McDonough*, 204 U. S. 8, 51 L. Ed. 345. This case was followed in a later one where a foreign railroad company had failed to comply with a statute requiring an agent for service to be designated, and pursuant to statute the secretary of state was served. The company defaulted, and it was held that no jurisdiction attached, the cause of action having been foreign, and the implied consent to be so sued and served being restricted to business done in the state. *Simon v. Southern Ry. Co.*, 236 U. S. 115, 59 L. Ed. 492, *aff'g* 195 Fed. 56.

In *Hoffman v. Washington-Virginia R. Co.*, 44 App. Cas. (D. C.) 418, both these cases are distinguished, and *International Harvester Co. v. Ken-*

tucky, 234 U. S. 579, 58 L. Ed. 1479, cited to the proposition that when a corporation is present by its own agents "it is as much liable to the service of process in a transitory action as would be an individual."

The distinction between inability to acquire jurisdiction over a matter or person by constructive service, and inability to have or exercise such jurisdiction by any means, is obvious but easily obscured by omitting to state the distinctive facts. It is, therefore, suggested by the authors that this case on a full statement of facts may be found to be in entire harmony with the sound doctrine of the cases which it cites as authority.

⁸⁵ See chapter on Foreign Corporations, *infra*, and see § 2957, *supra*.

⁸⁶ See §§ 2998, 3002, *infra*, and chapter on Foreign Corporations, *infra*, as to effect of withdrawal and revocation of authority of designated officers for service while causes of action or contracts of local origin or ownership remain outstanding.

⁸⁷ See this section, *supra*, and §§ 2977, 3018, *infra*, as to the manner of submitting to the jurisdiction.

⁸⁸ A foreign corporation which has ceased to do business in the state, and is there present only in the person of an officer negotiating for adjustment of a controversy arising out of a

whether a foreign corporation is present within a state or federal district where it only sends an agent there respecting a particular transaction. Rejecting the earlier decisions, made when the statute required that it should be an inhabitant of or "found" within, the district, the majority rule is now said to be that in such a situation it is not present and not subject to state jurisdiction,⁸⁰ but some decisions are to the contrary.⁸⁰

In so far as public policy is invoked, the presence of the corporation doing business in the state is a factor in favor of retaining jurisdiction.⁸¹ It has been denied that a tort feasant defendant can urge the public policy in opposition to the assumption of jurisdiction, but the soundness of the decision is questionable.⁸² Where there is jurisdiction over a foreign corporation, it will not be declined merely because such action will not harm plaintiff and will supposedly facilitate taking of proofs.⁸³

Jurisdiction is not obstructed by a charter provision that all suits must be in the domicile state,⁸⁴ nor conferred by one that the corpora-

contract made there, is not suable there by service of such officer while so present. *Noel Const. Co. of Baltimore City v. Geo. W. Smith & Co.*, 193 Fed. 492.

⁸⁰ *Noel Const. Co. of Baltimore City v. Geo. W. Smith & Co.*, 193 Fed. 492; *Hoyt v. Ogden Portland Cement Co.*, 185 Fed. 889; *Wilkins v. Queen City Sav. Bank & Trust Co.*, 154 Fed. 173; *Ladd Metals Co. v. American Min. Co.*, 152 Fed. 1008; *Louden Machinery Co. v. Malleable Iron Co.*, 127 Fed. 1008; *United States Graphite Co. v. Pacific Graphite Co.*, 68 Fed. 442; *Clews v. Woodstock Iron Co.*, 44 Fed. 31.

⁸⁰ *Brush Creek Coal & Mining Co. v. Morgan-Gardner Elec. Co.*, 136 Fed. 505; *New Haven Pulp & Board Co. v. Downingtown Mfg. Co.*, 130 Fed. 605; *Houston v. Filer & Stowell Co.*, 85 Fed. 757.

⁸¹ The operation of its railroad within the state and service there, is mentioned as a reason for taking jurisdiction, but no statute is cited making material that this was so;

and as the action was transitory it might have been retained anyway. See *Missouri, K. & T. R. Co. of Texas v. Kellerman* (Tex. Civ. App.), 87 S. W. 401; and see also *St. Louis & S. F. R. Co. v. Hale* (Tex. Civ. App.), 153 S. W. 411; *St. Louis & S. F. R. Co. v. Arms* (Tex. Civ. App.), 136 S. W. 1164.

In earlier Texas cases where the fact appears of operating a railroad within the state, the objection was made on ground of public policy and not sustained. *St. Louis & S. F. R. Co. v. Smith*, 34 Tex. Civ. App. 612, 79 S. W. 340.

⁸² The public policy of entertaining the action is for the court to decide, and the tort-feasor has no interest therein and cannot urge or question it. *Atchison, T. & S. F. R. Co. v. Worley* (Tex. Civ. App.), 25 S. W. 478.

⁸³ *State v. Grimm*, 239 Mo. 135, 143 S. W. 483.

⁸⁴ A charter provision that it could be sued only in the domicile state will not prevent assumption of

tion may sue or be sued "in all courts within the United States."⁹⁵

§ 2958. — **Citizenship or residence of other parties.** Under statutes, notably those of New York, it has been held that the courts could entertain jurisdiction whenever the plaintiff was a citizen or resident of that state on any cause of action, and although the corporation was foreign.⁹⁶ Formerly in Indiana jurisdiction was entertained over suits against foreign insurance companies only when grown out of contracts of insurance, but a citizen may now sue on any claim or demand.⁹⁷ When so made dependent on the citizenship or residence of the other parties adverse to the corporation, a personal representative residing within the jurisdiction can sue it if the cause of action admits,⁹⁸ but a mere fiction to produce a resident party adverse to the corporation will not suffice.⁹⁹

§ 2959. — **Locus of the subject-matter or cause of action.** The common-law doctrine that the parties could come into court and liti-

jurisdiction in a state where it does business. *Shields v. Union Cent. Life Ins. Co.*, 119 N. C. 380, 25 S. E. 951.

⁹⁵ A Kansas corporation is not made suable where it has no office and does no business and has no agent, merely because a government grant extended all the privileges of the Union Pacific Railroad Company to it, among them that of suing and being sued in all courts within the United States. *Lathrop v. Union Pac. Ry. Co.*, 1 MacArthur (D. C.) 234.

⁹⁶ See § 2959, *infra*. For the provisions of the New York statute, see § 2957, *supra*.

⁹⁷ *Rehm v. German Ins. & Sav. Institution*, 125 Ind. 135, 25 N. E. 173; *Byers v. Union Cent. Life Ins. Co.*, 17 Ind. App. 101, 46 N. E. 475.

Since the foregoing were decided, a citizen may sue a foreign insurance company on an account stated. By *Burns' St.* 1908, § 4798, jurisdiction was extended to "any claim or demand of any character whatever." *United States Health & Accident Ins.*

Co. v. Batt, 49 Ind. App. 277, 97 N. E. 195.

⁹⁸ *English v. New York, N. H. & H. R. Co.*, 161 N. Y. App. Div. 831, 146 N. Y. Supp. 963.

A person does not become a resident, if not one, by being appointed personal representative of an estate within the state. *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 2 L. R. A. 636, 19 N. E. 625.

Nonresidence of only one of several executors of a decedent who was a resident will not prevent jurisdiction over a foreign tort. *Mallory v. Virginia Hot Springs Co.*, 157 N. Y. App. Div. 253, 141 N. Y. Supp. 961.

⁹⁹ Action dismissed where a bank deposit was made to produce an appearance of assets within the state so as to have a resident administrator to sue a foreign corporation on a foreign cause of action. *Pietraroia v. New Jersey & H. Railway & Ferry Co.*, 197 N. Y. 434, 91 N. E. 120, *aff'g* 131 N. Y. App. Div. 829, 116 N. Y. Supp. 249.

gate any transitory action¹ has been modified in some states by statutes denying jurisdiction to their courts where a nonresident sues a foreign corporation, unless the cause of action arose within the state, or the contract sued on was made there or broken there, or the subject-matter of the action is located there. Such a statute in New York makes the place of origin of the cause of action or situation of the subject-matter decisive as a jurisdictional fact, and if either of the facts named is found it suffices; if none exists, jurisdiction is refused.² It applies only where a nonresident sues such a corpora-

¹ See § 2957, *supra*.

² See N. Y. Code Civ. Proc. § 1780.

So in *Municipal Court of New York*. *Sommese v. Florence Distilling Co.*, 56 N. Y. Misc. 670, 107 N. Y. Supp. 630.

The statute denies jurisdiction where the contract made in New Jersey insured property there. *Day v. Sun Ins. Office*, 40 N. Y. App. Div. 305, 57 N. Y. Supp. 1033, *aff'd* 167 N. Y. 543, 60 N. E. 1110, on opinion below.

Contract made in state gives jurisdiction. *New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co.*, 28 N. Y. App. Div. 411, 50 N. Y. Supp. 1093.

If the breach occurred in New York, it does not matter where the contract was made. *Rosenblatt v. Jersey Novelty Co.*, 45 N. Y. Misc. 59, 90 N. Y. Supp. 816.

Action for the price of a hiring of teams used in New York under a contract made in New Jersey is not for breach of a contract made within the state and does not arise within it. It is presumably payable when made. *Perry v. Erie Transfer Co.*, 28 Abb. N. Cas. (N. Y.) 430, 19 N. Y. Supp. 239, *rev'g* 40 N. Y. St. Rep. 693, 16 N. Y. Supp. 153.

A contract made out of the state for exhibitions at places chosen by defendant and for monthly payments while exhibiting is broken in New York by nonpayment while then exhibiting. *Hilleary v. Skookum Root*

Hair Grower Co., 4 N. Y. Misc. 127, 23 N. Y. Supp. 1016.

Stockholder's suit for receiver and to set aside an assignment by the corporation made within the state for benefit of creditors comes within Code Civ. Proc. § 1780, subd. 3, as a cause of action arising in the state. *Walter v. F. E. McAlister Co.*, 21 N. Y. Misc. 747, 48 N. Y. Supp. 26.

An action on a foreign judgment which has failed of enforcement where rendered is not a cause of action which "arose within the state." *Anglo-American Provision Co. v. Davis Provision Co.*, 169 N. Y. 506, 88 Am. St. Rep. 608, 62 N. E. 587, *aff'g* 50 N. Y. App. Div. 273, 63 N. Y. Supp. 987, and *aff'd* 191 U. S. 373, 48 L. Ed. 225.

Breach of contract of general sales superintendent, who lived in New Jersey spent most of his time in the employer's New York office, was paid there by drafts mailed from Wisconsin, and made final settlement and demand in New York, was a cause which arose in New York. *Strawn v. Edward J. Brandt-Dent Co.*, 71 N. Y. App. Div. 234, 75 N. Y. Supp. 698, *aff'd* without opinion 175 N. Y. 463, 67 N. E. 1090.

A breach of contract to convey real and personal property in another state arose in New York where refusal to perform was made when demanded. *Wrightsville Hardware Co. v. Assets Realization Co.*, 159 N. Y. App. Div. 849, 144 N. Y. Supp. 991.

tion, and a resident may sue on any cause of action;³ provided title to real estate in another state is not affected; that is, jurisdiction exists over transitory actions.⁴ If the corporation is doing business in the state, it is ordinarily not material where or how the cause of action arose,⁵ and in Maryland by statute it is now declared that "any cause of action" is suable under such conditions.⁶ The statutes

Dishonor in New York of checks dated and payable there is a cause of action arising there. *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367, 38 Am. Rep. 518; *Susquehanna Woolen Co. v. Imperial Coal & Coke Co.*, 66 N. Y. Misc. 621, 122 N. Y. Supp. 214; *Kline v. Imperial Coal & Coke Co.*, 66 N. Y. Misc. 616, 122 N. Y. Supp. 211.

A deposit of money in New York with promise to repay it and refusal there makes a cause of action "for breach of a contract made within the state." *Munger Vehicle Tire Co. v. Rubber Goods Mfg. Co.*, 39 N. Y. Misc. 817, 81 N. Y. Supp. 302.

A sale of goods made in Ohio to a foreign corporation doing business in New York followed by the purchaser's failure to pay the price when due after delivery in New York, gives rise to a cause of action in New York. *Shelby Steel Tube Co. v. Burgess Gun Co.*, 8 N. Y. App. Div. 444, 40 N. Y. Supp. 871.

Breach of a contract in another state where it was alone performable is not suable in New York. *Jones v. Burr Bros.*, 142 N. Y. App. Div. 640, 127 N. Y. Supp. 478.

An unauthorized stock transfer on books kept in New York presents a cause of action arising there for cancellation. *Toronto General Trust Co. v. Chicago, B. & Q. R. Co.*, 32 Hun (N. Y.) 190, aff'd 96 N. Y. 668.

Conversion in New Jersey of a shipment originating in Massachusetts on a through contract, or if on a forwarding contract with delivery to defendant in New Jersey, arises out-

side of New York. *Monda v. Wells, Fargo & Co.*, 20 N. Y. Misc. 685, 46 N. Y. Supp. 682.

Cannot be sued for killing a horse in New Jersey. *Harriott v. New Jersey R. Co.*, 8 Abb. Pr. (N. Y.) 284.

Accounting of partnership or venture in foreign state involving mines or mining claims there beyond jurisdiction. *Johnson v. Victoria Chief Copper Mining & Smelting Co.*, 150 N. Y. App. Div. 653, 135 N. Y. Supp. 1070, aff'g 65 N. Y. Misc. 332, 119 N. Y. Supp. 639.

³ Stockholders resident in the state may sue a foreign corporation to protect their rights in a contract made by it with their corporation also foreign concerning foreign lands. *Jacobs v. Mexican Sugar Refining Co.*, 104 N. Y. App. Div. 242, 93 N. Y. Supp. 776. Also for dividends on preferred stock of foreign corporation. *Prouty v. Michigan Southern & N. I. R. Co.*, 1 Hun (N. Y.) 655, 4 Thomp. & C. 230, overruling *Howell v. Chicago & N. W. R. Co.*, 51 Barb. (N. Y.) 378.

⁴ An action for negligently allowing fire to spread on land in a foreign state is transitory and may be brought by a resident against a foreign corporation. *Brisbane v. Pennsylvania R. Co.*, 141 N. Y. App. Div. 366, 125 N. Y. Supp. 1042, rev'd 205 N. Y. 431, 44 L. R. A. (N. S.) 274, Ann. Cas. 1913 E 593, 98 N. E. 752.

In the foregoing case the reversal in the court of appeals was on the ground that such an action was local.

⁵ See § 2957, *supra*.

⁶ By statute (Act of 1908, c. 240,

in providing for a mode of service on designated persons or registered agents of foreign corporations are not construed as limiting jurisdiction to those causes arising out of business done by the agent in question or within the state unless their terms and context require it.⁷ Thus in the specific instance of insurance companies the jurisdiction is not limited to actions on policies.⁸ With respect to causes of action arising on boundary rivers against foreign corporations, not only the state boundary, but also the limits of its jurisdiction must be consulted. Thus along the Ohio river the boundary is low water on the north bank but the jurisdiction is concurrent in both bounding states.⁹ A court has jurisdiction of an action affecting localized property of the corporation, e. g., foreclosure of its railroad line, notwithstanding some of it extends into another state, and it may enforce its decree through the persons who are before it,¹⁰ and necessary parties, such as a domestic successor of the original foreign corporate owner, may be retained to make the jurisdiction effective and complete.¹¹

§ 67) a nonresident can sue a foreign corporation "for any cause of action," but formerly only when the subject of the action was within the state. Such statute was not repealed by chapter 309 of the same year. *Hagerstown Brewing Co. v. Gates*, 117 Md. 348, 83 Atl. 570.

Under Maryland statutes (Laws 1908, c. 240) a foreign corporation may be sued by a domestic one on a contract made in Maryland to be performed in Illinois. *Noel Const. Co. of Baltimore City v. Geo. W. Smith & Co.*, 193 Fed. 492.

⁷ Under a similar statute in terms limited to "any action or suit pertaining to the property, business or transactions of such corporation within this state" (*Pierce's Code of Washington*, § 7216) no jurisdiction by service of the agent was gained unless the action pertained to the described subjects. *Olson v. Buffalo Hump Min. Co.*, 130 Fed. 1017.

⁸ *Washington Laws 1911*, p. 161 et seq., providing for service on the insurance commissioner in "any actions" against foreign insurance com-

panies doing business in the state, and in a distinct section fixing the venue in actions on policies, does not limit the commissioner's competency to actions on policies or to transactions arising in that state. *Lyden v. Western Life Indemnity Co.*, 204 Fed. 687.

⁹ By compact with Virginia the state of Indiana has jurisdiction concurrently with Kentucky over the whole breadth of the river. *Memphis & C. Packet Co. v. Pikey*, 142 Ind. 304, 40 N. E. 527.

¹⁰ State court has jurisdiction to foreclose railroad mortgage on line though part of it extends beyond the state, and may effectuate the decree by ordering receiver, trustee and corporate mortgagor to convey to purchaser. *McTighe v. Macon Const. Co.*, 94 Ga. 306, 32 L. R. A. 208, 47 Am. St. Rep. 153, 21 S. E. 701.

¹¹ If a foreign railroad corporation has been consolidated with a domestic one, and the new one in fact was mortgagor of an interstate railroad, such fact may be shown in a foreclosure suit, all parties being before

§ 2960. — **Character of the proceeding or relief sought.** This is material only as to courts of inferior, limited or special jurisdiction¹² when the defendant is a domestic corporation, or to actions in which defendant is a foreign corporation or a nonresident. The statutes by describing particular causes of action or relief which may be sued for, e. g., contracts broken within the state, impliedly deny jurisdiction of other causes or forms of relief. Thus formerly in New York a cause of action *ex delicto* arising in another state against a foreign corporation could be maintained only by a resident or a domestic corporation,¹³ which however is now modified by an amendment permitting it if the corporation is "doing business within the state."¹⁴ Inherently there is a lack of power to make remedial process operate in another state, this being a lack of judicial power rather than a lack of jurisdiction, however.¹⁵ So "jurisdiction" or power may be lacking to affect title to realty in another state, but not all actions relating to real estate affect title to it.¹⁶ If any control of the internal management of the foreign corporation is sought,

the court, and the jurisdiction over the consolidated company and the suit retained. *McTighe v. Macon Const. Co.*, 94 Ga. 306, 32 L. R. A. 208, 47 Am. St. Rep. 153, 21 S. E. 701.

¹² See § 2968, *infra*.

¹³ A nonresident administrator could not in 1908 sue for wrongful death of a person in another state. *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 2 L. R. A. 636, 19 N. E. 625; *Fairclough v. Southern Pac. Co.*, 171 N. Y. App. Div. 496, 157 N. Y. Supp. 862, rev'g 155 N. Y. Supp. 899; *English v. New York, N. H. & H. R. Co.*, 161 N. Y. App. Div. 831, 146 N. Y. Supp. 963; *Klunck v. Pennsylvania R. Co.*, 148 N. Y. App. Div. 786, 133 N. Y. Supp. 207, which were made obsolete by Laws 1913, c. 60.

¹⁴ By virtue of Laws 1913, c. 60, subdivision 4 was added to Code Civ. Proc. § 1780, enabling any cause of action, e. g., negligence, to be sued on. *Rubel v. Central R. R. of New Jersey*, 171 N. Y. App. Div. 456, 156 N. Y. Supp. 1094.

¹⁵ Objection that accounting of a

foreign corporation cannot be had goes to the scope of relief and not to the jurisdiction. *Sauerbrunn v. Hartford Life Ins. Co.*, 159 N. Y. App. Div. 121, 143 N. Y. Supp. 1009, explaining Missouri cases, *infra* note 17.

Decree operating in personam cannot operate on corporations in foreign state. *Reynolds & Hamby Estate Mortg. Co. v. Martin*, 116 Ga. 495, 42 S. E. 796; *Royal Fraternal Union v. Lunday*, 51 Tex. Civ. App. 637, 113 S. W. 185.

Mandamus to corporation must be limited to such acts as can be compelled within the state. *Hobbs v. Tom Reed Gold Min. Co.*, 164 Cal. 497, 43 L. R. A. (N. S.) 1112, 129 Pac. 781.

Mandamus will lie against the Union Pacific Railroad Company in the district of Iowa concerning the tracks operated in that state under Act of Congress. *United States v. Union Pac. R. Co.*, 3 Dill. 524, Fed. Cas. No. 16,600.

¹⁶ An action for specific performance does not necessarily "affect title to the real property" situated in an-

the court is without power to grant it,¹⁷ even where under a statute consent has been filed to service "as valid as" that made according to the laws of the state;¹⁸ but that does not prevent relief between stockholders though both are nonresidents.¹⁹ Without regard to the fact that one of the parties is a corporation, some proceedings of a special or statutory nature and some ancillary proceedings must be brought in certain courts or in the court which has jurisdiction of the principal proceeding. The statutes or decisions applicable generally to such proceedings should be consulted. Some such proceedings of frequent occurrence in corporation practice have separate chapters

other state. *Wrightsville Hardware Co. v. Assets Realization Co.*, 159 N. Y. App. Div. 849, 144 N. Y. Supp. 991.

¹⁷ Decree requiring by-law changes relating to fraternal assessments, held unenforceable and erroneous. *Mock v. Supreme Council of Royal Arcanum*, 121 N. Y. App. Div. 474, 106 N. Y. Supp. 155.

Although a policyholder in a foreign assessment company might sue it on his contract with it, jurisdiction to the extent of investigating and supervising the management of the corporation will not be taken. *Condon v. Mutual Reserve Fund Life Ass'n*, 89 Md. 99, 44 L. R. A. 149, 73 Am. St. Rep. 169, 42 Atl. 944.

An action founded on a contract right of a member as an individual is one to regulate the internal affairs, if being a mutual insurance contract the relief sought is to investigate the lawfulness of a class of insurance and to restrain alleged excessive assessments. *Taylor v. Mutual Reserve Fund Life Ass'n*, 97 Va. 60, 45 L. R. A. 621, 33 S. E. 385.

An injunction in such suit ought not to be granted if it cannot be enforced. *Id.*

A member of an assessment foreign life insurance company cannot sue to investigate whether its assessments are excessive and to recover the excess. *State v. Shain*, 245 Mo. 78, 149 S. W. 479. To same effect, *Clark v.*

Mutual Reserve Fund Life Ass'n, 14 App. Cas. (D. C.) 154, 43 L. R. A. 390; *Howard v. Mutual Reserve Fund Life Ass'n*, 125 N. C. 49, 45 L. R. A. 853, 34 S. E. 199.

Validity of an assessment not requiring visitation may be determined. *Castagnino v. Mutual Reserve Fund Life Ass'n*, 157 Fed. 29.

Accounting which requires examination of corporate books and affairs at domicile will not be undertaken, though a contract might be enforced. *State v. Denton*, 229 Mo. 187, 138 Am. St. Rep. 417, 129 S. W. 709.

See generally chapter on Foreign Corporations, *infra*.

¹⁸ A statute (Acts Ex. Sess. 1887, c. 271, p. 348) providing for designation of a resident agent for foreign insurance companies, service on whom shall be "as valid as if served . . . according to the laws of this or any other state," does not confer any jurisdiction over the internal affairs of the company. *Taylor v. Mutual Reserve Fund Life Ass'n*, 97 Va. 60, 45 L. R. A. 621, 33 S. E. 385.

¹⁹ While the foreign corporation cannot be controlled in respect to the voting of stock by a decree declaring ownership, nonresident individuals are within the jurisdiction so far as their meetings and stockholdings have been within the state. *Harper v. Smith*, 93 N. Y. App. Div. 608, 87 N. Y. Supp. 516.

herein devoted to them.²⁰ Action on a judgment recovered by a corporate plaintiff's predecessor is not, like *scire facias*, restricted to the court in which it was rendered.²¹

§ 2961. — **National banks and other national corporations.** Ordinary actions by or against national banks were by the federal statutes in 1882 made suable in state courts; and the national origin of the bank does not confer, of itself, any federal jurisdiction or exclude the state jurisdiction.²² Other grounds of federal jurisdiction over national banks as parties remained unchanged.²³ By the federal statutes, however, in "all cases commenced by the United States, or by direction of any officer thereof, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title 'National Banks' Revised Statutes, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title," the federal courts still have jurisdiction. The same section and paragraph makes such banks "citizens of the states in which they are respectively located."²⁴ It was enacted in 1915 that national incorporation of a railroad corporation shall not give jurisdiction to federal courts.²⁵ Formerly as to such corporations, and yet as to other federal corporations, the federal law creating them will present a federal question on which the federal courts will assume jurisdiction regardless of the corporate

²⁰ See chapters on Injunctions; Receivers; Bankruptcy; Execution and Supplementary Proceedings, *infra*.

²¹ A corporation given leave under the code to sue on a judgment recovered by its predecessor need not, by analogy to *scire facias*, sue in the same court which rendered it, but may choose any court which another plaintiff might. *National Mechanics' Banking Ass'n v. Usher*, 81 N. Y. Super. Ct. 403.

²² See Act Aug. 13, 1888, c. 866 (25 Stat. L. 436), which is to be read with Judicial Code, § 24, par. 16. See also Act of July 13, 1882, c. 290, § 4 (22 Stat. L. 163); *Whitmore v. Amoskeag Nat. Bank*, 134 U. S. 527, 33 L. Ed. 1002; *Leather Manufacturers' Bank v. Cooper*, 120 U. S. 778, 30 L. Ed. 816.

State courts have jurisdiction over national banks both in local and transitory actions, except perhaps actions purely in rem. *Fresno Nat. Bank v. Superior Court*, 83 Cal. 491, 24 Pac. 157. This exception seems unsound. If it is purely in rem the jurisdiction of the persons is immaterial after the thing is seized.

²³ *Petri v. Commercial Nat. Bank*, 142 U. S. 644, 35 L. Ed. 1144.

²⁴ See U. S. Judicial Code, § 24, par. 16.

²⁵ Act of Jan. 28, 1915, c. 22, § 5, provides that no federal court "shall have jurisdiction upon the ground that the party was a railroad incorporated under an Act of Congress." 38 Stat. L. 804.

domicile²⁶ or the adverse party's citizenship;²⁷ but the controversy must actually have involved some question dependent on the federal origin of the corporation.²⁸ Neither before nor since the Act of 1915 has a grant to a federal corporation of power to sue or be sued in any court been regarded as conferring jurisdiction on courts but only as giving power to the corporation.²⁹ If no laws of the United States are involved other than those collectively forming a federal charter, and the corporation is a railroad one created by congress, no federal question is presented since the Act of 1915 took effect.³⁰ Of course there may be other federal questions than those dependent on federal incorporation, and these alone would sustain federal jurisdiction even of such a corporation.³¹ Either state or national courts

²⁶ Such a suit presents a question arising under the laws of the United States. *Texas & P. R. Co. v. Eastin*, 214 U. S. 153, 53 L. Ed. 946; *Knights of Pythias v. Kalinski*, 163 U. S. 289, 41 L. Ed. 163; *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 36 L. Ed. 829; *Pacific Railroad Removal Cases*, 115 U. S. 1, 29 L. Ed. 319; *Osborn v. Bank of United States*, 9 Wheat. (U. S.) 738, 816, 6 L. Ed. 204, 223; *United States Freehold Land & Emigration Co. v. Gallegos*, 89 Fed. 769; *Union Pac. R. Co. v. McComb*, 1 Fed. 799.

Corporation domiciled in District of Columbia held subject to jurisdiction of circuit court in Arkansas. *Supreme Lodge Knights of Pythias v. England*, 94 Fed. 369.

Right to build bridge under railroad charter presents federal question. *Hughes v. Northern Pac. Ry. Co.*, 18 Fed. 106.

If one defendant is a federal corporation it confers jurisdiction over the whole case. *In re Dunn*, 212 U. S. 374, 53 L. Ed. 558; *Lund v. Chicago, R. I. & P. Ry. Co.*, 78 Fed. 385.

²⁷ *Bauman v. Union Pac. R. Co.*, 3 Dill. 367, Fed. Cas. No. 1,117; *Smith v. Union Pac. R. Co.*, 2 Dill. 278, Fed. Cas. No. 13,121.

²⁸ A corporation of a territory held not a federal corporation, and even so no federal question is presented by

that fact alone. A federal question must be involved in the controversy. *Adams Exp. Co. v. Denver & R. G. Ry. Co.*, 16 Fed. 712.

²⁹ *Bankers Trust Co. v. Texas & P. R. Co.*, 241 U. S. 295, 60 L. Ed. 1010, citing *Bank of United States v. Deveaux*, 5 Cranch (U. S.) 61, 3 L. Ed. 194, and distinguishing *Osborn v. Bank of United States*, 9 Wheat. (U. S.) 738, at pp. 816-818, 6 L. Ed. 204, where the grant of power differed in terms.

³⁰ Even though its charter enables it to sue or be sued in any court of law or equity within the United States. *Bankers' Trust Co. v. Texas & P. R. Co.*, 241 U. S. 295, 60 L. Ed. 1010.

³¹ The taxability locally of a right of way granted by congress to the Northern Pacific R. Co., a national corporation, with exemption from taxation presents a federal question, of which federal courts and territorial courts of Montana have jurisdiction. *Northern Pac. R. Co. v. Carland*, 5 Mont. 146, 3 Pac. 134.

See § 2965 et seq., *infra*.

As to suits in state courts under Federal Employers' Liability Act and other acts, which suits are usually against railroad corporations and which are no longer removable, see Judicial Code, § 28, as amended.

are open to such corporations, e. g., national banks³³ or nationally chartered railroad corporations.³³

§ 2962. — Dual incorporation and existence; interstate corporations. No corporation can have two domiciles.³⁴ If there is more than one incorporation under the same name and in different states, as often happens in the case of railroad and other corporations operating in several states, each is domestic in the place where it is incorporated and foreign elsewhere;³⁵ and it may be sued in either as a domestic one.³⁶ It accordingly follows, as to such corporations, that the jurisdiction rests either on the fact that one of them is a domestic corporation, or that, if foreign, it has come into the jurisdiction by doing business there or appointing an agent there or in some other way.³⁷

§ 2963. — Principal and subsidiary or branch corporations. What has been said in the last section applies equally and for like reasons to corporations one of which is the principal or holding corporation and one of which is the subsidiary or operating corporation. A principal corporation may be regarded as operating within the state when its subsidiary is a mere form,³⁸ but ordinarily they are

³³ A national bank is not restricted to the state courts because their remedies may be deemed adequate. *First Nat. Bank of New Orleans v. Bohne*, 8 Fed. 115.

³³ See *Bankers' Trust Co. v. Texas & P. R. Co.*, 241 U. S. 295, 60 L. Ed. 1010, in which it appears that this power was granted to the corporation. Some other federally chartered railroad corporations had a like power.

³⁴ See § 387, *supra*, quoting the opinion of Mr. Justice Holmes in *Bergner & Engel Brewing Co. v. Dreyfus*, 172 Mass. 154, 70 Am. St. Rep. 251, 51 N. E. 531.

³⁵ See § 387, *supra*, citing *Mobile & O. R. Co. v. Barnhill*, 91 Tenn. 395, 30 Am. St. Rep. 889, 19 S. W. 21.

³⁶ A corporation existing in two states and operating as one institution can be sued as a domestic one in its domicile for injury to plaintiff, a passenger, in the other state. *Mississippi*

pi & T. R. Co. v. Ayres, 84 Tenn. (16 Lea) 725.

An act granting to a foreign corporation the same rights as by the domiciliary charter and subjecting it to the same liabilities of the state as it sustains in the domicile makes a dual incorporation suable in this state as regards its properties and operations therein. *Baltimore & O. R. Co. v. Gallahue's Adm'rs*, 12 Gratt. (Va.) 655, 65 Am. Dec. 254.

³⁷ See the other sections in this subdivision of this chapter, and see also chapter on Foreign Corporations, *infra*.

³⁸ A corporation is within the state doing business where it operates a railroad, though in the name and through the form of a subcorporation. *St. Louis & S. F. R. Co. v. Arms*, — Tex. Civ. App. —, 136 S. W. 1164; *St. Louis & S. F. R. Co. v. Hale*, — Tex. Civ. App. —, 153 S. W. 411.

distinct corporations and jurisdictions of one does not bring in the other.³⁹

§ 2964. — Reincorporated, consolidated or domesticated corporations. Any succession by reincorporation, consolidation or domestication leaves either a new corporation with inherent capacity to sue and be sued, or the old corporation with merely a new form and likewise with inherent power to sue and be sued. Jurisdiction therefore depends on whether a new or the old corporation exists after the change, and with that ascertained can be determined by ordinary rules. The whole question is, what is the effect of the succession or change that has taken place.⁴⁰ In the case of the consolidation of foreign with domestic corporations, either two new corporations result, one foreign and the other domestic but identical in composition, or else a domestic consolidation merging the foreign one, or a foreign merging the domestic one. In any of these events the action or suit by or against one of these corporations will be governed by the rules applying respectively to actions where a domestic corporation is a party, or by those applicable where the foreign one is a party.⁴¹ A foreign corporation may become a domestic one by grant of a domestic charter or by compliance with statutes requiring it as a condition to admission to do business in the state. When domestication thus takes place, actions are governed by the general rules applicable to other domestic corporations.⁴²

§ 2965. Federal jurisdiction—In general. The jurisdiction of the federal courts of original jurisdiction was first defined in the Judiciary Act of 1789, which through its several amendments has been carried into the present Judicial Code, § 24, paragraph "First" being the one which touches the scope of this chapter. It is set out in the footnote.⁴³ It will be seen that nothing in this language sug-

Corporation regarded as mere form in serving process, see § 2991, *infra*.

³⁹ No jurisdiction of the holding company is had on suit where only the subsidiary one is served. *State v. International Harvester Co. of America*, 81 Kan. 610, 108 Pac. 1053. See other cases, § 2991, *infra*.

⁴⁰ As to such effects, see generally chapters on Reorganization; Consolidation; Foreign Corporations (domestication).

⁴¹ As to the general effect of such a consolidation see chapter on Consolidation, *infra*.

As to the citizenship of such a consolidation, see § 390, p. 836, *supra*.

⁴² As to the doctrine of domestication, see chapter on Foreign Corporations, *infra*.

⁴³ The circuit courts having been abolished and their jurisdiction having been devolved on the district courts, the district courts now have

gests any question of corporation law or practice. Only that by the generality of its terms and the necessities of procedure it must and does include corporations as suitors or defendants does an inquiry into the law of corporations become secondarily necessary to apply the statute. And not in every case where a corporate party is before a federal court is there anything decided which is of the least pertinency to a work on corporations. Precedents on the law of federal jurisdiction must therefore be sought in standard works on that subject, what is here considered being only the corporation aspect of the subject. Regarding it from the viewpoint of a corporate party or rather that of an action in which a corporation is a party, it will be seen that three general bases for jurisdiction exist: (a) a federal question, which will seldom depend on anything peculiar to corporations except in cases by or against a federal incorporation; (b) diversity of citizenship among the parties, one side including a corporation and all on the opposite side of the controversy being of some other state or states; (c) diversity of citizenship consisting in parties on one side being citizens of a state, or corporations thereof, and others being citizens or subjects of a foreign country, or corporations thereof. Furthermore an assignee or indorsee is placed in the shoes of the assignor of the chose in action or note for this purpose, but with this important exception that foreign bills of exchange and instruments payable to bearer and made by a corporation may be sued by an assignee or holder whose assignor or transferror would have been unable to sue.⁴⁴ Any suit directly on a note, bond, or chose

jurisdiction: "Of all suits of a civil nature, at common law or in equity * * * where the matter in controversy exceeds exclusive of interest and costs the sum or value of three thousand dollars and (a) arises under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different states, or (c) is between citizens of a state and foreign states, citizens and subjects." Judicial Code, § 24, par. "First" (36 Stat. L. 1091), derived from Rev. St. §§ 563, 629. Original legislation was Judiciary Act of September 24, 1789.

⁴⁴The second sentence of section 24, following that quoted in the note

preceding, reads: "No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made:" etc. As contained in U. S. Rev. St. § 629, this sentence used the words, "the contents of any promissory note or other chose in action," instead of the present words, "to recover upon any promissory note," etc. This was construed as meaning the

in action *ex contractu*, generally speaking, is within this exception,⁴⁵ but it does not apply to a mere form of an indorsement or assignment made as part of the insurance of the paper,⁴⁶ or to a new contract arising from or out of the assignment,⁴⁷ or to suit on a trust collateral thereto,⁴⁸ or to an action by the assignee to enforce his rights involving no recovery on the assigned chose or right,⁴⁹ or to assigned causes for tort or negligence.⁵⁰

same as the present language, but the earlier cases must be read in the light of it. See *Kolze v. Hoadley*, 200 U. S. 76, 50 L. Ed. 377, for a general exposition of this legislation.

⁴⁵ Corporate notes. *State Nat. Bank v. Eureka Springs Water Co.*, 174 Fed. 827.

Railroad bonds payable in blank. *White v. Vermont & M. R. Co.*, 21 How. (U. S.) 575, 16 L. Ed. 221.

And negotiable bonds made by corporations though negotiability was first imparted by indorsing a new agreement thereon. *Marine & River Phosphate Min. & Mfg. Co. v. Bradley*, 105 U. S. 175 at page 180, 26 L. Ed. 1034, 1036. See also *Dodge v. Tulleys*, 144 U. S. 451, 36 L. Ed. 501.

Certificates made by a city and payable to bearer. *New Orleans v. Quinlan*, 173 U. S. 191, 43 L. Ed. 664, approving *Newgass v. New Orleans*, 33 Fed. 196, founded on like certificates.

A bank check on a foreign bank is a bill of exchange within this language. *Bull v. Bank of Kasson*, 123 U. S. 105, 31 L. Ed. 97.

⁴⁶ A bank which was the real party interested in a note, and entitled in the state court to sue on it, may sue on it in the federal court regardless of the citizenship of its cashier who was the nominal payee with the words "trustee" added to his name, and who indorsed it to the corporation. *Franklin v. Conrad-Stanford Co.*, 137 Fed. 737.

Corporate notes payable to its own treasurer and by him indorsed as a means of issuance do not pass

to the taker as to an assignee. *Blair v. Chicago*, 201 U. S. 400, 50 L. Ed. 801.

⁴⁷ Action based on a new agreement originating in an assignment and contracts of employment by a corporation may be sued on grounds of diverse citizenship of the parties. *American Colortype Co. v. Continental Colortype Co.*, 188 U. S. 104, 47 L. Ed. 404.

⁴⁸ Bill to enforce a trusteeship arising *ex maleficio* out of an assignment and contract of employment may be maintained without regard to assignor's citizenship. *Prest-O-Lite Co. v. Avery Portable Lighting Co.*, 164 Fed. 60.

⁴⁹ Suit to compel a transfer is not one upon the shares involved. *Jewett v. Bradford Sav. Bank & Trust Co.*, 45 Fed. 801.

Assignee of franchise may sue for rentals for water service. *Seymour v. Farmers' Loan & Trust Co. of New York*, 128 Fed. 907.

⁵⁰ A tort cause of action against carriers may be sued by an assignee without regard to his assignor's citizenship. *Muller v. Chicago, I. & L. R. Co.*, 149 Fed. 939.

Claim for freight overcharge is not a chose in action *ex contractu*. *Conn v. Chicago, B. & Q. R. Co.*, 48 Fed. 177.

An action against a correspondent bank for breach of its contract to collect a draft is not one to recover on the draft (or to recover its contents). *Barney v. Globe Bank*, 5 Blatchf. 107, Fed. Cas. No. 1,031.

In addition to the three general grounds of jurisdiction which may be affected by the corporate character of the party or parties, a number of special subjects of jurisdiction are enumerated mainly dependent on the subject-matter involved, e. g., admiralty, internal revenue, patent and copyright cases, interstate commerce cases, anti-trust and monopoly cases based on federal laws. None of these essentially depends on anything peculiar to corporations, except paragraph 16 of section 24 which relates to national banks. As to them certain suits are specified as subjects for federal jurisdiction and the citizenship of such banks as to "all other" actions is fixed in the "states in which they are respectively located."⁵¹ This summary of the statutes is made for the purpose of explaining the cognizance of a suit with a corporate party in the national courts. For the cases in general the reader is referred to the numerous treatises, digests and annotated editions of the federal statutes, most of the cases either having no corporate parties or, if any, not in a manner or attitude affecting the questions decided. The most litigated question of corporate law in this connection has been that of the corporate citizenship and inhabitancy, and this is already disposed of in an earlier chapter.⁵² The existence or nonexistence of a federal question is not ordinarily determinable by any principle of corporation law, but one exception to this is in the case of a federal corporation, a suit by or against which does present a question arising under the laws of the United States.⁵³ This exception itself has been so greatly eaten away by late legislation that only the lesser portion of its real substance remains. No federal jurisdiction now exists merely because a national bank or railroad corporation is a party, and in the case of the railroad corporations chartered by congress no state citizenship is conferred on them as on national banks. Moreover many cases are no longer removable, e. g., federal

⁵¹ The remaining paragraphs or subdivisions of section 24 give jurisdiction over twenty-four distinct kinds of suits, including crimes, among which paragraph 16, relating to national banks, reads: "Of all suits commenced by the United States, or by direction of any officer thereof, against any national banking association; and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under [Na-

tional Bank Act] to enjoin the Comptroller of the Currency, or any receiver acting under his direction as provided by such title * * *."

⁵² See § 390 et seq., *supra*, as to citizenship.

⁵³ Suit by the Bank of the United States or other federal corporation. *Osborn v. Bank of United States*, 9 Wheat. (U. S.) 738, 6 L. Ed. 204; *Bank of United States v. Northumberland Bank*, 4 Wash. C. C. 108, Fed. Cas. No. 931. See also other cases cited § 2961, *supra*. See also § 2974, *infra*.

employers' liability cases, and loss, delay and injury cases under the interstate commerce acts involving less than \$8,000 in controversy.⁵⁴ But there may be federal questions in a case where a national corporation is a party which do not depend on their incorporation, and among them are cases involving franchises and exemptions not a part of their charters but granted by congress,⁵⁵ and generally questions arising under any other laws of congress.⁵⁶ A corporation formed under territorial laws is not a federal corporation.⁵⁷ A federal corporation doing business within the state is suable there by a citizen of the state, service being made according to the state laws.⁵⁸

The right to take jurisdiction of a foreign corporation as one of the parties is an undoubted consequence of the doctrine finally settled that a corporation is a "citizen" of the state creating it, and the only question is whether it is present in the state which contains the federal district so that it can there be served when it does not voluntarily appear.⁵⁹ It makes no difference that the state courts could not have had jurisdiction because one of the corporations was foreign to it and to the federal district, since the state practice is not followed in jurisdiction.⁶⁰ An alien corporation is a citizen or subject of the state or

⁵⁴ By statute no federal court can now take jurisdiction by reason of the law of their creation over national banks or federal incorporated railroads, so that cases of this kind will henceforth be fewer than in the past. See § 2961, *supra*, and see *Bankers' Trust Co. v. Texas & P. R. Co.*, 241 U. S. 295, 60 L. Ed. 1010, which, in addition to denying the existence of a federal question by reason of federal incorporation, also denied that the grant of right to sue or be sued in any court conferred any jurisdiction, and further held that railroad corporations chartered by congress have no state citizenship entitling them to base a diversity of citizenship thereon. See Judicial Code, § 28, for provision making certain cases not removable.

⁵⁵ Attempt to tax railroad right of way granted by the federal government as tax exempt makes federal question. *Northern Pac. R. Co. v. Carland*, 5 Mont. 146, 3 Pac. 134.

⁵⁶ Violation under Sherman Anti-Trust Act makes a federal question. *Mannington v. Hocking Valley Ry. Co.*, 183 Fed. 133.

Suits under the anti-trust acts will nearly always have corporate parties, but such suits are themselves a special ground of federal jurisdiction under express terms of Judicial Code, § 24, par. 23.

⁵⁷ *Maxwell v. Federal Gold & Copper Co.*, 155 Fed. 110.

⁵⁸ A federal company lessee of a line operated in Washington by lessees, to which lease the state of Washington is not bound, is doing business there and may be sued there by a Washington resident and citizen in a federal court and served through the lessor as agent. *Van Dresser v. Oregon Ry. & Nav. Co.*, 48 Fed. 202.

⁵⁹ See § 390 *et seq.*, *supra*, and see also § 2957, *supra*.

⁶⁰ In *United States v. American Bell Tel. Co.*, 29 Fed. 17, it was questioned whether a foreign corporation

power creating it, and as such its alien citizenship may bring the suit under the third ground laid down in section 24;⁶¹ but the law does not admit of suits between aliens, one of them a corporation, for it in terms specifies that the controversy shall be one between "citizens of a state" and "foreign states, citizens, or subjects."⁶²

The rule that an ancillary proceeding belongs to the jurisdiction that entertained the original suit applies as between state and federal courts respecting actions with corporate parties just as with natural parties.⁶³ The objection has been made and overruled that a federal court has no jurisdiction of a creditors' suit founded on a judgment of a court of another state, but as the court entertaining the bill pointed out this was on a false supposition that a creditors' bill must be based on a judgment whereas it can be based on any sufficient equity or want of legal means of enforcing the debt. This is not therefore a decision on jurisdiction but on relief.⁶⁴

It is a settled rule that no jurisdiction which it could not exercise by law can be conferred on or exercised by a federal court because the parties consent to it or one of them waives objection. At any stage of the case the court will and should raise the question of its own motion, and even on appeal or error will inquire of its own or the trial court's jurisdiction, if federal, and will not retain the case if it is found lacking,⁶⁵ but this disability to give jurisdiction by waiver does not apply to the privilege to be sued in the district or residence of the defendant.⁶⁶

could be sued in a federal court where the same suit could not have been maintained against it in the state court for want of jurisdiction. A later decision questions this ruling on the authority of *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 54 L. Ed. 272, in which it was pointed out that the federal courts did not conform to state laws and decisions in jurisdictional matters. See discussion in *Noel Const. Co. of Baltimore City v. George W. Smith & Co., Inc.*, 193 Fed. 492.

⁶¹ A corporation created by a foreign sovereign is a foreign citizen. *Pelzer Mfg. Co. v. Hamburg-Bremen Fire Ins. Co.*, 62 Fed. 1.

⁶² There is no jurisdiction of an action between an alien corporation and

another alien not involving any federal question. *Gage v. Riverside Trust Co., Ltd.*, 156 Fed. 1002; *Laird v. Indemnity Mut. Marine Assur. Co.*, 44 Fed. 712.

⁶³ See § 2969, *infra*.

⁶⁴ *Merchants' Nat. Bank v. Chattanooga Const. Co.*, 53 Fed. 314, citing *Stutz v. Handley*, 41 Fed. 531, *aff'd* 139 U. S. 417, 35 L. Ed. 227.

⁶⁵ *Chicago, B. & Q. R. Co. v. Willard*, 220 U. S. 413, 55 L. Ed. 521; *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 48 L. Ed. 870; *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 28 L. Ed. 462. Other cases need not be cited as the question is only indirectly a corporate one.

⁶⁶ It can be waived only so far as there is jurisdiction and a right to be

§ 2966. — **Diversity of citizenship; inhabitancy.** It has long been settled that all necessary parties on one side shall be of different citizenship from all on the other side. And for this purpose the parties may be rearranged and aligned according to their relation to and interest in the controversy.⁶⁷ After holding for a time that the citizenship to be considered was that of the stockholders, the supreme court laid down the rule that the domicile of the corporation gave it and fixed its citizenship.⁶⁸ A federal corporation active in several states cannot be regarded as a citizen of any state for the purpose of jurisdiction on the ground of diversity, unless like national banks congress has specially ascribed a citizenship to such corporations. Hence a corporation of one state cannot bring such a corporation into a federal court of another state where it operates and has its general offices.⁶⁹ The inhabitancy of the corporation is not a test for fixing jurisdiction, but determines in part the place for trial; that is, the district in which the suit must be brought if the corporation insist on the privilege.⁷⁰ In patent infringement cases it is expressly provided that the jurisdiction may be had in the district where defendant is an inhabitant or shall have committed acts of infringement and have a regular place of business.⁷¹

sued in a given district. *In re Winn*, 213 U. S. 458, 53 L. Ed. 873.

Waiving venue, see § 2978, *infra*.

⁶⁷ *St. Louis & S. F. R. Co. v. Wilson*, 114 U. S. 60, 29 L. Ed. 66; *Chicago & N. W. R. Co. v. Crane*, 113 U. S. 424, 28 L. Ed. 1064; *Central R. Co. of New Jersey v. Mills*, 113 U. S. 249, 28 L. Ed. 949; *American Bible Society v. Price*, 110 U. S. 61, 28 L. Ed. 70; *Case of the Sewing Machine Companies*, 18 Wall. (U. S.) 553, 21 L. Ed. 914. See also other cases, § 2972, *infra*.

Alignment of parties, see § 2967, *infra*.

⁶⁸ See § 390 et seq., *supra*; *Louisville, C. & C. R. Co. v. Letson*, 2 How. (U. S.) 497, 11 L. Ed. 353, overruling in effect.

Commercial & Railroad Bank v. Slocomb, 14 Pet. (U. S.) 60, 10 L. Ed. 354; *Bank of United States v. Deveaux*, 5 Cranch (U. S.) 61, 3 L. Ed. 38; *United States Bank v. Planters' Bank*, 9

Wheat. (U. S.) 904, 6 L. Ed. 244.

⁶⁹ "The suit is not one between citizens of different states." *Bankers' Trust Co. v. Texas & P. R. Co.*, 241 U. S. 295, 60 L. Ed. 1010.

In the earlier case of *In re Dunn*, 212 U. S. 374, 53 L. Ed. 558, the residence of the same corporation was held to be in the state where it had general offices (Texas), but this was on the question where it should be sued. The Act of 1915 was not yet passed.

⁷⁰ See Judicial Code, § 51.

A corporation may have no state citizenship but may have inhabitancy within the state. See cases cited in note preceding.

What is the state where the corporation is an "inhabitant" or "found" has been discussed, § 396, *supra*, which see. Other matters relating to venue, see §§ 2978, 2979, *infra*.

⁷¹ Judicial Code, § 48. See cases

§ 2967. — Alignment of parties to ascertain diversity. Because of the terms of Judicial Code, § 24, it is not the nominal alignment of the parties as plaintiffs and defendants, but their actual alignment on different sides in interest of the "matter in controversy" which is "between" them, that confers jurisdiction.⁷² In a stockholders' suit the corporation is usually aligned as a defendant when alleged to be under control of defendant officers or stockholders, and in other cases may sometimes be aligned as a coplaintiff.⁷³ While purely nominal parties may be disregarded for this purpose,⁷⁴ officers are not

cited § 391, *supra*, as to what is inhabitancy or regular place of business.

⁷² It is "the duty of the court in determining whether there was the requisite diversity of citizenship to arrange the parties with respect to the actual controversy looking beyond the formal arrangement made by the bill." *Helm v. Zarecor*, 222 U. S. 32, 56 L. Ed. 77.

On a bill to declare the true ownership of a church publishing corporation in favor of members of an unincorporated church against a faction also unincorporated claiming to be the regular church organization, the corporation was properly a defendant. *Id.* To same effect on facts similar except that a local church of the same denomination and factions was involved, see *Sharpe v. Bonham*, 224 U. S. 241, 56 L. Ed. 747.

On a bill by a mortgagee corporation against a city and the mortgagor corporation, to enforce a contract between the city and the mortgagor and for injunction, the mortgagor will be aligned with the mortgagee though named as defendant where the object was to get a federal trial of an issue decided against the mortgagor in the state court. *Dawson v. Columbia Ave. Sav. Fund, Safe Deposit, Title & Trust Co.*, 197 U. S. 178, 49 L. Ed. 713.

A coal selling corporation, plaintiff, has different causes of action shown on a bill alleging a conspiracy to cut off coal production by a strike and

thus injure it from those which coal producing companies have against their individual co-defendants. Hence, plaintiff and defendant corporations cannot be aligned together. *Carroll v. Chesapeake & O. Coal Agency Co.*, 124 Fed. 305.

⁷³ In the case of a stockholder's suit the corporation will be aligned as a defendant when controlled by individual defendants. See chapter on Stock & Stockholders, subd. Remedies of Stockholders, etc., *infra*.

Diversity exists in a stockholder's suit where he and the corporation and its receiver are of one state, and the other defendants against whom relief is sought are of another. *Kelly v. Dolan*, 218 Fed. 966.

In a stockholder's suit, brought while a statutory receiver has title to corporate property and choses, the receiver may be aligned with the stockholder, their interest in the suit being the same, so as to produce requisite diversity. *Kelly v. Dolan*, 218 Fed. 966.

⁷⁴ A corporation of California can sue a bank of Iowa in Iowa for recovery of a specific fund embezzled by an officer of plaintiff and turned over to defendant, where the officer though joined is a formal defendant. *White Swan Mines Co., Ltd., v. Balliet*, 134 Fed. 1004.

Inability to serve the corporation which is a nominal defendant does not defeat jurisdiction. Hence the

to be regarded as nominal parties when they are joined for discovery.⁷⁵

§ 2968. Inferior and special jurisdictions. The ecclesiastical courts of England had no jurisdiction over corporations at common law for the reason that such courts acted only for the health of the soul and enforced their sentences only by spiritual censure.⁷⁶

The jurisdiction of inferior courts is entirely defined by the constitutions and statutes. It is impossible and inappropriate to essay any analysis of all existing statutes on their jurisdiction over corporate parties.⁷⁷ Subject to constitutional limitations, the legislature may confer such jurisdiction as it sees fit.⁷⁸ The typical inferior tribunal is that of the justice of the peace. In an earlier day a con-

corporation can be disregarded where bondholders sue its officers for fraud and deceit. *Slater Trust Co. v. Randolph-Macon Coal Co.*, 166 Fed. 171.

⁷⁵ Officers joined for discovery are not to be regarded as nominal parties. Hence jurisdiction is ousted by their common citizenship with some of defendants. *Doyle v. San Diego Land & Town Co.*, 43 Fed. 349.

⁷⁶ 1 Bl. Comm. 477. Blackstone seems to regard this as bad reasoning, for he adds that it, if "carried to its full extent, would demonstrate the impropriety of these courts interfering in any temporal rights whatsoever."

⁷⁷ The statutes of the particular state and affecting the particular court must be consulted. That it is wholly statutory, see *Joseph Speidel Grocery Co. v. Warder*, 56 W. Va. 602, 49 S. E. 534. See also cases in notes following.

⁷⁸ To give greater jurisdiction in amount than is had over natural persons may be offensive to a constitutional provision that they shall be suable in like cases as natural persons are (Const. 1901, § 240). See dictum in *Brown v. Alabama Great Southern R. Co.*, 87 Ala. 370, 6 So. 295; repudiated in *Kansas City, M. & B. R. Co. v. Whitehead*, 109 Ala. 495, 19 So. 705,

The municipal court of New York is not a new inferior court but a re-organized continuation of various local courts; hence the statute giving it jurisdiction over "foreign corporations having an office in the City of New York" did not create an inferior court with a special jurisdiction greater than allowed by Const. art. 6, § 18. *Worthington v. London Guarantee & Accident Co.*, 164 N. Y. 81, 58 N. E. 102.

Under the Municipal Court Code (adopted later) the foregoing law was changed to dispense with necessity of an office in New York City, and this was also held to be not an extension of the jurisdiction so defined and limited to that given to the county courts. *Degnon v. Cook & Wilson's Greatest Wild Animal Circus on Earth*, 98 N. Y. Misc. 251, 162 N. Y. Supp. 1051. See earlier cases of *Heimerdinger v. American Mfg. Co.*, 28 N. Y. Misc. 773, 58 N. Y. Supp. 1022; *Reiser v. Charles F. Parker & Co.*, 27 N. Y. Misc. 205, 57 N. Y. Supp. 745, where act conferring jurisdiction on municipal court was unconstitutional.

Code Civ. Proc. § 263, giving jurisdiction to the city court where the cause of action arose within the city, is not contrary to the constitution, and embraces actions against corporations. *Kirchner v. George C. Flint*

siderable body of opinion denied his jurisdiction over corporations on the theory that the machinery for the acquisition of jurisdiction found in the justices' practice was so inadequate that an exclusion of jurisdiction was implied. Partly by alterations of practice and amendments of statute, and partly through a more liberalized construction, this doctrine has now waned.⁷⁹ Generally speaking, the constitutional or statutory jurisdiction of justices of the peace includes actions by or against corporations, provided the limits in amount and subject-matter or in the nature of the action are not exceeded,⁸⁰ and by the better and modern rule mere want of defined practice or process, or the necessity of adaptations of practice, afford no conclusive reason for a construction which denies such jurisdiction.⁸¹ In an early New York case, the distinction was made that corporations could sue be-

Co., 19 N. Y. Civ. Proc. 368, 11 N. Y. Supp. 741.

⁷⁹ See cases cited in notes following in this section.

⁸⁰ *Dennis v. Atlantic Coast Line R. R.*, 86 S. C. 258, 68 S. E. 465. See also *Harding v. New Haven Township*, 3 Ohio 227, holding incorporated township can be sued.

Suit may be brought either in county of principal office of domestic corporation or in county where the cause of action arose. *Joseph Speidel Grocery Co. v. Warder*, 56 W. Va. 602, 49 S. E. 534.

A breach of duty which would have been avoided had the corporation performed a covenant to make cattle guards at a crossing is none the less a tort which may be sued before a justice (Code, c. 50, § 26). *Harrow v. Ohio River R. Co.*, 38 W. Va. 711, 18 S. E. 926.

A statute denying them such jurisdiction, which the constitution gave, is void. *More v. Woodruff*, 5 Ark. 214. And such jurisdiction within limits extends to garnishment of the corporation. *Woodruff v. Griffith*, 5 Ark. 354.

⁸¹ *Loomis v. Commercial Bank*, 4 How. (Miss.) 660.

Inability to issue a distringas is no obstacle when the justice can issue

summons and where actual personal appearance is not requisite to jurisdiction. *Union Bank v. Lowe, Meigs* (Tenn.) 225.

By statute, process can run outside the county to a foreign corporation but not under all circumstances to natural persons. *Allen-Fleming Co. v. Southern R. Co.*, 145 N. C. 37, 58 S. E. 793.

Action can be maintained against it and stockholders jointly, though some of them are nonresidents and not servable, and though a "clerk's" indorsement on process is required. (Justice can indorse as his own clerk.) *Milroy v. Spurr Mountain Iron Min. Co.*, 43 Mich. 231, 5 N. W. 287.

Power of justice to obtain jurisdiction of corporation which has no managing agent or other person within statute, see *Jepson v. Postal Tel. Cable Co.*, 22 N. Y. Civ. Proc. 434, 20 N. Y. Supp. 300.

Want of power to send process for witnesses to another county is not the test of jurisdiction. *Dennis v. Atlantic Coast Line R. R.*, 86 S. C. 258, 68 S. E. 465.

In the earlier Michigan cases jurisdiction over foreign corporations was denied because of the lack of any way to obtain jurisdiction in such courts, the modes of process being inapplica-

fore a justice, but could not be sued because of the lack of a means of obtaining jurisdiction.⁸³

The jurisdiction usually extends only to a fixed maximum amount.⁸³ Jurisdiction is often made concurrent with that of the court of general jurisdiction up to the statutory limits,⁸⁴ but when it has a minimum jurisdiction leaving to the inferior courts cases below that amount, a construction will be favored giving the inferior courts jurisdiction of corporation cases within that minimum, because otherwise no court would have it.⁸⁵ The jurisdiction therefore extends to

ble to such courts. *American Exp. Co. v. Conant*, 45 Mich. 842, 8 N. W. 574; *Hebel v. Amazon Ins. Co.*, 33 Mich. 400; *Hartford Fire Ins. Co. v. Owen*, 30 Mich. 441; *Brigham v. Eglington*, 7 Mich. 291.

The same result based on the same lack was reached in New Jersey (explaining that *distringas* was obsolete, but that justices could proceed only according to defined process). *State Bank v. Van Horn*, 4 N. J. L. 382.

⁸³ *Hotchkiss v. First Religious Soc. of Homer*, 7 Johns. (N. Y.) 356.

⁸³ A justice has no jurisdiction of an action sounding in debt for a tortious violation of a by-law for \$100 damages. *White Water Valley Canal Co. v. Boden*, 8 Blackf. (Ind.) 130.

By statute a justice has jurisdiction without regard to value in actions against railroads for the killing of animals within the township (2 Wagn. St. 808). *Hudson v. St. Louis, K. C. & N. R. Co.*, 53 Mo. 525.

⁸⁴ Justices of the peace "in the county where the cause of action or some part thereof arose" have up to the limit of amount concurrent jurisdiction with the county court. *Western Paving Co. v. Binion*, — Okla. —, 150 Pac. 898.

The city court of New York being given jurisdiction over defendant foreign corporations by Code Civ. Proc. § 315, has, reading in section 1780, jurisdiction over them when sued by

nonresidents in proper cases. *Susquehanna Woolen Co. v. Imperial Coal & Coke Co.*, 66 N. Y. Misc. 621, 122 N. Y. Supp. 214; *Kline v. Imperial Coal & Coke Co.*, 66 N. Y. Misc. 616, 122 N. Y. Supp. 211.

In the city court of New York plaintiff need not be a resident of the city but only of the state to give jurisdiction of "any cause of action" (construing Code Civ. Proc. §§ 315, 1780). *Maas v. Cunard S. S. Co.*, 19 N. Y. Misc. 100, 43 N. Y. Supp. 219.

⁸⁵ A construction will not be adopted which restricts their jurisdiction and leaves no other court to exercise it. *Loomis v. Commercial Bank*, 4 How. (Miss.) 660.

A statute enacting that a corporation may be sued or may sue in any county in which it has a usual place of business only fixes venue and does not confer jurisdiction over foreign corporations on the municipal court of Boston. But a statute providing that in inferior courts venue of an action against "A defendant who is not an inhabitant of" the state "if personal service * * * is made within" the state implies that such court has jurisdiction by service on the Commissioner of Corporations, the foreign corporation having a place of business within the state. *Potter v. Lapointe Mach. Tool Co.*, 201 Mass. 557, 88 N. E. 418.

foreign corporations⁸⁶ of every kind not necessarily excluded in language or the nature of the tribunal⁸⁷ and not impliedly excluded by want of any legal means of obtaining jurisdiction.⁸⁸ Minor courts have jurisdiction of forcible entry and detainer suits or dispossession proceedings against corporations, where they are regarded as "persons" against whom the service of the necessary notices and process can go.⁸⁹ There may be jurisdiction of garnishment proceedings even though there is none on original process,⁹⁰ and a jurisdiction over foreign corporations by attachment is not conversely applicable to domestic ones.⁹¹ In Missouri an early statute withdrew corporations from the justices' jurisdiction except in given particulars.⁹²

Inferior or limited courts in some instances have jurisdiction dependent on the corporation's "doing business" or having an "office"⁹³

⁸⁶ By How. St. § 3723, jurisdiction over foreign corporations was conferred, though prior to 1881 justices of the peace had it only in attachment and garnishee cases. *Gallagher v. American Exp. Co.*, 56 Mich. 13, 22 N. W. 96.

Rev. St. 1889, § 6123, giving jurisdiction over corporations includes foreign corporations. *Rechnitzer v. Missouri, K & T. Ry. Co.*, 60 Mo. App. 409.

A penal action can be brought in any county where the foreign corporation does business or has property. *Allen-Fleming Co. v. Southern R. Co.*, 145 N. C. 37, 58 S. E. 793.

The jurisdiction of a magistrate of actions for injury to person or property up to \$100 includes corporations both domestic and foreign. *Dennis v. Atlantic Coast Line R. R.*, 86 S. C. 258, 68 S. E. 465.

⁸⁷ Statutes construed as extending jurisdiction over foreign insurance as well as other foreign corporations. *McLean v. Prudential Ins. Co.*, 130 Mich. 591, 90 N. W. 405.

⁸⁸ *Wheeler & Wilson Mfg. Co. v. Carty*, 53 N. J. L. 336, 21 Atl. 851. See also *Delaware, L. & W. R. Co. v. Ditton*, 36 N. J. L. 361.

⁸⁹ A district court has power to

serve a corporation in dispossession proceedings by a landlord, and therefore has jurisdiction. *Facts Pub. Co. v. Felton*, 52 N. J. L. 161, 19 Atl. 123.

⁹⁰ Want of original jurisdiction does not exclude jurisdiction in garnishment process. *Smith v. Durbridge*, 26 La. Ann. 531.

⁹¹ "Foreign corporation" in the attachment statute excludes all domestic corporations of the state. *Boley v. Ohio Life Insurance & Trust Co.*, 12 Ohio St. 139.

⁹² Statute exempted all railroad companies from justice's jurisdiction except as therein or in their charters provided. This was not overcome by a charter right to sue or be sued "in all courts and places whatsoever." *Fatchell v. St. Louis & L. M. R. Co.*, 28 Mo. 178.

General Railroad Law, § 12, gives jurisdiction of actions by laborers against railroad corporations. *Granahan v. Hannibal & St. J. R. Co.*, 30 Mo. 546; *Mooney v. Hannibal & St. J. R. Co.*, 28 Mo. 570.

⁹³ A county court in Georgia has jurisdiction if the corporation "resides" within its district though the animal was killed (on which suit is based) in another district of the same

within the county, city, district, or residing there, or because the

county. *Southern Ry. Co. v. Wells*, 103 Ga. 209, 29 S. E. 714.

Under the statutes the city court of Topeka had jurisdiction exclusive of justices of the peace of the county outside of Topeka if "any defendant resides in such city." Where the suit is against a corporation with its general office in Topeka, the justice had no jurisdiction. *H. Parker Grain Co. v. Chicago, R. I. & P. Ry. Co.*, 70 Kan. 168, 78 Pac. 406. But where only a station was maintained in that city and the general office in Kansas was in another county, the justice had jurisdiction on proper service being had. *Robinson v. Missouri Pac. R. Co.*, 67 Kan. 278, 72 Pac. 854.

As to municipal court of Boston, see *Potter v. Lapointe Mach. Tool Co.*, 201 Mass. 557, 88 N. E. 418.

Railroad corporation is a resident in any county where it passes and has an agent for service (1 Wagn. St. 394, §§ 26, 28). *Slavens v. South. Pac. R. Co.*, 51 Mo. 308.

The New York municipal court has no jurisdiction over foreign corporations which do not have an office in the city (statutes construed). *Sommese v. Florence Distilling Co.*, 56 N. Y. Misc. 670, 107 N. Y. Supp. 630; *Epstein v. S. Weisberger Co.*, 52 N. Y. Misc. 572, 102 N. Y. Supp. 488.

Operating a railroad in part within a municipal court district constitutes a residence there within Code Civ. Proc. § 341. *New York v. Union Ry. Co.*, 31 N. Y. Misc. 451, 64 N. Y. Supp. 483.

Having a railroad line in the county makes it an inhabitant. *Sherwood v. Saratoga & W. R. Co.*, 15 Barb. (N. Y.) 650.

Sufficiency of evidence of place of residence. *Livermore & Knight Co. v. American Darracq Automobile Co.*, 96 N. Y. Supp. 1024.

Principal place of business of a religious corporation is where its office is, and not where its church is. *St. Michael's Protestant Episcopal Church v. Behrens*, 13 Daly (N. Y.) 548.

Buffalo municipal court, having same jurisdiction as justices' courts in towns, could not entertain suit against domestic corporation with no place of business in the county (statutes construed). *Revere Rubber Co. v. Genesee Valley Blue Stone Co.*, 20 N. Y. App. Div. 166, 46 N. Y. Supp. 989.

The county court of Albany has no jurisdiction over a domestic corporation operating through that county but having its principal place of business in New York county. *Heenan v. New York, W. S. & B. Ry. Co.*, 34 Hun (N. Y.) 602, 1 How. Pr. (N. S.) 53.

Justice in Albany county could not serve corporation of Saratoga merely because secretary lived in Albany. *Perry v. Round Lake Camp Meeting Ass'n*, 22 Hun (N. Y.) 293.

The city court of Brooklyn having jurisdiction "where any of the defendants shall reside or be personally served within the said city" (Laws 1870, c. 470) has no jurisdiction thereby over corporations. *Daidsburgh v. Knickerbocker Life Ins. Co.*, 90 N. Y. 526.

A ferry company with one terminal of its line in Brooklyn and an office there is established there, even if also established in New York where the principal office is, and the Brooklyn city court has jurisdiction of an action against it. *Crofut v. Brooklyn Ferry Co.*, 36 Barb. (N. Y.) 201.

Corporation must have place of business in Brooklyn. *Brauneck v. Knickerbocker Life Ins. Co.*, 1 Abb. N. Cas. (N. Y.) 393.

cause of action is localized there or arose there,⁹⁴ or where the judgment demanded is for money only.⁹⁵

The service must be strictly according to the statutory method in all substantial matters,⁹⁶ and every other prerequisite must exist.⁹⁷

§ 2969. Original, exclusive and ancillary jurisdiction. In addition to the original general jurisdiction of the superior courts of first instance, which does not depend on the corporate character of the party or parties, the supreme courts of appeal in the various states sometimes have an original jurisdiction of certain actions against corporations, especially banking and railroad corporations and others whose operations are supposed to affect the general public. As to this original jurisdiction the constitutions and statutes of the various states must be consulted. It is improper to do more in this connection than to suggest that among such suits are injunction, mandamus and quo warranto suits covered by the prerogative jurisdiction of such courts, or by special statutes, and insolvency and dissolution suits against banks and other corporations, and suits under the various anti-trust and antimonopoly statutes.⁹⁸ A state owned corporation, being a party, does not confer on the Supreme Court of the United States exclusive or any original jurisdiction as in a case where "a state shall be party."⁹⁹ A superior jurisdiction made special and limited to ad-

An insurance company doing business and having its office in Charleston "resides" there within the statute giving jurisdiction to the city court. *Cromwell's Ex'rs v. Charleston Insurance & Trust Co.*, 2 Rich. L. (S. C.) 512.

⁹⁴ Justice has jurisdiction of domestic corporation sued for money either in county of principal office or where cause of action arose, provided service can there be had. *Joseph Speidel Grocery Co. v. Warder*, 56 W. Va. 602, 49 S. E. 534.

⁹⁵ Action in tort for money damages is one which "demands judgment for a sum of money only" (Code Civ. Proc. § 315) and may be entertained by city court of New York. *Mulligan v. New York & Q. C. R. R.*, 89 N. Y. Supp. 288.

⁹⁶ See § 2989, *infra*.

⁹⁷ Where a summary jurisdiction by

motion and notice against debtors of a dissolved bank is given, a certificate of trustees required by the statute is essential to jurisdiction. *Crawford v. Planters' & Merchants' Bank*, 6 Ala. 289.

⁹⁸ See chapters herein treating of those actions, *infra*.

The statutory original jurisdiction of the supreme court in equity over corporations originally restricted to Philadelphia was extended throughout the state by Act of June 16, 1836. *Hottenstein v. Clement*, 3 Grant (Pa.) 316.

⁹⁹ See U. S. Const. Art. III, § 2, par. 2, also Amendment XI. The statute is now Judicial Code, § 253, formerly Rev. St. § 687.

Even if the state is a corporation the circuit court jurisdiction is not ousted in favor of the supreme court. *Bank of United States v. Planters'*

versary actions, i. e., those "against" the corporation, excludes those which are not technically "against" it, such as dissolution suits.¹ And one expressly for enforcement of a contract for sale of a canal does not extend to a tort action for not managing the property as agreed.²

Jurisdiction of any ancillary proceeding follows and is supported by that of the federal courts in the main proceeding,³ and while, a like rule in favor of the state applies, it does not follow that a suit founded on a state judgment is ancillary to the action in which judgment was rendered.⁴ There is nothing about this rule except its applications that is of interest here, and the cases cited are illustrative of others which might be cited.⁵ A federal bill to wind up the corporation is exclusive of a state bill thereafter to appoint a trustee if it would interfere with complete justice in the federal court,⁶ but even where the federal jurisdiction is reserved by decree it does not prevent the state courts from taking jurisdiction of the corporation in a matter that does not trench on the subject reserved.⁷

Bank, 9 Wheat. (U. S.) 904, 6 L. Ed. 244.

¹ The superior courts in New York have jurisdiction only of actions "against" subsisting corporations, and cannot entertain suit for dissolution, which involves visitorial powers. A portion of the prayer for recovery of a demand will, however, retain such an action. *Brahe v. Pythagoras Ass'n*, 11 How. Pr. (N. Y.) 44.

² A special and exclusive jurisdiction in the circuit court of Richmond of "all suits necessary for the enforcement of the contract" (sections 3 and 4 of Acts 1878-79, p. 119, authorizing sale of the James River and Kanawha Canal) includes only the said contract of sale and not a tort action for injury against a remote purchaser which failed in a devolved duty. *Chesapeake & O. Ry. Co. v. Jennings*, 98 Va. 70, 34 S. E. 986.

³ Hence having had jurisdiction of a foreclosure suit it may entertain a suit to enforce the purchaser's title by settling a dispute as to an ease-

ment for a railroad granted over said land with a reserved right of way for a wagon road. *Ferguson v. Omaha & S. W. R. Co.*, 227 Fed. 513.

⁴ A suit to correct mistake in a judgment is not ancillary to the state suit in which judgment was rendered, if the relief is only such as can be had by original bill grounded on mistake. *Pelzer Mfg. Co. v. Hamburg-Bremen Fire Ins. Co.*, 62 Fed. 1.

⁵ Consult general works on Courts and Jurisdiction.

⁶ On a bill in the federal court to wind up a corporation and protect its bondholders, the jurisdiction to do complete justice will enable it to remove a trustee appointed by a state chancery court after the bill was filed. *State Nat. Bank of Denison v. Syndicate Co. of Eureka Springs, Arkansas*, 178 Fed. 359.

⁷ The reserved jurisdiction of a federal court to settle liens and priorities on a foreclosure of a railroad was not encroached on by a state suit to compel the corporate successor to perform a contract duty to keep shops and offices as previously located by

§ 2970. Removal of cause to federal court—In general. While it is impossible to include in the present chapter a treatise on removal of causes, it is necessary to go into it enough to consider fully the jurisdiction of courts over actions with corporate parties. Removals from state to federal courts were early provided for by congress and are now regulated by the Judicial Code, the most material part of which is quoted below.⁸ It will be noticed that in the first two clauses it is the suit that is to be removed because of a federal jurisdiction pervading the whole suit. In the third clause the suit is made removable because it contains two or more separable controversies, one of which is between citizens of diverse states. In the fourth clause if a suit contains a controversy between citizens of different states

terms of a contract and statute binding the successor. *International & G. N. R. Co. v. Anderson County*, — Tex. Civ. App. —, 174 S. W. 305.

*The removal sections are now found in Judicial Code, §§ 28-39 of which §§ 28, 30-34 define the grounds for removal. Section 28 is the only one that needs comment or quotation. It provides in its first clause that "suits" involving a federal question can be removed "by the defendant or defendants therein" to the district court. The identical language of section 24 is repeated in describing a federal question. Section 28 then continues as follows: "Any other suit of a civil nature at law or in equity, of which the district courts of the United States are given jurisdiction by this title * * * may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove such suit into the district court of the United States for the proper district. And where

a suit is now pending, or may hereafter be brought, in any state court in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being a citizen of another state, may remove such suit * * * at any time before the trial thereof, when it shall be made to appear to said district court that from prejudice or local influence he will not be able to obtain justice in said state court, or in any other state court," etc. Judicial Code, § 28, derived from original Act of March 3, 1875, c. 137, § 2; 18 Stat. L. 470, and amendments of March 3, 1887, c. 373, § 1, August 13, 1888, c. 866, April 5, 1910, c. 143, § 1. The Judicial Code is Act of March 3, 1911, c. 231, and this section was amended to read as above on January 20, 1914, c. 11. Sections 30-34 respectively make the following suits removable: those under land grants from different states, those involving denial of civil rights, those against revenue officers, officers of federal courts, and officers of congress on account of official acts done by them, those by aliens against persons who are or were civil officers of the United States. These are independent of the general causes of removal specified in section 28.

the suit may be removed on application of any defendant on the ground of prejudice and local influence.⁹ Under all of these grounds and occasions for removal it is expressly required that the subject-matter be or embrace that which is within the jurisdiction of the national courts. The first clause is predicated on a federal question, the second on "any other * * * given jurisdiction," the third and fourth on jurisdiction because of a "controversy between citizens." Separableness of the controversy or the existence of prejudice is a cause for removal but not a ground of jurisdiction;¹⁰ and the jurisdiction also depends on whether it was begun in a county which could have had jurisdiction.¹¹ Nothing in the statutes distinguishes a corporation from any other suitor or defendant so far as removal is concerned, yet perhaps the majority of removal cases have a corporate party. Most of these cannot properly be cited here without making this a commentary on removal of causes, which it does not pretend to be. They cannot be cited because the points of the decision turned on nothing peculiar to corporations. But in deciding who are "citizens" or in what states the party or parties are "resident," also in distinguishing a "suit" from the "controversy" thereby presented, it becomes necessary to consider the nature of the corporation, its domicile or citizenship, and the distinctness of its rights in controversy from those of its officers or stockholders or other persons; and these are the most vital and ramifying of corporate questions, all fully treated in their proper places.¹² Only a party can claim the

⁹ The separate controversy clause applies only when there are two or more controversies in one suit, and not when the controversy is joint and jurisdiction is founded either on a federal question or on the other grounds mentioned. *Chicago, R. I. & P. R. Co. v. Martin*, 178 U. S. 245, 44 L. Ed. 1055.

¹⁰ Prejudice or local influence is not an independent ground of jurisdiction but only a ground of removal where jurisdiction otherwise exists. *Cochran v. Montgomery County*, 199 U. S. 260, 50 L. Ed. 182, 4 Ann. Cas. 451, and even on a showing of it the case must be remanded if a ground of federal jurisdiction does not exist.

¹¹ Although no Kentucky court falls within the terms of Ky. Civ. Code Pr. § 73, prescribing where action against

a railroad for personal injury must be brought, if the railroad passes into Kentucky some county has jurisdiction; and accordingly in a removed case jurisdiction depends on whether action was begun in the right county in Kentucky. *Fisher v. Cleveland, C., C. & St. L. Ry. Co.*, 169 Fed. 956. In those states where the jurisdiction of the cause as well as of the parties depends on the suit's having been brought in the right county (see § 2978, *infra*) this is an important factor.

¹² See Chap. 1, *supra*, as to nature of corporation and distinctness of corporate entity; also Chap. 13 on Citizenship, Domicile, etc., *supra*; also Chap. 42 on Officers, *supra*; and chapter on Stock and Stockholders, *infra*.

right of removal, and hence an individual claiming to be sole owner of the corporate defendant cannot do so,¹³ nor can a corporate successor not party on the record.¹⁴

If the plaintiff be a state, there is no right to remove on the ground of diverse citizenship either the whole suit or, as against the state, any separable controversy in the suit, for there is neither original jurisdiction on that ground where a state is a party, nor is there a separable controversy wholly between "citizens" of different states.¹⁵ A suit begun by a state may be removed by defendant if it appears by the bill or complaint that a federal question exists, but neither the petition nor any subsequent pleadings can supply the showing of such existing question.¹⁶ The right of a corporation foreign to the state in which the suit is brought to remove the case is substantially expressed in the provision that nonresident defendants may remove the suit, coupled with establishment of the doctrine that such a corporation is a nonresident everywhere but in its domicile where it was created.¹⁷ An alien corporation may remove a controversy between it and citizens¹⁸ and may join with a defendant corporation which is entitled to remove because of its diverse citizenship from plaintiff.¹⁹ The right of an alien corporation to remove a case is open to some doubt where the suit is not one presenting a federal

¹³ *Chesapeake & N. R. Co. v. Venable*, 111 Ky. 41, 63 S. W. 35. In separable controversy cases, see also § 2971, *infra*.

¹⁴ *Bertha Zinc & Mineral Co. v. Carrico*, 61 Fed. 132.

¹⁵ *Postal Tel. Cable Co. v. Alabama*, 155 U. S. 482, 39 L. Ed. 231; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. Ed. 511.

¹⁶ *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 48 L. Ed. 870; *Postal Tel. Cable Co. v. Alabama*, 155 U. S. 487, 39 L. Ed. 232; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. Ed. 511.

¹⁷ As to residence see Chap. 13, *supra*.

¹⁸ A controversy between a citizen corporation and an alien corporation is removable. *Pelzer Mfg. Co. v. Hamburg-Bremen Fire Ins. Co.*, 62 Fed. 1.

An alien's privilege of removal

given by U. S. Rev. St. § 639, subd. 1, was repealed by the Act of 1875, together with those of 1887 and 1888. *O'Connor v. Texas*, 202 U. S. 501, 50 L. Ed. 1120.

¹⁹ Alienage of one defendant corporation is no obstacle to a removal on petition by both defendants jointly on the ground of diversity of citizenship from that of plaintiff. *Roberts v. Pacific & A. Ry. & Nav. Co.*, 121 Fed. 785; same case below on motion, 104 Fed. 577. In this case diversity was the ground of removal, but the diversity in the case of one corporation was that of different state citizenships, while as to the other one it was a diversity between citizenship and alienage. Either could have afforded a ground of federal jurisdiction and the petitions might as well have been separate as joint, and vice versa.

question. The requirement that the petitioning defendant shall be "nonresident" of that state (see second clause), however, seems to take the word in the sense of "noncitizen," and that would admit of a removal on petition of an alien corporation if any of the other grounds of original federal jurisdiction existed. As to removal of separable controversies and removals on the ground of prejudice or local influence, the respective requirements that such separable controversy be "wholly between citizens of different states" and that the petitioner be "such citizen of another state" would exclude an alien corporation as petitioner and also a citizen petitioner if the other side of the controversy was represented by an alien corporation.²⁰ Some cases have dicta that alienage of a party prevents removal on the ground of prejudice or local influence, but they did not necessarily decide that point.²¹

A fraudulent joinder for that purpose will accomplish nothing either to prevent or to permit removal on the ground of diverse citizenship; for it would not give any matter of controversy to the suit, and in aligning the parties the one so fraudulently joined would be disregarded.²² If anything is done to invoke the jurisdiction of the

²⁰ In a very recent case, "nonresident" has been construed to mean "noncitizen" as applied to an alien person, and the reasons for such meaning are stated. It was there held that a foreign corporation defendant could remove a suit brought by an alien in the state where he resided. *Best v. Great Northern Ry. Co.*, 243 Fed. 789.

To like effect holding alien corporation is a "nonresident" though maintaining an office and doing business in the state, see *Purcell v. British Land & Mortgage Co., Ltd.*, 42 Fed. 465.

As to meaning of the words "any defendant, being such citizen of another state," see *Cochran v. Montgomery County*, 199 U. S. 260, 50 L. Ed. 182, 4 Ann. Cas. 451, holding that the prejudice and local influence clause applies only to cases in which there is a controversy between a citizen of the state in which the suit is pending and a citizen or citizens of another or other states.

²¹ A suit by an alien plaintiff

against a corporation of the state where the suit is brought cannot be removed by the corporation under the Act of 1887. *Cohn v. Louisville, N. O. & T. R. Co.*, 39 Fed. 227, with dictum that the prejudice and local influence clause does not apply where an alien is either plaintiff or defendant. Nor could an alien corporation defendant remove it under such clause (U. S. Rev. St. § 639, subsec. 3); and a petition seemingly based on diversity as the only other ground was bad because plaintiff's citizenship did not appear in the record. *Grand Trunk Ry. Co. v. Twitchell*, 59 Fed. 727. The foregoing case is based on the necessity of diversity between citizens of different states and cites *Young v. Parker's Adm'r*, 132 U. S. 267, 33 L. Ed. 352, which, however, went on the point that the diversity was not shown to have been complete between the two sides.

²² The court is required of its own motion to stop all further proceedings and dismiss the case or remand

state court the defendant so invoking it cannot remove the suit²³ and there must be no voluntary general appearance by such defendant for that would waive it, but the petition for removal is no longer regarded as an appearance waiving defects in the service of the petitioner corporation.²⁴ When removed the case goes to the federal court whose district or division embraces the county whence it came,²⁵ and is there proceeded with as if originally begun in the district court to which it has been removed,²⁶ unless remanded or dismissed because improperly removed.²⁷

§ 2971. — Reality and separableness of controversy. It is the controversy between citizens of different states which is the predicate of the right to remove, and therefore it must be a real controversy,²⁸ separable from other portions of the case.²⁹ The petitioner must be a party³⁰ and one necessary to the case,³¹ or standing in opposition in the controversy to a necessary one.³² Although this to some ex-

it. *Lehigh Min. & Mfg. Co. v. Kelly*, 160 U. S. 240, 40 L. Ed. 444.

Act of Congress, March 3, 1875; Judicial Code, § 37. Illustrated in *Free v. Western U. Tel. Co.*, 122 Fed. 309, at page 311; *Pennsylvania R. Co. v. Allegheny Valley R. Co.*, 25 Fed. 113, 115.

In separable controversy cases, see § 2971, *infra*.

²³ The right may be lost by defendants impleading another corporation with which plaintiff has no concern and so invoking jurisdiction below. *Texas & P. R. Co. v. Eastin*, 214 U. S. 153, 53 L. Ed. 946, following *Merchants Heat & Light Co. v. Clow & Sons*, 204 U. S. 286, 51 L. Ed. 488, where a counterclaim invoked it.

²⁴ See §§ 3018, 3019, *infra*.

²⁵ "In all cases of the removal of suits from the courts of a state to the district court of the United States such removal shall be to the United States district court in the division in which the county is situated from which the removal is made." Judicial Code, § 53. See also § 2978, *infra*.

²⁶ Judicial Code, § 38.

²⁷ Judicial Code, § 37.

²⁸ See § 2970, *supra*.

²⁹ See § 2970, *supra*.

³⁰ Removal is proper where a bill against individuals, alleging that their foreign corporation was fictitious, seeks to set aside a deed to the corporation in favor of plaintiff, a municipality of Georgia, where two individuals of Georgia are defendants charged as agents of the corporation, and where it has come in as party to defend. *Macon v. Cummins*, 47 Ga. 321.

The corporation became a party where, on a bill against individuals to cancel a deed to the corporation for fraud alleging that the corporation was fictitious, it appeared by name, asked to defend, and petitioned for removal. *Macon v. Cummins*, 47 Ga. 321. In no case can a stranger remove it. See § 2970, *supra*.

³¹ Removal will not be allowed on petition of unnecessary ones. *Gudger v. Western North Carolina R. Co.*, 21 Fed. 81, approving *Gudger v. Western North Carolina R. Co.*, 87 N. C. 325.

³² One having no apparent connection with a corporation, though alleged to be its author and controller,

tent is a question of parties, some illustrative cases will better explain the application of the rule. The case as made by the pleadings, that is by the complaint or bill, will determine whether the controversy is separable. This is settled law.³³ Thus in actions for injuries from negligence of a corporate master and its servant, even if there are distinct acts of negligence alleged and the allegation is that they concurred in producing the injury, the controversy is not separable; but if they are distinct and there is no allegation that they concurred, there may be a separable controversy.³⁴ As against a corporate lessor and its corporate lessee the liability of one is not separable from the other's if by the law of the state they are equally and jointly liable for the injury or were concurring tortfeasors; but if one is liable as operator and the other on an unconnected ground they may be separated.³⁵ No part of a bill in equity can be separated if in fact one cause of action is asserted against all of the defendants and all are necessary to decree, but if a cause of action be asserted against some of them to which the others are not necessary parties it may be

is not apparently a necessary party to an injunction bill against it, where he stands enjoined by a former suit against doing the thing complained of, and by representation of the corporation will be bound in the present one. *Mayor, etc., of New York v. New Jersey Steam-Boat Transp. Co.*, 24 Fed. 817.

³³ *Alabama Great Southern Ry. Co. v. Thompson*, 200 U. S. 206, 50 L. Ed. 441, 4 Ann. Cas. 1147, citing many cases; *Graves v. Corbin*, 132 U. S. 571, 33 L. Ed. 462.

³⁴ *Chicago, R. I. & P. R. Co. v. Dowell*, 229 U. S. 102, 57 L. Ed. 1090; *Chesapeake & O. R. Co. v. Dixon*, 179 U. S. 131, 45 L. Ed. 121; *Beckwith v. Chicago, M. & St. P. Ry. Co.*, 223 Fed. 858; *Trivette v. Chesapeake & O. R. Co.*, 212 Fed. 641; *Nichols v. Chesapeake & O. Ry. Co.*, 195 Fed. 913.

Causes against the company and its engineer for negligence are not separable merely because one violated a statutory and the other a common-law duty, or because different proof may be necessary, or one ground of action

unfounded in fact. *Dowell v. Chicago, R. I. & P. Ry. Co.*, 83 Kan. 562, 112 Pac. 136.

³⁵ Two railroad corporations, one foreign, lessor, and one domestic, lessee, may be joined as joint tortfeasors when they are equally liable by the law of the state, though it be done to prevent removal. *Chicago & A. R. Co. v. McWhirt*, 243 U. S. 422, 61 L. Ed. 826, aff'g. — *Mo.* —, 187 S. W. 830; *Chicago, B. & Q. R. Co. v. Willard*, 220 U. S. 413, 55 L. Ed. 521.

A statute making lessor "remain liable" but not jointly liable does not make the cause joint and inseparable as to lessor and lessee. *Kelly v. Chicago & A. Ry. Co.*, 122 Fed. 286.

Action for negligence consisting in operation of leased railroad is not separable as to lessor and lessee. *Person v. Illinois Cent. R. Co.*, 118 Fed. 342.

Contra, *Williard v. Spartanburg, U. & C. R. Co.*, 124 Fed. 796; *Seaboard Air Line Ry. v. North Carolina R. Co.*, 123 Fed. 629.

separated, though they grew out of the same transactions.³⁶ A controversy over the ownership and right to shares is not separable from the right to have the corporation transfer them on the books as an incident of the decision sought.³⁷ In a suit to annul a lease or conveyance by the corporation to its codefendants, the lessees or grantees, there is ordinarily but one controversy requiring all defendants as parties,³⁸ but if additional relief be sought against some of the defendants, such as an accounting, that may be separated.³⁹ In a stockholder's suit his corporation is a necessary party and other conspiring defendants cannot be separated,⁴⁰ but a cause of action against some of them

³⁶ Suit against land company for a conveyance and its stockholders for accounting of proceeds of prior sales held separable. *Barney v. Latham*, 103 U. S. 205, 26 L. Ed. 514.

A creditors' suit was held to show but one controversy where one transfer was assailed as a fraud on numerous creditors, and pursuant to the fraud judgments were confessed which the bill prays to annul and to subject the debtors' entire property to payment of debts. *Graves v. Corbin*, 132 U. S. 571, 33 L. Ed. 462.

These two were pronounced leading cases in *Insurance Co. of North American v. Delaware Mut. Ins. Co.*, 50 Fed. 243, where a great number of corporations were parties.

See also *Fritzlen v. Boatmen's Bank*, 212 U. S. 364, 53 L. Ed. 551, where defendant's prior mortgage was assailed by both principal parties to a foreclosure suit.

Foreclosure suit held not separable from the right to have personal decree against corporation defendant, all such relief being proper to the one suit. *United States Mortg. Co. v. McClure*, 42 Ore. 190, 70 Pac. 543. Dismissed. *McClure v. United States Mortgage & Trust Co.*, 197 U. S. 624, 49 L. Ed. 911 (mem. dec.).

³⁷ Controversy between persons over shares in defendant corporation standing in name of one with the other praying transfer is inseparable

from the corporation. *Rogers v. Van Nortwick*, 45 Fed. 513; *Patterson v. Farmington St. Ry. Co.*, 111 Fed. 262 (specific performance requiring stock transfer).

Suit to compel corporation and claimants to transfer stock held not separable, all defendants denying plaintiff's title though by separate answers. *St. Louis & S. F. R. Co. v. Wilson*, 114 U. S. 60, 29 L. Ed. 66.

A new party who was brought in instead of an original one but claiming in his right cannot remove the suit where there was originally and remains a want of diversity and the corporation is a necessary party. *Crump v. Thurber*, 115 U. S. 56, 29 L. Ed. 328.

³⁸ A suit to annul a corporate lease held not separable though lessees and stockholders of lessor were joined, all being necessary parties. *Central R. Co. of New Jersey v. Mills*, 113 U. S. 249, 28 L. Ed. 949. See also *East Tennessee, V. & G. R. Co. v. Grayson*, 119 U. S. 240, 30 L. Ed. 382.

³⁹ Suit to annul a conveyance by the corporation and for an accounting and recompense of losses by directors are separable. *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 47 L. Ed. 1122.

⁴⁰ Suit for accounting and relief against majority holder and others alleging a concerted misappropriation but by different defendants in differ-

for a personal decree may be separable from that against all of them for relief from their control.⁴¹ A fraudulent joinder of parties for the purpose of destroying separableness of the corporation's controversy and to prevent removal will not be presumed.⁴² On this ground it is not necessary that all of the defendants should join in the petition.⁴³ Under the present statute the whole suit is removed where a part thereof is separable and is removed,⁴⁴ but separate and distinct actions combined in one proceeding are not within this meaning and do not go up as an entirety.⁴⁵

§ 2972. — Diversity of citizenship. As in cases where original jurisdiction of the federal court is invoked, so in a removal case based on diversity all on one side necessary to the action must be of a different citizenship from all on the other.⁴⁶ Nominal parties and those

ent ways, held not separable. *Baillie v. Backus*, 230 Fed. 711. And see *Crawford v. Seattle, R. & S. Ry. Co.*, 198 Fed. 920, on same point; *Pollitz v. Wabash R. Co.*, 176 Fed. 333, rev'g 167 Fed. 145 (a bill to cancel a bond issue with a stock bonus alleged to have been done by conspiracy); *MacGinnis v. Boston & M. Consol. Copper & Silver Min. Co.*, 119 Fed. 96 (where petitioner, a corporation, was alleged to have conspired with plaintiff's corporation); *Hanover Nat. Bank v. Credits Commutation Co.*, 118 Fed. 110.

⁴¹ Suit by stockholders held separable as to an accounting of profits abstracted by the controlling defendant (another corporation) from that part alleging a control in fraud of plaintiffs. *Lamm v. Parrot Silver & Copper Co.*, 111 Fed. 241.

⁴² The joinder is deemed to have been made in good faith and if correct by the state practice the case is not removable. (Corporation and individuals joined for tort.) *Southern Ry. Co. v. Miller*, 217 U. S. 209, 54 L. Ed. 732.

Suing an individual jointly does not show fraudulent joinder though his finances make it unlikely that any-

thing will be realized from him. *Dowell v. Chicago, R. I. & P. R. Co.*, 83 Kan. 562, 112 Pac. 136.

Joinder of a lessor and its servant cannot be regarded as fraudulent where by the law of the state the lessor is liable with the lessee; and the state law determines whether joinder is proper. *Chicago, B. & Q. R. Co. v. Willard*, 220 U. S. 413, 55 L. Ed. 521; *Illinois Cent. R. Co. v. Sheegog*, 215 U. S. 308, 54 L. Ed. 208.

See also § 2970, *supra*.

⁴³ *Cochran v. Montgomery County*, 199 U. S. 260, 50 L. Ed. 182, 4 Ann. Cas. 451; *Chicago, R. I. & P. R. Co. v. Martin*, 178 U. S. 245, 44 L. Ed. 1055.

⁴⁴ *Connell v. Smiley*, 156 U. S. 335, 39 L. Ed. 443; *Barney v. Latham*, 103 U. S. 205, 26 L. Ed. 514.

⁴⁵ *Deepwater Ry. Co. v. Western Pocahontas Coal & Lumber Co.*, 152 Fed. 824 (two condemnations united in one proceeding).

⁴⁶ *Central R. Co. of New Jersey v. Mills*, 113 U. S. 249, 28 L. Ed. 949.

A corporation chartered by Ohio and then Pennsylvania is a citizen of both and cannot remove from state courts of Pennsylvania a suit by a municipality of that state. *Allegheny*

improperly joined will be disregarded on inspecting the record sought to be removed,⁴⁷ but the corporation against which a deficiency judgment in foreclosure is prayed will not be held to be a nominal defendant, though the petition for removal avers that it has been released; since it is the state of the pleadings that determines that fact.⁴⁸ These rules find frequent illustration in stockholders' suits.⁴⁹ The corporation must join all of the other defendants in the petition.⁵⁰

§ 2973. — Prejudice or local influence. Not only the corporation which is the primary object of the prejudice and local influence, but also any other corporation or party working out its rights through such corporation may ask removal on that ground.⁵¹ The statute defines the quality of prejudice and local influence no further than that it shall be such that the petitioner "will not be able to obtain justice" in the state court or courts because of it. This does not

v. Cleveland & P. R. Co., 51 Pa. St. 228, 88 Am. Dec. 579.

If a corporation resident with plaintiff be a necessary party, removal is not allowable. *Chicago & N. W. Ry. Co. v. Crane*, 113 U. S. 424, 28 L. Ed. 1064.

The fact that one is then imprisoned in another state does not destroy his citizenship even if it has that effect on his residence. *Guarantee Co. of North America v. First Nat. Bank*, 95 Va. 480, 28 S. E. 909.

See excerpt from the statute, § 2970, *supra*, and consult treatises on removal of causes. As to the citizenship of the corporations, see § 390 *et seq.*, *supra*.

⁴⁷ Joinder of a servant who was nonfeasant in a duty owing solely to his employer, defendant, will not prevent removal. *Kelly v. Chicago & A. Ry. Co.*, 122 Fed. 286.

⁴⁸ A corporation liable on the complaint for a deficiency judgment which the state court may award is not a nominal party, even though the petition for removal avers that they have been released. *United States Mortg. Co. v. McClure*, 42 Ore. 190, 70 Pac. 543. Dismissed *McClure v. United*

States Mortgage & Trust Co., 197 U. S. 624, 49 L. Ed. 911.

⁴⁹ *East Tennessee, V. & G. R. Co. v. Grayson*, 119 U. S. 240, 30 L. Ed. 382; *Central R. Co. of New Jersey v. Mills*, 113 U. S. 249, 28 L. Ed. 949. Further applications of this rule in stockholders' suits, see chapter on Stock and Stockholders, *infra*.

⁵⁰ Alien corporation must join its co-defendant, who is a citizen, though he is imprisoned in another state and for that reason is claimed not to be a resident. *Guarantee Co. of North America v. First Nat. Bank*, 95 Va. 480, 28 S. E. 909.

⁵¹ A bill in a state court to annul a street franchise may be removed at the petition of a nonresident co-defendant mortgagee on the ground that because of prejudice and local influence no fair trial can be had in the state courts. *Detroit v. Detroit City R. Co.*, 54 Fed. 1.

Facts considered as showing a well-grounded belief of local prejudice against a defendant street railway corporation and in favor of plaintiff city preventing a fair trial of a suit to declare its franchise expired. *Detroit v. Detroit City R. Co.*, 54 Fed. 1.

mean, however, that the degree of it must be such as to affect the possibility of recovering a favorable or unfavorable judgment, and it is enough to show that it affects the possibility of a judgment's being reached uninfluenced or uncoerced.⁵³ The case need not be a jury case involving questions of fact to come under this clause; an equity case with none but law questions can be removed, even though all such questions could eventually be reviewed on appeal by state judges out of the prejudiced locality.⁵³ Any defendant can remove if the requisite diversity exists to make jurisdiction when the federal court is reached⁵⁴ and the requisite amount in controversy;⁵⁵ but there need not be a separate controversy as to the petitioner.⁵⁶

§ 2974. — Federal questions and defenses involved. The federal questions which will support a removal petition are the same as those which would confer original jurisdiction on the federal courts, and as previously said, few of these are at all peculiar to corporation law.⁵⁷ If there be such a question it must appear on the pleading of the plaintiff or plaintiffs, and the petition cannot be used to show

⁵³ *Detroit v. Detroit City R. Co.*, 54 Fed. 1.

The power of the local judge to call in another judge, not being a right of defendant, does not afford a trial in some other state court so as to deny removal or warrant remand. *Detroit v. Detroit City R. Co.*, 54 Fed. 1. Neither does the fact that only law questions are presented so that the whole question could be gone into by appeal to the state supreme court. *Id.*

⁵⁴ It applies to equity suits tried by the court as well as to law cases tried before a jury. *Detroit v. Detroit City R. Co.*, 54 Fed. 1.

Removal may be had though none but questions of law are involved which a state judge alone would consider. *Detroit v. Detroit City R. Co.*, 54 Fed. 1. Especially on a showing that the local judges will be embarrassed by importunities and public pressure. *Id.*

⁵⁴ The Act of 1887 repealed the earlier statute which required all on one side to be of different states from

all on the other side. *Whelan v. New York, L. E. & W. R. Co.*, 35 Fed. 849, 1 L. R. A. 65. Hence a New York corporation could petition in a suit by an Ohio citizen against it and three Ohio corporations. *Id.*

If not all plaintiffs are of the state, then "any defendant" cannot remove on ground of prejudice and local influence. *Thouron v. East Tennessee, V. & G. Ry. Co.*, 38 Fed. 673. Joinder of an unnecessary co-complainant cannot affect the right to remove. *Id.*

⁵⁵ The jurisdictional amount must appear when removal is asked on this ground. *Re Pennsylvania Co.*, 137 U. S. 451, 34 L. Ed. 738.

⁵⁶ *Whelan v. New York, L. E. & W. R. Co.*, 35 Fed. 849, 1 L. R. A. 65.

⁵⁷ See § 2965, *supra*.

If one defendant is a federal corporation it makes the case removable as presenting a federal question over the whole case without dependence on other grounds of federal jurisdiction. *In re Dunn*, 212 U. S. 374, 53 L. Ed. 558; *Lund v. Chicago, R. I. & P. Ry. Co.*, 78 Fed. 385.

that a defense involving such a question will be made.⁵⁸ All the defendants must join in the petition, if the controversy is indivisible and only a federal question is presented as a ground for removal.⁵⁹

§ 2975. — Petition and affidavit for removal. Not more than a bare outline of removal procedure can be given. The technicalities of it involve few corporate peculiarities but present many points which must be studied in the light of all the cases.⁶⁰ The procedure for removal is defined by the Judicial Code, consisting of a verified petition filed with the state court before answer day, accompanied by bond and on written notice of the bond and petition to the adverse party. This applies to all of the grounds already mentioned herein except that of prejudice and local influence, as to which "it shall be made to appear to said district court" (the one to which removal is asked), but the means by which the showing is to be made is only inferentially shown by an allusion later in the statute to affidavits.⁶¹ By express provision the petition is now required to be "duly verified," this being a new provision, although it was usually done before. Either by the petition or in the pleadings the jurisdictional facts must be made to appear,⁶² which include necessary allegations, in the petition, of course, as to there being a fraudulent or collusive joinder, or other facts; and all such facts must be pleaded as facts and not by mere conclusions.⁶³ In corporation cases the jurisdictional fact of citizenship requires special attention. Most of the state courts do not require that the residence and citizenship of the corporate parties be pleaded with that certainty of fact required in the

⁵⁸ Merely alleging existence of a defense under a federal statute on which the controversy is not based does not present a federal question. That must appear from the complaint. In *re Winn*, 213 U. S. 458, 53 L. Ed. 873.

⁵⁹ *Chicago, R. I. & P. R. Co. v. Martin*, 178 U. S. 245, 44 L. Ed. 1055.

⁶⁰ Standard treatises or digests on Removal of Causes should be consulted.

⁶¹ Judicial Code, § 29, also as to prejudice and local influence, see section 28 of that code.

The procedure for removals on the grounds mentioned in sections 30-34 (to-wit, suits under state land grants, suits involving denial of civil rights,

suits against revenue officers or other federal officers of congress or the federal courts, or suits by aliens against persons who are or were civil officers of the United States) is set out in those sections respectively, which see.

⁶² The petition need not allege facts of incorporation which appear by the pleadings. *Howard v. Gold Reefs of Georgia, Ltd.*, 102 Fed. 657; *Wileox v. Gibbs Guano Co. v. Phoenix Ins. Co. of Brooklyn*, 60 Fed. 929; *Shattuck v. North British & Mercantile Ins. Co. of London and Edinburgh*, 58 Fed. 609.

⁶³ An allegation of fraudulent joinder to prevent removal should state facts. *Dowell v. Chicago, R. I. & P. R. Co.*, 83 Kan. 562, 112 Pac. 136.

federal courts to support jurisdiction depending on such facts,⁶⁴ and such must accordingly be supplied by the petition when lacking or at all doubtful. It therefore should state the incorporation as a fact, the state or nation by or under whose laws it was had, and the place where, if foreign, it is doing business and situated within the state, also the fact, when material, that it is a "nonresident."⁶⁵ All of these facts must be alleged as of the time of the petition.⁶⁶ It is equally important and necessary that the citizenship as well as the residence of plaintiffs⁶⁷ and codefendants be stated in like manner and particulars.⁶⁸ If more than one ground for removal exists it will be advisable to aver each one clearly, since a petition might be sufficient on one ground and not on another unless claimed, or might seem

⁶⁴ See §§ 3042, 3043, *infra*.

⁶⁵ Should allege that it is a citizen of and organized in a given state. *Frisbie v. Chesapeake & O. Ry. Co.*, 57 Fed. 1.

"Duly chartered and incorporated under the laws of Great Britain," held sufficient. *Robertson v. Scottish Union & National Ins. Co.*, 68 Fed. 173.

In addition to facts of citizenship, the record must show petitioner to be a nonresident. *Overman Wheel Co. v. Pope Mfg. Co.*, 46 Fed. 577; *Hirschl v. J. I. Case Threshing Mach. Co.*, 42 Fed. 803; *Guarantee Co. of North America v. First Nat. Bank*, 95 Va. 480, 28 S. E. 909.

Must allege that defendant corporation is a nonresident and also that it is a corporation existing under the laws of another state, naming it. Allegation that it is a "citizen" of a named state is bad. *Lewis v. Clyde S. S. Co.*, 131 N. C. 652, 42 S. E. 969, rehearing granted 132 N. C. 904, 44 S. E. 666.

Contra, holding that facts of incorporation fix residence at same place. *Myers v. Murray, Nelson & Co.*, 43 Fed. 695, 11 L. R. A. 216.

Further precedents as to manner of alleging these facts may be found in § 3049, *infra*.

⁶⁶ An allegation of petitioner's in-

corporation and due organization under the laws of a foreign country imports that it was so at the time of filing the petition. *Roberts v. Pacific & A. Ry. & Nav. Co.*, 104 Fed. 577; same case on error 121 Fed. 785.

That petitioner was "originally created" by laws of a named other state is bad. *Thompson v. Southern Ry. Co.*, 130 N. C. 140, 41 S. E. 9.

⁶⁷ An allegation that plaintiff is a resident of a state does not show that he is a citizen thereof, and a conclusion that parties are citizens of different states does not aid it. *Neel v. Pennsylvania Co.*, 157 U. S. 153, 39 L. Ed. 654.

⁶⁸ A co-defendant's citizenship as well as his residence must be alleged. *Guarantee Co. of North America v. First Nat. Bank*, 95 Va. 480, 28 S. E. 909.

An erroneous allegation that defendant is a Texas corporation does not prevent removal on proper averments that it is a federal corporation not a citizen with plaintiff. *Texas & P. R. Co. v. Cody*, 166 U. S. 606, 41 L. Ed. 1132, *aff'd* 67 Fed. 71. And see *Oregon Short Line & Utah Northern Ry. Co. v. Skottowe*, 162 U. S. 490, 40 L. Ed. 1048, where the removal petition was insufficient to state a ground.

uncertain and equivocal if each was not averred. It is permissible to amend the petition if there is in it a ground for removal.⁶⁹ Amendment to relate the allegations to the time of the petition has been allowed.⁷⁰

The statute does not specify how or by whom the petition shall be signed. In a number of cases the signature has been by officers of the corporation or by its attorney with a verification by the officer or the attorney, no question having been made as to the signature because the petition was clearly that of the defendant and so treated in the state court. A signature in the manner of other pleadings would seem to be good practice.⁷¹ The requirement that it be "duly verified" does not require verification of anything but facts, it being of no force to verify conclusions of law,⁷² and such verification may be made by some person for the corporation who knows the facts, e. g., its attorney.⁷³

The petition must be presented to the state court "at the time or at any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff," if the removal is sought on any ground mentioned in section 28 except that of prejudice or local influence.⁷⁴ The time is that fixed by stat-

⁶⁹ It may be amended "when and only when the petition, as presented to the state court, shows upon its face sufficient ground for removal." *Martin's Adm'r v. Baltimore & O. R. Co.*, 151 U. S. 673, 38 L. Ed. 311.

⁷⁰ May be amended to state that petitioner was a corporation at time of filing though time to file it has passed. *Roberts v. Pacific & A. Ry. & Nav. Co.*, 104 Fed. 577.

⁷¹ Removal Cases, 100 U. S. 457, 25 L. Ed. 593, where petition not signed at all was held unobjectionable in federal court, no objection having been made in state court and parties having treated it as that of the defendant. *Fayette Title & Trust Co. v. Maryland, P. & W. V. Telephone & Telegraph Co.*, 180 Fed. 928 (signature and verification by agent); *Harley v. Home Ins. Co.*, 125 Fed. 792 (signature by attorney); *Weeks v. Billings*, 55 N. H. 371 (signature by

president); *Shaft v. Phoenix Mut. Life Ins. Co.*, 67 N. Y. 544, 23 Am. Rep. 138 (verification by officer and signature by attorney); *Bell v. Lycoming Ins. Co.*, 3 Hun (N. Y.) 409 (signature by general agent).

But a signature by attorneys of another state not admitted to practice or for the purposes of the case is bad, it seems. *Tomson v. Iowa State Traveling Men's Ass'n*, 78 Neb. 400, 110 N. W. 997.

⁷² *Murray v. Southern Bell Telephone & Telegraph Co.*, 210 Fed. 925; and the same conclusion was reached prior to the enactment of the Judicial Code in a case which assumed for argument that state laws might require verification. See *Harley v. Home Ins. Co.*, 125 Fed. 792.

⁷³ *Berry v. Mobile & O. R. Co.*, 228 Fed. 395.

⁷⁴ Judicial Code, § 29.

ute or by general rule of practice as the time at which defendant is required to plead to the complaint ⁷⁶ "any defense whatever," either demurrer or plea in abatement of any kind, or answer to the merits.⁷⁶ "Rule of court" in this sense has received various interpretations and the cases, as said in a recent opinion, are difficult to reconcile; but a rule obnoxious to a statute fixing time to plead is not meant⁷⁷ and no extension by discretionary order in the case will enlarge or extend it, for the "rule" must be one which applies indiscriminately to all suits of a like character.⁷⁸ Even a stipulation or a consent order will not extend it unless the consent appears to have contemplated that additional privilege.⁷⁹ The cases are not in harmony as to the effect of extensions, but those cited are recent and contain references to the others and to the elements of real and apparent conflict. They suffice to show the great importance of filing the petition before there is any doubt as to the time.

When based on the ground of prejudice or local influence, it may be "at any time before the trial" of the suit.⁸⁰ Not only must the petition

⁷⁶ *Waverly Stone & Gravel Co. v. Waterloo, C. F. & N. Ry. Co.*, 239 Fed. 561.

A default cuts off the time for petition notwithstanding delay in entering judgment for four terms. *Kansas City, Ft. S. & M. R. Co. v. Daughtry*, 138 U. S. 298, 34 L. Ed. 963, aff'g 88 Tenn. (4 Pickle) 721, 13 S. W. 698.

A second removal can be had after remand if subsequent pleadings disclose a ground not passed on by the former petition and remand, and if timely petition be filed. *Fritzen v. Boatmen's Bank*, 212 U. S. 364, 53 L. Ed. 551.

⁷⁶ *Goldey v. Morning News*, 156 U. S. 518, 39 L. Ed. 517; *Martin's Adm'r v. Baltimore & O. R. Co.*, 151 U. S. 673, 38 L. Ed. 311.

⁷⁷ *Waverly Stone & Gravel Co. v. Waterloo, C. F. & N. Ry. Co.*, 239 Fed. 561, distinguishing decisions coming from states where time is fixed by "rule of court" or in other words by rule to plead.

⁷⁸ An extension in a particular case pursuant to a rule authorizing exten-

sions does not extend time for petition. *Pilgrim v. Aetna Life Ins. Co.*, 234 Fed. 958. See also *Waverly Stone & Gravel Co. v. Waterloo, C. F. & N. Ry. Co.*, 239 Fed. 561, disapproving *Wilecox & Gibbs Guano Co. v. Phoenix Ins. Co. of Brooklyn*, 60 Fed. 929 (reviewing authorities and distinguishing cases under the Act of 1875).

Must be filed within time fixed by federal statute notwithstanding the state court has extended time to plead. *Lewis v. Clyde S. S. Co.*, 131 N. C. 652, 42 S. E. 969, citing *Howard v. Southern Ry. Co.*, 122 N. C. 944, 29 S. E. 778, where it clearly appears that the filing of the petition originally ineffectual was not legally made until after answer filed within extended time.

⁷⁹ *Williams v. Wilson Fruit Co.*, 222 Fed. 467.

⁸⁰ Under the Act of 1875, a petition presented later than the first term at which the action might have been tried and based on prejudice or local influence is too late. *School Dist. No. 6 v. Aetna Ins. Co.*, 66 Me. 370.

The time when trial might have

be in time but also the complementary acts of filing bond or security and giving notice.⁸¹ The time of filing the petition is not jurisdictional, however, and objection that it was filed too late may be waived.⁸² All defendants must join in the petition when based on a federal question of a nature not presenting a separable controversy or when based on other facts making the whole suit one for the federal courts, but when a separable controversy or prejudice and local influence is made the ground then the petitioner entitled to remove need not have any other defendant join with him.⁸³

The state of the pleadings and the record at the time of application determines removability,⁸⁴ and when an issue of fact is made on the right to remove, such question should be left for the federal court, since it has full power to inquire thereof and to remand the case if improperly removed.⁸⁵ Necessary facts may be proved by

been had is not advanced by a waiver of time which might have been but was not made. *Detroit v. Detroit City R. Co.*, 54 Fed. 1. Hence a petition before actual trial is timely. *Id.*

Hearing on demurrer is not a trial which cuts off the right. *Whelan v. New York, L. E. & W. R. Co.*, 35 Fed. 849, 1 L. R. A. 65.

A void default against a foreign corporation cannot be considered as a trial so as to make a petition, filed after setting it aside, too late. *Detroit v. Detroit City R. Co.*, 54 Fed. 1.

Under the law of 1875, the first term after default is set aside is the term for trial (in Michigan) and a petition before that term is in time. *Detroit v. Detroit City R. Co.*, 54 Fed. 1.

⁸¹ Tendering security for removal after calling a jury, the petition and affidavit having been in time, is too late. *St. Anthony Falls Water-Power Co. v. King Wrought Iron Bridge Co.*, 23 Minn. 186, 23 Am. Rep. 682.

⁸² *Martin's Adm'r v. Baltimore & O. R. Co.*, 151 U. S. 673, 38 L. Ed. 311.

⁸³ When the controversy is joint, the defendants must join in the petition even where a federal question sustains jurisdiction. *Chicago, R. I.*

& P. R. Co. v. *Martin*, 178 U. S. 245, 44 L. Ed. 1055.

If solely on the ground mentioned in the first clause of the Removal Act, all must unite. *Removal Cases*, 100 U. S. 457, 25 L. Ed. 593.

Where removal is based on separableness of the controversy, any one or more of the defendants therein interested without joinder of his co-defendants may petition (construing acts of 1875 and prior). *Barney v. Latham*, 103 U. S. 205, 26 L. Ed. 514.

See also §§ 2971-2974, *supra*.

⁸⁴ *Chicago, B. & Q. R. Co. v. Willard*, 220 U. S. 413, 55 L. Ed. 521.

⁸⁵ *Texas & P. R. Co. v. Eastin*, 214 U. S. 153, 53 L. Ed. 946; *Chesapeake & O. R. Co. v. McCabe*, 213 U. S. 207, 53 L. Ed. 765.

An issue of fact arising on the petition is to be tried by the federal court. *Kansas City, Ft. S. & M. R. Co. v. Daughtry*, 138 U. S. 298, 34 L. Ed. 963, *aff'g* 88 Tenn. (4 Pickle) 721, 13 S. W. 698. In this case the error of the state court in assuming to try the fact was harmless because the right to remove was lost.

Duty to inquire and remand if improperly removed is fixed by Judicial Code, § 37.

ex parte affidavits, which according to the chancery practice may be on information and belief on a petition presented to the federal court addressed to the ground of prejudice and local influence.⁸⁶ By reason of the separation of law and equity in the federal courts, and for other reasons, a recasting of the pleadings will often be required in the case. This should be left to the federal court to which the case goes.⁸⁷ In case the state court denies the right of removal, the petitioner may invoke the power of the district court to assert and protect its jurisdiction by assuming the trial on a record supplied in the manner provided by the statute⁸⁸ enjoining further prosecution in the state court, or alternatively the trial may be had in the state court and the matter then reviewed on a writ of error.⁸⁹ State jurisdiction terminates ipso facto by a timely and sufficient filing of petition for removal.⁹⁰

§ 2976. — **Remand and subsequent removal.** If in any removal suit "it shall appear to the satisfaction of the" court that there is no dispute or controversy within its jurisdiction or that parties have been "improperly or collusively made or joined" to make a removable case, the court "shall dismiss the suit or remand it * * * as justice may require."⁹¹ The recasting of the pleadings necessi-

⁸⁶ May be shown by ex parte affidavits. *Whelan v. New York*, L. E. & W. R. Co., 35 Fed. 849, 1 L. R. A. 65.

The affidavit of prejudice and local influence may be on information and belief, that being the chancery rule on all interlocutory petitions. *Detroit v. Detroit City R. Co.*, 54 Fed. 1, citing 1 Daniell Chan. Pr. 394, 2 Daniell Chan. Pr. 1509.

⁸⁷ *Barney v. Latham*, 103 U. S. 205, 26 L. Ed. 514. See Judicial Code, § 38, which requires that the case be treated as if originally begun in the district court.

⁸⁸ See Judicial Code, § 35, as to procedure where the clerk refuses to make up the record and deliver same, and section 39, as to certiorari and criminal proceedings to enforce delivery and transmission of the record.

⁸⁹ When a state court denies removal, defendant may either try the

case reserving his rights by writ or error to the United States Supreme Court, or he may invoke the power of the district court to enjoin further proceedings in the state court. *Chesapeake & O. R. Co. v. McCabe*, 213 U. S. 207, 53 L. Ed. 765.

⁹⁰ Removal being accomplished by filing of petition and bond ipso facto divests the jurisdiction of the state court and invests it in the federal court without any formal order, though order is customary; the state court can only pass on the sufficiency of the papers. Accordingly, a temporary injunction not yet effectual because the bond was not yet approved and adjusted by the state court never took effect. *Mannington v. Hocking Valley R. Co.*, 183 Fed. 133.

⁹¹ Judicial Code, § 37, which is identical with the prior law except for the word "district" substituted for "circuit" court.

tated in the federal court may destroy the apparent ground for removal, and if so the case will be remanded.⁹² On a motion to remand before answer, the bill if vague or ambiguous as to the necessity of joining an individual with the corporation will be carefully scrutinized together with the affidavits, indulging no intendments in its favor, where some indications of a joinder to frustrate removal appear on the record; and, if it is seen that in the development of the case it may appear, though it does not presently appear, that such person is a necessary party, the motion may be denied, reserving the power to remand when the fact develops.⁹³

Dismissal rather than remand is called for where the jurisdiction totally fails because the action begun by garnishment was not of a class which could be so begun,⁹⁴ or where the summons or service is quashed and the federal court has no power to issue an alias summons that will reach defendants.⁹⁵ A second application for removal after remand may be made if, as to the petitioner, a change in the pleadings or otherwise presents a new ground not previously passed on,⁹⁶ and the time for such second petition runs from the first knowl-

"This was for the protection of the court as well as parties against frauds upon its jurisdiction," and calls on the court to act on its own motion whenever the improper joinder appears. *Lehigh Min. & Mfg. Co. v. Kelly*, 160 U. S. 327, 40 L. Ed. 444. See also *Put-In-Bay Waterworks, Light & Railway Co. v. Ryan*, 181 U. S. 409, 45 L. Ed. 927.

⁹² The recasting of the pleadings should be left for the federal court which, on so doing, will remand if by reframing them the federal jurisdiction be ousted. *Barney v. Latham*, 103 U. S. 205, 26 L. Ed. 514.

A controversy is not the same as a cause of action. There might be separable causes of action in a single controversy. Hence, remand is proper where petitioning defendants in a tort action stood as virtual cross complainants for equitable relief. *Gudger v. Western North Carolina R. Co.*, 21 Fed. 81.

⁹³ So, where one who was bound by a former injunction was joined without apparent necessity with a

corporation in which he seemed to have no active part though alleged to control its operations. *Mayor, etc., of New York v. New Jersey Steam Boat Transp. Co.*, 24 Fed. 817.

⁹⁴ *Macurda v. Globe Newspaper Co.*, 165 Fed. 104.

⁹⁵ *Stowe v. Santa Fe Pac. R. Co.*, 117 Fed. 368.

The fact that the officers of a corporation know of the issuance of process against it does not dispense with the necessity for regular service as provided by statute. *Harrell v. Mexico Cattle Co.*, 73 Tex. 612, 11 S. W. 863.

⁹⁶ A second application may be made where new pleadings introduce a cause for removal. *Fritzen v. Boatmen's Bank*, 212 U. S. 364, 53 L. Ed. 551.

If the time has passed, dismissal involuntarily as against one defendant does not reopen it in favor of the other. *Lathrop, Shea & Henwood Co. v. Interior Construction & Improvement Co.*, 215 U. S. 246, 54 L. Ed. 177.

edge or legal notice of the new pleadings or other change.⁹⁷ A remand is conclusive and the state court will proceed with its jurisdiction so established, unless as just mentioned a new ground for removal develops.⁹⁸

§ 2977. Acquisition, extent and loss of jurisdiction. Jurisdiction over the plaintiff corporation is obtained by its appearance in bringing suit, and in an action by the corporation there is nothing different from an action by any other suitor as respects the acquisition of jurisdiction over the defendant. When the action is against the corporation jurisdiction over it in personam is had either by legal service of valid process or by appearance⁹⁹ provided the corporation is one over which the court can gain jurisdiction at all¹ and the subject-matter of the suit is within the jurisdiction which the

⁹⁷ Time runs from first knowledge of additional pleadings which disclose a removable controversy. *Fritzen v. Boatmen's Bank*, 212 U. S. 364, 53 L. Ed. 551.

⁹⁸ After remand the state court will not hear a contention that it was error to remand, and hence that the state court has no jurisdiction. The decision of the federal court is binding. *Western U. Tel. Co. v. Luck*, 91 Tex. 178, 66 Am. St. Rep. 869, 41 S. W. 469; *Texas & P. Ry. Co. v. Conway*, — Tex. Civ. App. —, 182 S. W. 52. And see *Missouri Pac. R. Co. v. Fitzgerald*, 160 U. S. 556, 40 L. Ed. 536, holding action of federal court final in this respect and not reviewable.

⁹⁹ "A corporation like a natural person may voluntarily subject itself to the jurisdiction of the court, either by commencing an action therein or by appearing in an action against it without objecting to the jurisdiction of the court, and having done so is bound by the judgment to the same extent as a natural person." *Freeman, Judgments*, § 120b, citing *North Missouri R. Co. v. Akers*, 4 Kan. 453, 96 Am. Dec. 183; *Pierce v. Equitable Assur. Society*, 145 Mass. 56, 146, 1

Am. St. Rep. 433, 12 N. E. 858; *March v. Eastern R. Co.*, 40 N. H. 548, 77 Am. Dec. 732.

"In all cases in which a defendant does not voluntarily appear, service of process upon him in some mode authorized by law is indispensable" or the judgment will be void even collaterally. *Freeman, Judgments*, § 120a.

Only by service or appearance. *Boyle v. Oro Plata Mining & Milling Co.*, 14 Ariz. 484, 131 Pac. 155; *Chesapeake, O. & S. W. R. Co. v. Heath's Adm'r*, 87 Ky. 651, 9 S. W. 832.

If there is jurisdiction by service, the fact of an appearance is immaterial. *Venner v. Denver Union Water Co.*, 40 Colo. 212, 122 Am. St. Rep. 1036, 90 Pac. 623.

Appearance to criminal prosecution gives jurisdiction. *State v. Passaic County Agr. Society*, 54 N. J. L. 260, 23 Atl. 680.

As to process, service and appearance in general, see §§ 2985-3020, *infra*.

¹ See § 2957 et seq., *supra*, and see also chapter on Foreign Corporations, *infra*.

court can exercise.² No jurisdiction in personam or in rem is had without an appearance, or valid service of process, or such a seizure of a thing as to impart notice thereby to all claimants.³ Since there may be jurisdiction of a foreign corporation (if the court can get it by appearance or by process), unless statutes or ruling decisions deny it in specified cases,⁴ the foregoing statements are necessarily true as to both foreign and domestic corporations; but as to foreign ones such statements are an abstraction of little or no substance. The question whether the foreign corporation has come into the territory of the court and submitted to the jurisdiction and modes of process, the further question whether all of the technical requirements of process and service against a foreign corporation have sufficiently complied with, and other questions springing out of its foreign creation and status, are so much involved that a separate treatment of jurisdiction over such corporations is given in another chapter.⁵

It is again essential to note that the corporation itself must be served or must appear as a party and not some member or stockholder for it,⁶ they being separate and distinct entities,⁷ or some co-defendant⁸ or some related corporation;⁹ and if service was on an agent or officer, he must have been an agent of the corporation at the time and competent in representation of it to receive service.¹⁰ Even when an agent is competent for service, the extent of jurisdiction thereby acquired is another question.¹¹ If parties wrongly sued as

² See § 2959 et seq., supra, and see also standard treatises on Courts; Jurisdiction; Judgments, etc.

³ A mere seizure of mining claims not in actual possession and without publication of summons is not sufficient to give jurisdiction. *King Tonopah Min. Co. v. Lynch*, 232 Fed. 485.

⁴ See § 2957 et seq., supra, and see also chapter on Foreign Corporations, infra.

⁵ See generally chapter on Foreign Corporations, infra.

⁶ No judgment against the corporation can rest on a suit against its members as a firm and an answer by it, not made party, as a corporation. *Rousseau v. Hall*, 55 Cal. 164.

If the corporation served is not made a party, service amounts to

nothing. *Little Rock Trust Co. v. Southern Missouri & A. R. Co.*, 195 Mo. 669, 93 S. W. 944.

⁷ See § 33 et seq., supra.

⁸ *Aiken v. Quartz Rock Mariposa Gold Min. Co.*, 6 Cal. 186.

⁹ See § 2991, infra.

A corporation which is merely a part of one system and of a controlling corporation is in court by service of any of the subcorporations. *Pecos & N. T. Ry. Co. v. Cox*, — Tex. Civ. App. —, 141 S. W. 327.

¹⁰ See § 2991 et seq., § 3002, infra.

That a default without such existing agency is void, see § 3118, infra.

¹¹ The question whether an agent may be served does not involve the question what subject-matter the jurisdiction thus gained may extend to.

a partnership are in court, the corporation must be made a party and be served or appear as such before amendment to substitute its name.¹³ It has been declared incontrovertible that jurisdiction in personam is conferred by serving an insurance commissioner in the particular state on business there arising when a consent thereto was duly filed.¹³

The important distinction between a process sufficient to constitute due process of law and the efficacy of the process or service to confer jurisdiction over the corporation is illustrated in a case in the United States Supreme Court which conceding that by the state practice due process was satisfied declined the jurisdiction and quashed the service though the state court would have treated the objection as a general appearance and proceeded to judgment reserving the jurisdictional question.¹⁴ The general rule laid down by writers of ability is that to gain jurisdiction in personam, due process of law requires either personal service within the state or a voluntary appearance by the defendant. Constructive service and service actually made outside the state are alike inefficient.¹⁵ In applying

State v. United States Mut. Acc. Ass'n, 67 Wis. 624, 31 N. W. 229 in which a nonlicensed foreign corporation was held well served on any soliciting agent in the state.

¹³ It must be brought in as a party by service or appearance though composed of the same persons. *Thompson v. Allen*, 86 Mo. 85.

The South Dakota court, with some apparent misgiving, sustained an amendment by which members of a firm were substituted for a corporation, supposedly composed of them, they having appeared voluntarily in the action. *Haggarty v. Strong*, 10 S. D. 586, 74 N. W. 1037. It is suggested that if the adverse party had consented to such voluntary appearance and the record showed it, as ordinarily would be the case if one had been made, no criticism of this procedure would lie. The corporation might also make such a voluntary appearance by consent and then be substituted, it seems.

¹³ Under a consent the insurance

commissioner represents the corporation while it continues to do business in the state. *Swann v. Mutual Reserve Fund Life Ass'n*, 100 Fed. 922.

Service of mandamus on a foreign insurance company through the insurance commissioner, its accredited agent in the state, is valid and constitutional. *State v. Brotherhood of American Yeomen*, 111 Minn. 39, 126 N. W. 404.

¹⁴ *Mexican Cent. R. Co. v. Pinkney*, 149 U. S. 194, 37 L. Ed. 699.

Service, according to statute, of process against a domestic corporation's officer beyond the state is due process. *Straub v. Lyman Land & Investment Co.*, 31 S. D. 571, 46 L. R. A. (N. S.) 944, 141 N. W. 979, affirming on rehearing 30 S. D. 310, 46 L. R. A. (N. S.) 941, 138 N. W. 957.

It must be served either in its domicile or in a state where it is doing business. *Swann v. Mutual Reserve Fund Life Ass'n*, 100 Fed. 922.

¹⁵ *McGehee, Due Process of Law*,

this to a domestic corporation the difficulty is in determining which of the persons composing it or representing it must be served, for in the ordinary sense it cannot be served in person. The persons competent for this purpose are usually designated by statute, as will hereafter be seen.¹⁶ With respect to domestic corporations, a service by posting and mailing or publishing has been held sufficient to give jurisdiction in personam,¹⁷ but this is very questionable. In a North Carolina case it was held that without the seizure of or levy upon property to bring a res into court, such publication was a nullity because the action without such a res was purely in personam.¹⁸ If the service is made on a public officer, who for that purpose is regarded as a representative of the corporation, a somewhat different factor is introduced, to wit, a human agency and intelligence set in motion to notify the corporation. Such a mode of service has been held sufficient to give jurisdiction in personam,¹⁹ but a contrary conclusion was reached in Wisconsin holding that a provision for service by copy left with the register of deeds of the domicile county of

pp. 89, 92. Taylor, *Due Process of Law*, § 136 et seq.

A statute (Code Civ. Proc. §§ 435, 436) for substituted service on a person by copies of summons at his residence "with a person of proper age" was held constitutional in *Continental Nat. Bank of Boston v. Thurber*, 74 Hun (N. Y.) 632, 26 N. Y. Supp. 956.

Due process of law is satisfied only with such a method of service as will with reasonable certainty result in actual notice to the corporation. *King Tonopah Min. Co. v. Lynch*, 232 Fed. 485.

¹⁶ See § 2991 et seq., infra.

¹⁷ *Nashville & C. R. Co. v. McMahon*, 70 Ga. 585.

A statute for published service on a domestic corporation, which cannot be served for want of officers, is constitutional and judgment in personam can be entered thereon. *Clearwater Mercantile Co. v. Roberts, Johnson, Rand Shoe Co.*, 51 Fla. 176, 4 L. R. A. (N. S.) 117, 120 Am. St. Rep. 153, 40 So. 436.

¹⁸ Where an action begun by at-

tachment was void as against a domestic corporation because no attachment was authorized, the proceeding was purely in personam; and no personal jurisdiction could be had by publication. *Bernhardt v. Brown*, 118 N. C. 700, 36 L. R. A. 402, 24 S. E. 527, 715.

¹⁹ A Minnesota statute providing for service in duplicate on the secretary of state, with the mailing of a copy to the corporation or its officers as ascertained from articles on file, was held to afford due process to obtain jurisdiction in personam. *Town of Hinckley v. Kettle River R. Co.*, 70 Minn. 105, 72 N. W. 835.

The Florida case of *Clearwater Mercantile Co. v. Roberts, Johnson, Rand Shoe Co.*, supra, note 17, erroneously states that the Minnesota case is "directly in point." The distinctive factor of a service on some person has been pointed out. It is not "directly" in point.

a corporation which failed to file a list of its officers was lacking in due process. It is important that the Wisconsin statute here under consideration did not, according to excerpts quoted by the court, contain any provision like that of Minnesota making it the officer's duty to mail or otherwise transmit the copy of summons to the corporation.²⁰ There is no conflict between the Minnesota and Wisconsin cases if this last mentioned distinction be observed. Service through an agency in control or operation of defendant's property, it seems, will give jurisdiction in personam when authorized by statute.²¹ Personal service beyond the state can give no jurisdiction in personam over the corporation; and when provided for by statute must be regarded as constructive service or else void.²² The following generalization may be ventured as a resultant of the decisions last com-

²⁰ *Pinney v. Providence Loan & Investment Co.*, 106 Wis. 396, 50 L. R. A. 577, 80 Am. St. Rep. 41, 82 N. W. 308. And see the note to this case in 50 L. R. A. 577.

²¹ A statute providing for serving a railroad corporation by serving the person or corporation "operating" the railroad, was impliedly sustained by upholding a conjoined provision that a motion to quash such service should be regarded as a general appearance. *Maysville & B. S. R. Co. v. Ball*, 108 Ky. 241, 21 Ky. L. Rep. 1693, 56 S. W. 188, 15 Ky. L. Rep. 632, 24 S. W. 1068. The foregoing cases were founded on *York v. Texas*, 137 U. S. 15, 34 L. Ed. 604, wherein a Texas statute like that of Kentucky was involved. This cited case however decided only that the provision making a motion to quash operate as a general appearance was constitutional. The United States Supreme Court, per Brewer, J., said: "It must be conceded that such statutes contravene the established rule elsewhere * * * that an appearance which, as expressed, is solely to challenge the jurisdiction, is not a general appearance in the cause, and does not waive the illegality of the service or submit the party to the jurisdiction of the court." It then sustained the

Texas court on the ground that nothing of due process was denied except the right to have the validity of the process and service tried as a separate question and "decided in the first instance and alone."

The reader will readily see that *York v. Texas*, supra, did not pronounce any decision on the validity of such service. That was left an open question. All that was decided was that it was constitutional to require it to be tried with other questions on one general appearance. This was followed in a case turning on the same statute in *Kaufman v. Wootters*, 138 U. S. 285, 34 L. Ed. 962.

²² Construing Rev. St. § 1766, applying to domestic corporations. *John McMenamy Investment & Real Estate Co. v. Stillwell Catering Co.*, 267 Mo. 340, 184 S. W. 467, rev'g 175 Mo. App. 668, 158 S. W. 427. See also *York v. Texas*, 137 U. S. 15, 34 L. Ed. 604, where such service was conceded to be a nullity.

Service personally on the president of a domestic corporation at his residence in another state gives no jurisdiction of itself and without an attachment of property or other proceeding in rem within the county. *Dillard v. Central Virginia Iron Co.*, 82 Va. 734, 1 S. E. 124.

mented upon: Personal service on a corporation to give jurisdiction in personam over it must be upon some natural person or other corporation whose duty or relationship to the defendant corporation is such that it may reasonably be supposed that through the person thus served actual notice will come to the defendant of the bringing of the action, and such service must be within the state where the judicial process runs; posting, mailing, filing, and publishing without a direct monition of a person to notify the corporation will give jurisdiction in rem or nothing.²³

Jurisdiction in rem, or quasi in rem, is acquired by attachment, garnishment, or some judicial seizure of the res, as on a libel in admiralty. This jurisdiction is, however, in strict language a jurisdiction over the thing rather than over the corporation interested in it or claiming to be so.²⁴ A judgment in rem on such process will

²³ Service must be on an officer or agent or on one whom the corporation has consented may represent it for that purpose. *Swann v. Mutual Reserve Fund Life Ass'n*, 100 Fed. 922.

²⁴ "All property within a state is subject to the jurisdiction of its courts, and they have the right to adjudicate the title thereto, to enforce liens thereupon, and to subject it to the payment of debts of its owners, whether residents or not. It must be confessed it is somewhat difficult on principle to reconcile this statement with the rule that a court has no jurisdiction over persons who are neither citizens nor residents of the state whose tribunal it is. This difficulty has been solved by regarding as quasi proceedings in rem all actions or proceedings the direct object of which is to affect the title, or to enforce liens upon property, or to make it contribute to satisfaction of such judgment as may be recovered." *Freeman, Judgments*, § 120a.

Attachment process gives jurisdiction in rem limited to the property of defendant in the goods seized. If it has no interest no jurisdiction is had. *Tennent-Stribbling Shoe Co. v. Hargardine-McKittrick Dry-Goods Co.*, 58 Ill. App. 368.

Jurisdiction in rem to subject the surrender value of insurance policies issued by defendants to a lien of pledge is had by service on the insurance commissioner though such would not give jurisdiction in personam. *Mutual Ben. Life Ins. Co. v. First Nat. Bank*, 160 Ky. 538, 169 S. W. 1028.

Mere levy of attachment without further notice gives no jurisdiction. *Great West Min. Co. v. Woodmas of Alston Min. Co.*, 12 Colo. 46, 13 Am. St. Rep. 204, 20 Pac. 771.

Jurisdiction in rem is not gained by serving a corporation which is not party but is operating the property affected, and where no good service was had on any other party. *Little Rock Trust Co. v. Southern Missouri & A. R. Co.*, 195 Mo. 669, 93 S. W. 944. See generally chapter on Attachment and Garnishment, *infra*. No discussion of the distinction between jurisdiction in personam and that in rem can be undertaken in this work for the reason that the sources of such law are found in cases having no relation to the law of corporations; but it may be observed that, as proceedings in rem regard and operate only upon the thing and not on the owner or claimant, it would be inaccurate to

bind only the res and its claimants as to the matters adjudged directly or incidentally within the scope of the proceeding.²⁵

While consent to jurisdiction over the person will enable a court to assume jurisdiction over a corporate party²⁶ it cannot confer on a court any jurisdiction which the law withholds, and thus if it has by statute a jurisdiction of certain corporations only, no others can consent to be sued there.²⁷ Neither can appearance by the corporation bring in other parties.²⁸ The venue cannot be waived where it is jurisdictional.²⁹ Wherever the venue is jurisdictional, as in Georgia and some other states, no jurisdiction is acquired unless the action is laid in the proper county;³⁰ and in that state, where two corporations are joined on the law side, of which the principal could not be sued separately in the county chosen and the other not separately at all but only as a co-defendant, it has been questioned whether any legal jurisdiction in the chosen county could be had over the two.³¹ If the corporation is only a formal or passive party and jurisdiction of the principal defendant is not had, there is no jurisdiction in personam.³²

speak of jurisdiction in rem over a corporation unless perhaps in a proceeding where the status of the corporation was the res. As to such proceedings, see chapters on Quo Warranto and Forfeiture, etc., *infra*.

²⁵ The general rule may be said to be that, if jurisdiction of the res is had it will be bound as to matters within the scope of the proceeding and directly decided (by some authorities those also incidentally disposed of in the decree), but the persons interested or claiming it will not be bound beyond that unless jurisdiction in personam over them was had. See Greenleaf on Evidence, §§ 525, 541 et seq.; Story, Conflict of Laws, § 591 et seq.; Mr. Cowen's annotation in 4 Cow. (N. Y.) 520, note 3; *Vandenheuvel v. United Ins. Co.*, 2 Caines Cas. (N. Y.) 217; 2 Johns. Cas. (N. Y.) 451, 481, 1 Am. Dec. 180, and collection of cases citing same in 1 Notes on American Decisions and Reports, page 37.

²⁶ As to waiver or consent to be sued in the wrong county, see § 2978 et seq., *infra*.

²⁷ Consent held inefficient to give city court of Brooklyn jurisdiction over a corporation not established or doing business in that city. *Davidsburgh v. Knickerbocker Life Ins. Co.*, 90 N. Y. 526.

²⁸ Appearance may confer jurisdiction in personam over the corporate owner but the judgment will not be enforced against attached property until the holder of the legal title is brought in. *Chapman v. Pittsburgh & S. R. Co.*, 18 W. Va. 184.

²⁹ See § 2978, *infra*.

³⁰ See § 2978 et seq., *infra*.

³¹ *Empire State Ins. Co. v. Collins*, 54 Ga. 376.

³² On a bill to subject stock to a nonresident defendant holder's liabilities, the corporation, joined to effectuate judgment by preventing a transfer of it is not a principal defendant, and the holder being the principal defendant and not served, the court had no jurisdiction. In *re Coleman's Appeal*, 75 Pa. St. 441.

Jurisdiction may be lost or rather transferred by a change of venue or a removal or transfer of the cause³³ or in any way in which it might be lost in an action between natural persons.³⁴ It is not lost by quashing an answer which constituted an appearance and then going to judgment by default.³⁵ If jurisdiction has attached in a suit at the county of one defendant, it will continue there notwithstanding his dismissal;³⁶ if it has not attached, as where the action is founded on invalid constructive process, a dismissal as to the defendant so attempted to be served cannot save the action as against other defendants.³⁷

§ 2978. Venue or place for trial; privilege and waiver—In general. The general common-law rule was that the venue must be laid truly in all local actions but might be laid in any county if the action was transitory, subject to the power of the court to order the venue changed if it was untruly stated,³⁸ but this rule, as appears from the authorities just cited and many other authorities on the subject, was a rule of pleading; and the term venue is now used in describing the place where the action is to be brought. Some of the modern statutes now use the term "place of trial" in the same sense. In the case of actions against corporations especially, the matter is now almost entirely regulated by statute,³⁹ and in transitory actions the word

³³ See § 2970 et seq., *supra*, § 2983, *infra*.

³⁴ See Freeman on Judgments, or any standard treatise on that subject, or on Courts, or on Jurisdiction.

³⁵ *Gerhard Hardware Co. v. Texas Cotton-Press Co.* (Tex. Civ. App.), 26 S. W. 168.

³⁶ After jurisdiction has attached on a joint and several cause at the co-defendant's county, the corporation defendant may be retained there for suit though the resident defendant be dismissed. *Gray v. Grand River Coal & Coke Co.*, 175 Mo. App. 421, 162 S. W. 277.

³⁷ Where the court has no jurisdiction because the action is brought on trustee process in a county where the corporate trustee has no office, the action cannot be saved by dismissing the trustees and proceeding against the principal defendants, who were

regularly served. *Lewis v. Denney*, 4 Cush. (Mass.) 588. In the foregoing case the reason seems to be that the action failed with the failure of the trustee process. Otherwise no good reason appears why it could not proceed as to the co-defendants. Hence where the venue is jurisdictional, and the wrong venue is chosen as to the corporation and another defendant, the latter's default without objection will not cure it as to the corporation, though it might have been permissible to sue it where he resided. *Whitman County v. United States Fidelity & Guaranty Co.*, 49 Wash. 150, 94 Pac. 906.

³⁸ 3 Bl. Comm. 294; Stephen on Pleading (Tyler's Ed.), 274.

³⁹ For a historical account of the meaning originally and now ascribed to the word "venue," and of the transition from an allegation of place

"venue" in its primary common-law sense may be regarded as obsolete.⁴⁰ There are dicta that "at common law" the rule was thus and so, respecting the place for the trial, but in view of the fact that the common law of England had no developed doctrine on the place for trial of actions in which a corporation was a party, these dicta must be taken as expressions of the policy of the particular state in the absence of a specific statute. Some of the states treated the corporation as "residing" or situated at the chief office or place of business, and likening it to natural persons held it suable there as a privilege. Others denied that it had any residence or situation at any given locality within the state, and held it suable at any county in the state. The eventual settlement of the question by the United States Supreme Court, that the corporation was a citizen of the state of its creation and domicile for the purposes of federal jurisdiction, did not include a settlement of the question where its domicile within the state was located.⁴¹

The place for trial in the federal courts is now fixed by the United States Judicial Code, material excerpts from which are given in the footnotes. With respect to certain kinds of actions, the venue is pre-

to a place for trial, see Professor Hepburn's article on Venue, 40 Cyc. 1.

⁴⁰ That the venue in a transitory action has ceased to have its common-law meaning and purpose, see *Briggs v. Nantucket Bank*, 5 Mass. 94.

⁴¹ Corporation is a person within the venue acts. *Commercial Ins. Co. v. Mehlman*, 48 Ill. 313, 95 Am. Dec. 543; *Lewis v. Denney*, 4 Cush. (Mass.) 588.

Primarily the suit against the corporation should be where its corporate property or principal office is located and only by statute can it be elsewhere. *Great Western Life Assur. Co. v. State*, 181 Ind. 28, 103 N. E. 843, 102 N. E. 849.

Before the Revised Statutes (that is under St. 1784, c. 28, § 13) a corporation might sue or be sued in any county. *Taunton & S. B. Turnpike Corporation v. Whiting*, 9 Mass. 321, stated in *Raymond v. Lowell*, 6 Cush. (Mass.) 524, 529, 53 Am. Dec. 57.

In enacting Rev. §§ 422, 424, it was

intended to give to the corporation a place of business in which it could sue or be sued, such place of business serving the same purpose of fixing venue that a natural person's residence does. Accordingly action may be either at the county where the individual party resides or where the corporate party has its place of business, excepting such actions as are specially covered by sections 419, 420 and 421. *Rackley v. Rowland Lumber Co.*, 153 N. C. 171, 69 S. E. 56. Formerly it might be sued in any county by a nonresident. *Cline v. Bryson City Mfg. Co.*, 116 N. C. 837, 21 S. E. 791.

See § 2979, *infra*, as to the place of business as a test for venue.

As to residence for purposes of fixing place for trial, see also §§ 396, 397, *supra*.

See generally § 390 *et seq.*, *supra*, for the doctrines as to citizenship and domicile.

scribed specially by it.⁴² Then with respect to actions not of a local nature and not of the kinds for which the venue is specially fixed, it is enacted that the suit shall be brought in the district or division determined by the inhabitancy or residence of plaintiff or defendant, or one of the defendants.⁴³ Following this are provisions respecting local actions.⁴⁴ The federal statute superseded by the present sec-

⁴² As to pecuniary penalties and forfeitures, "either in the district where they accrue or in the district where the offender is found." Judicial Code, § 43.

Suits for internal revenue taxes "either in the district where the liability for such tax occurs or in the district where the delinquent resides." Judicial Code, § 44.

Proceedings on seizures either where "the property so seized is brought" if seized on the high seas, or "where the seizure is made" except as otherwise provided. Judicial Code, § 45.

Condemnation of insurrectionary property is the subject of section 46, and seizure proceedings against vessels or cargoes entering a closed port, etc., is the subject of section 47 of Judicial Code.

Patent infringement suits may be brought "in any district of which the defendant is an inhabitant, or in any district in which the defendant * * * shall have committed acts of infringement and have a regular place of business." Judicial Code, § 48.

National bank suits "to enjoin the Comptroller of the Currency," etc., "shall be had in the district where such association is located." Judicial Code, § 49.

⁴³ Judicial Code, § 51, reads: "Except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between

citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Section 52 reads: "When a state contains more than one district, every suit not of a local nature * * * against a single defendant inhabitant of such state, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the state, it may be brought in either district," etc.

Section 53 reads: "When a district contains more than one division, every suit not of a local nature against a single defendant must be brought in the division where he resides; but if there are two or more defendants residing in different divisions of the district it may be brought in either division." * * * Either plaintiff corporation's domicile district or defendant's may be chosen when diversity of citizenship is the sole ground of jurisdiction. *N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. R. Co.*, 54 Fed. 420, 38 L. R. A. 271.

It is not essential in a case of that class that plaintiffs be all of the same division in the district. *Merchants' Nat. Bank v. Chattanooga Const. Co.*, 53 Fed. 314.

⁴⁴ Section 55 reads: "Any suit of a local nature, at law or in equity, where the land or other subject matter of a fixed character lies partly in one district and partly in another, within the same state, may be brought in the district court of either district." * * *

tion 51 added after the word "inhabitant" the clause "or in which he shall be found." This was held to be descriptive of foreign corporations licensed to do business within a state, and thus found there.⁴⁵ It is now reduced in the federal courts to little more than a question where the corporation is an inhabitant or has its residence.⁴⁶ In the case of a federal railroad corporation, this is in that district within the state where it has its principal office.⁴⁷

In the statutes of the states, transitory actions generally are suable where the corporation has its chief office, domicile or place of business, or where it has an agency, or where either party resides; while local actions concerning land are suable in the county where it lies; and certain specified kinds of actions in the county where the cause of action accrued, or the contract sued on was made or is to be performed, or the injury occurred, or the agency is located out of which the cause of action arose. The phrasing of the statutes varies, but the foregoing will be found to describe the main types of statutes.⁴⁸ In some states the constitution prescribes the place for trial.⁴⁹ A special venue is sometimes established for actions by the state, not uncommonly at the county wherein the capital lies, and the ordinary venue is not obligatory in such a case;⁵⁰ and when such a statute is

Section 56 regulates suits in which a receiver shall be appointed of "land or other property of a fixed character, the subject of the suit, [which] lies within different states in the judicial circuit."

⁴⁵ Act of March 3, 1875, re-enacting portion of Act of September 24, 1789, § 11. "Found" within district so as to be suable there. *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853; *Blackburn v. Selma, M. & M. R. Co.*, 2 Flip. 525, Fed. Cas. No. 1,467; *Knott v. Southern Life Ins. Co.*, 2 Woods 479, Fed. Cas. No. 7,894; *Fonda v. British Amer. Assur. Co.*, Fed. Cas. No. 4,904, 6 Cent. L. J. 305.

⁴⁶ See § 396, *supra*.

⁴⁷ The corporation (chartered by congress) will be suable in that state where its general office is at which all acts of directors resolved on elsewhere are confirmed before becoming effective. *In re Dunn*, 212 U. S. 374, 53 L. Ed. 558.

⁴⁸ See generally cases cited in sections following.

⁴⁹ California Const. art. 12, § 16, provides: "A corporation * * * may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases."

⁵⁰ Quo warranto based on violation of Anti-Trust Law may be brought in any county in which any of the combining corporations has a place of business or is situated, or in Franklin county, or in the supreme court (Rev. St. 4427-2). *State v. King Bridge Co.*, 28 Ohio Cir. Ct. 147.

By statute when the state is plaintiff, suit may be in Dauphin county and need not be in a county where property is situated. *Com. v. Wil-*

based on state officers being parties, it will not be limited to those actions in which they represent the state.⁵¹ A statute applying to actions "commenced" in the court of general jurisdiction, and fixing the place of trial for such, will also apply to those brought there by appeal from a justice of the peace.⁵² It has been said that the policy of the law is to restrict all suits to either the plaintiff's or the defendant's residence.⁵³ Statutes to this effect have been held to be merely declaratory of the common law⁵⁴ although, as already stated, it is doubtful if there was any common law on this subject; and it certainly does not appear from the great variety of statutes hereinafter cited that any near approach to realizing such a policy has been made.

There is a sound distinction between corporations and other defendants, natural persons, which will sustain, as constitutional, laws giving a different venue to actions against them. Such laws have been held not to offend the XIVth Amendment or the similar provisions of the state constitutions against denial of equal protection, special privileges and immunities, lack of due process, or class legislation.⁵⁵

ington & R. R. Co., 2 Pearson (Pa.) 408.

⁵¹ A statute giving jurisdiction to the county containing the capital whenever it is necessary or proper to make certain state officers defendant does not limit the venue to actions in which they represent the state. Hence a suit to subject a security fund in the state treasurer's hands, he being joined, may be brought there. *Universal Life Ins. Co. v. Cogbill*, 30 Gratt. (Va.) 72.

⁵² *Schoch v. Winona & St. P. R. Co.*, 55 Minn. 479, 57 N. W. 208.

⁵³ *Greacen v. Buckley & Douglas Lumber Co.*, 167 Mich. 569, 133 N. W. 538.

⁵⁴ Civil Code, § 55, enacting, "every other action must be brought in the county in which the defendant or some one of the defendants reside or may be summoned," is essentially declaratory of the common law. *Henry v. Missouri, K. & T. R. Co.*, 92 Kan. 1017, 142 Pac. 972.

⁵⁵ It is not unconstitutional to specially restrict venue of corporate ac-

tions in view of the distinctively ambulatory nature of their operations and locality. *Hatcher v. Southern R. Co.*, 191 Ala. 634, 68 So. 55; *Smith v. Louisville & N. R. Co.*, 75 Ala. 449; *Home Protection v. Richards & Sons*, 74 Ala. 466.

The constitutional privilege of suing corporations at any of the designated places besides the principal place of business is based on a sound distinction pertinent to them, and hence does not offend the Fourteenth Amendment, though it limits the privilege of being sued at some defendant's residence given by Code Civ. Proc. § 395. *Cook v. W. S. Ray Mfg. Co.*, 159 Cal. 694, 115 Pac. 318. The foregoing case explains the earlier cases of *Grocers' Fruit Growing Union v. Kern County Land Co.*, 150 Cal. 466, 89 Pac. 120, which overruled *Miller & Lux v. Kern County Land Co.*, 134 Cal. 586, 66 Pac. 856 (first appeal). In respect to local actions affecting real estate, there is no basis for discrimination, hence the constitutional provision as to corporations could

and a constitutional privilege of being sued at defendant's residence was not violated by a statute making railroads suable elsewhere than at the principal office; since its office is not the sole residence of the corporation.⁵⁶ A charter provision fixing venue may be repealed without impairing the contract contained in the charter; it is purely remedial.⁵⁷ Even a constitutional right to be sued like natural persons does not require that venue be laid at the residence of one of the parties.⁵⁸

not validly deny to corporations the equal protection given to natural defendants of having real actions tried where the land lies as provided by Code Civ. Proc. § 392. See *Grocers' Fruit Growing Union v. Kern County Land Co.*, 150 Cal. 466, 89 Pac. 120, in which however the declaration of unconstitutionality was avoided by holding that the power reserved to the court in the California Const. art 12, § 16, "to change the place of trial as in other cases," allowed the court on the corporation's application to change a local action to the county where the land is. In that event no denial of equal protection would be done, and none is commanded by the California constitution.

Const. art. 12, § 16, is self-executing, and a change of venue of action for damages to land will not be made to the county where it lies merely because Code Civ. Proc. § 392, declares that all such actions shall be there tried and that the constitution permits a change. Further showing is requisite. *Miller & Lux v. Kern County Land Co.*, 134 Cal. 586, 66 Pac. 856.

Making certain corporations (railroad and electric) suable where the cause of action originated, does not unconstitutionally discriminate between citizens, or deny equal protection of the laws, or abridge privileges and immunities of citizens, or lack in due process, or act retroactively. It is a remedial statute only. *Central Georgia Power Co. v. Stubbs*, 141 Ga. 172, 80 S. E. 636.

The legislature may regulate venue of actions on contracts. *Howard v. Kentucky & L. Mut. Ins. Co.*, 13 B. Mon. (Ky.) 282.

⁵⁶ A statute making existing railroads suable elsewhere than at the county of the chartered principal office, to-wit, where the injury occurred, does not violate the constitutional privilege of being sued at one's "residence," because the corporation's office is not its sole residence; and does not impair the obligation of the charter as a contract, because it carries, if any, a contract right to be sued wherever its residence may by law be fixed. *Davis v. Central Railroad & Banking Co.*, 17 Ga. 323.

A constitutional provision that "all other civil suits shall be tried in the county where defendant resides" is not violated by a statute declaring that suits shall be brought in the county in which the cause of action originated. That statute virtually only ascribes a residence to the corporation in such county. *Gilbert v. Georgia Railroad & Banking Co.*, 104 Ga. 412, 30 S. E. 673.

⁵⁷ A charter provision for suits to be brought only in a certain county was repealed, and accordingly act allowing plaintiff to sue where he resides applies. *Sanders v. Hillsborough Ins. Co.*, 44 N. H. 238.

⁵⁸ It may be where the action arose. *Pollock v. Detroit United Ry.*, 168 Mich. 581, 134 N. W. 1029.

Quite commonly the statute fixes the place for trial of actions generally between natural persons, and also contains special provisions applicable to those against or by corporations, in which case the general provision rules only when the special provision does not, unless it can be said that the special provision as to corporations is merely a cumulative provision to the general one giving an option between them.⁵⁹ Thus a section in a code, regulating place of trial generally, which provides specifically as to domestic corporations that they "may" be sued with certain exceptions in either of several counties, according to place of business or origin of the cause of action, requires that one of the counties "shall" be chosen but either of them "may" be when a corporation is sued,⁶⁰ and another section prescribing the place for trial of "all other actions" has no application to those against domestic corporations of the kinds mentioned in the former sections.⁶¹ Obviously the foregoing applies only when the statute enacts a general venue for actions against corporations as distinguished from the general venue which rules the bringing of actions against natural persons. In other words, if there is a complete scheme of venue provided for corporations it will be adhered to. Ordinarily it does not stop at this, for in addition to a statute, which lays down a general rule as to the place for trial of actions against corporations in general, many or a majority of the states have statutes assigning a special venue to particular kinds of corporations or to particular kinds of actions against corporations. Thus, statutes are common which provide that railroad companies, common carriers, electric companies, banking and insurance corporations, and other corporations engaged in some particular kinds of business, shall be suable wherever their lines extend or are operated, or their property is found, or where injury is done, or where they have an agency,

⁵⁹ See cases cited this section, *infra*.

⁶⁰ *Western Travelers' Acc. Ass'n v. Taylor*, 62 Neb. 783, 87 N. W. 950.

A statute (Code, § 55) providing that actions against corporations "may" be brought where it has principal office is permissive. They may also be brought wherever they could be brought against a natural person. *Cobbey v. State Journal Co.*, 77 Neb. 619, 110 N. W. 643.

⁶¹ Code Civ. Proc. §§ 55, 60, construed, holding that the latter section reading, "Every other action must

be brought in the county in which defendant, or some one of the defendants, reside or may be summoned," did not allow action against a corporation where neither of the conditions mentioned in section 55 existed, but in which an officer was served. *Western Travelers' Acc. Ass'n v. Taylor*, 62 Neb. 783, 87 N. W. 950.

See a construction of "all other actions" as applied to certain kinds of actions against railroads in *Forney v. Black Mountain R. Co.*, 159 N. C. 157, 74 S. E. 884.

and so forth through all the specifications of place which legislative language can devise.⁶² An electric power generating company has been held to be an electric company within such a statute⁶³ and a logging tram to be a "railroad."⁶⁴ The right to sue a "carrier" implies that a carrier's liability shall be the subject of the action, and does not include every action against a railroad corporation engaged in common carriage.⁶⁵ A corporation, having two or more characters with the venue not the same, should be sued in that venue appropriate to the character involved in the action, e. g., where it is a banking and also an insurance corporation.⁶⁶ A corporation entitled to sue "in any court of law or equity" may choose its own forum wherever defendants may be found and sued.⁶⁷

If these statutes applying to specific corporations are exclusive, then the statutes regulating venue of actions against corporations generally do not apply to such corporations; but where they are not exclusive then the action may be brought either in the county indicated by them or in any county where any other corporation might be sued on a like cause of action. In short it is a matter of statutory construction,⁶⁸ as it is with statutes giving the right to sue foreign

⁶² In Kentucky the statute makes distinct provisions as to banking and insurance corporations (Code, § 71), other corporations other than carriers (Code, § 72), and carriers. *Employers' Indemnity Co. of Philadelphia v. Duncan*, 159 Ky. 460, 167 S. W. 414.

Either a foreign or domestic insurance company must be sued for commissions to an agent either in the county of its chief office or in the county where the transaction with the agent took place. *Employers' Indemnity Co. v. Duncan*, 159 Ky. 460, 167 S. W. 414.

⁶³ "All railroad and electric companies" includes an electric power company for generation and distribution of water-generated electric power. *Central Georgia Power Co. v. Stubbs*, 141 Ga. 172, 80 S. E. 636.

⁶⁴ Logging tramroad operated as adjunct to a sawmill (Laws 1901, c. 27). *Receivers of Kirby Lumber Co. v. Lloyd*, 103 Tex. 153, 124 S. W. 903.

⁶⁵ An action against a railroad corporation for wages is not one on a

liability as carrier which by *Kirby's Dig. § 6068*, may be brought in any county through which the line passes. *Spratley v. Louisiana & A. Ry. Co.*, 77 Ark. 412, 95 S. W. 776.

⁶⁶ Corporation may be sued on its insurance contract without regard to the venue which a suit on its banking powers might require. *Wytheville Ins. Co. v. Stultz*, 87 Va. 629, 13 S. E. 77.

⁶⁷ It may go to another state in order to sue its promoter effectually for his fraud. *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 74 N. J. Eq. 457, 71 Atl. 153.

⁶⁸ The Manufacturing Corporations Act of 1853 prevails over the earlier general act. *Dewey v. Central Car & Manufacturing Co.*, 42 Mich. 399, 4 N. W. 179.

Under Rev. §§ 422, 424, a domestic corporation can be sued in the same venue as an individual except actions against railroads, governed by the latter section. The principal office within the state fixes it. *Roberson v.*

corporations in a particular county, considered in connection with *Greenleaf Johnson Lumber Co.*, 153 N. C. 120, 68 S. E. 1064. Where the action was for injury on a logging railroad and all parties were in the county, it was the proper one. *Id.*

Where injury was at a mill in the same county as the defendant's principal office when suit was begun, but plaintiff sued in the county of his own residence, it was a proper venue (*Rev. §§ 422, 424 construed*). *Rackley v. Rowland Lumber Co.*, 153 N. C. 171, 69 S. E. 56.

Where the special charter of an insurance company, providing for adjustments of losses, added that any person dissatisfied might sue in a given county, it did not exclude suits in other counties under the general law where no adjustment was made. *Indiana Mut. Fire Ins. Co. v. Rutledge*, 7 Ind. 25; *Boynton v. Middlesex Mut. Fire Ins. Co.*, 4 Metc. (Mass.) 212.

Charter of an insurance company providing mode of adjusting loss and for action in certain county if insured is dissatisfied, gives exclusive venue where company by following statutory procedure on claim of loss so entitled itself. Otherwise the statutes relating generally to insurance companies apply. *Howard v. Kentucky & L. Mut. Ins. Co.*, 13 B. Mon. (Ky.) 282.

Live stock insurance companies being in all respects on the plane of other insurance companies by statute, and they being suable where the loss occurred or the policyholder resides (*Rev. St. art. 3070*), the holder of a policy may sue where he lives for loss on the death of a horse in another county. *Indiana & O. Live Stock Ins. Co. v. Krenak*, — Tex. Civ. App. —, 144 S. W. 1181. See also this section, *infra*, note 78.

Civil Code, § 73, relating to actions against carriers, is construed with

section 72 relating to corporations generally but expressly excepting cases mentioned in section 73. If the action is against a carrier, section 72 does not apply. *Harper v. Newport News & M. V. R. Co.*, 90 Ky. 359, 14 S. W. 346.

Action by an attorney to enforce his lien against a railroad corporation, which had compromised a judgment, may be brought in any county where the corporation has an office or where its chief officer resides (*Civ. Code, § 72*), or in any county as a case not specially provided for (*Civ. Code, § 78*), and section 73 relating to carriers does not control. *Louisville & N. R. Co. v. Procter*, 21 Ky. L. Rep. 447, 51 S. W. 591.

Corporation (railroad) held suable in any county where it runs and has an agent for service (*1 Wagn. St. 394, §§ 26, 28*). *Slavens v. South Pac. R. Co.*, 51 Mo. 308.

Under the proviso in *Rev. § 424*, if action be against a railroad, it shall be either in the county where the cause of action arose, or in that where plaintiff then resided, or in some county adjoining plaintiff's. This was not intended to deprive plaintiff of the right to sue where he resides, but to repeal the provision *pro tanto* that any county where a track runs might be chosen. *Watson v. North Carolina R. Co.*, 152 N. C. 215, 67 S. E. 502.

Railroad corporations are "private corporations" within *Rev. St. art. 1198, subd. 21*, providing that actions against them may be brought in any county where they have an agency, and also providing, "and suits against a railroad corporation" may be brought in any county where the railroad extends. *St. Louis & S. F. Ry. Co. v. Traweak*, 84 Tex. 65, 19 S. W. 370.

They may be sued under such stat-

other general statutes.⁶⁹ In some of the states the statutes specially declare where foreign corporations may sue or be sued.⁷⁰ Thus, in Georgia ⁷¹ a foreign corporation operating a domestic railroad is suable

ute in a county where the road extends and they have an agent. *Galveston, H. & S. A. Ry. Co. v. Horne*, 69 Tex. 643, 9 S. W. 440.

As to statutes permitting suits against railroads or common carriers, to be sued in the county where the line of road extends or is operated, or actions for personal injuries or for damages to be sued where the injury occurred, see also § 2980, *infra*.

⁶⁹ A foreign corporation does not gain a fixed residence by designating an agent. *Boyer v. Northern Pac. R. Co.*, 8 Idaho 74, 70 L. R. A. 691, 66 Pac. 826, overruling *Easley v. New Zealand Ins. Co.*, 4 Idaho 205, 38 Pac. 405.

A nonresident can sue a foreign corporation in any county, and not only where its place of business is (Rev. St. c. 90, §§ 14, 16). *Allen v. Pacific Ins. Co.*, 21 Pick. (Mass.) 257.

Action against a foreign corporation for penalty for delay in carriage may be tried either where the cause of action arose (Rev. § 420), being the ordinary venue, or where defendant does business or has property (Rev. § 423). *Allen-Fleming Co. v. Southern R. Co.*, 145 N. C. 37, 58 S. E. 793.

The statute enabling persons to sue foreign corporations in the county where the cause of action arose was designed to give an optional venue and not to limit such suits to such county. *Handy v. Insurance Co.*, 37 Ohio St. 366.

⁷⁰ In the municipal court of New York City, a foreign corporation with offices in two districts may be sued in either. If a plaintiff it must sue where "it transacts its general business" (Mun. Court Act, § 25). *Goldzier v. Central R. Co. of New Jersey*,

43 N. Y. Misc. 667, 88 N. Y. Supp. 214.

Prior to the Act of 1903, a foreign corporation like a domestic one was suable at the county of its residence, i. e., where it maintained its principal agency or place of business in the state, or where the cause of action arose. *Cunningham v. Klamath Lake R. Co.*, 54 Ore. 13, 101 Pac. 213, rehearing denied, 54 Ore. 13, 101 Pac. 1099.

A foreign corporation may be sued in the county or corporation where the cause or some part of it arose, or where a co-defendant resides, or where it has debts or estate (Code, §§ 3215 and 3214, pars. 1, 4). *Guarantee Co. of North America v. First Nat. Bank*, 95 Va. 480, 28 S. E. 909.

Foreign corporation cannot be sued where it has no office and no agent, the statutory agent being served in another county (Bal. Code, § 4854). *Hammel v. Fidelity Mut. Aid Ass'n*, 42 Wash. 448, 85 Pac. 35.

See also chapter on Foreign Corporations, *infra*.

⁷¹ A foreign lessee corporation may be served by leaving a copy of summons at the superintendent's office, being its principal office and that of the lessor in Georgia in action for a foreign tort (Ga. Code, § 3407). *Hills v. Richmond & D. R. Co.*, 37 Fed. 660.

A foreign corporation operating a domestic railroad franchised to have its principal office at a place may be sued there for an injury in another county, if it has an office at the franchised place though its own principal office is in another state and though it has another office in Georgia of equal importance and powers. *Williams v. East Tennessee, V. & G. Ry. Co.*, 90 Ga. 519, 16 S. E. 303.

at the principal place of business of the domestic lessor or owner. Whenever the general venue fixed by statutes or by decisions is at the county of the principal place of business, all actions but those specially assigned to a different venue must be brought at that county,⁷³ and if the statute be applicable only to actions "against" the corporation, the general law of venue controls those by it.⁷³

The general statutes do not apply to local actions⁷⁴ or to those for which a venue is specially prescribed.⁷⁵ It may be stated as a general rule also that whenever any element of locality is inherent in such statutes, actions though of a similar nature to those described, but incapable of the prescribed locality are governed by the more general statutes and must be brought accordingly. For example, the statutes fixing venue according to the place of residence, or of injury, or accrual of the cause, or of operation and location of defendant's railroad, are not to be regarded as applying to causes arising beyond the state or against a foreign corporation, or both, and therefore not susceptible of localization by such tests.⁷⁶ Accordingly they are

Personal injuries are suable only where the cause of action originated, the corporation being foreign, or where its lessor has a residence if it be operating under a domestic franchise. It is not suable in a county merely because it has a place of business there. *Coakley v. Southern R. Co.*, 120 Ga. 960, 48 S. E. 372.

⁷³ See § 2979, *infra*.

⁷³ The statute allowing suits against railroads in any county where the road extends has no application to suits by the corporation. It must sue where it resides, its principal place of business, or where defendant resides. *Connecticut & P. Rivers R. Co. v. Cooper*, 30 Vt. 476, 73 Am. Dec. 319.

⁷⁴ See § 2982, *infra*.

⁷⁵ The statutes relating to venue generally do not control venue of an action to enforce a judgment, which is specially regulated by Civ. Code, § 474. *McDormant v. Louisville, C. & L. R. Co.*, 11 Bush (Ky.) 386.

A statute providing that, "Whenever in * * * any particular character of action the venue is expressly

prescribed, the suit shall be commenced in the county to which the jurisdiction may be so given" (Rev. St. art. 1194, subd. 27), requires that an injunction suit against a railroad company should be begun at its domicile, that being expressly prescribed by statute (Rev. St. art. 2996), and it cannot be brought as other actions against railroads in any county where the road extends. *International & G. N. R. Co. v. Anderson County*, — Tex. Civ. App. —, 150 S. W. 239, *aff'd* 106 Tex. 60, 156 S. W. 499.

⁷⁶ *Chesapeake & O. R. Co. v. Cowherd*, 96 Ky. 113, 27 S. W. 990.

An action arising outside the state cannot have arisen from an agency in any county. *Atlanta, K. & N. R. Co. v. Wilson*, 116 Ga. 189, 42 S. E. 356; *Wright v. Southern R. Co.*, 7 Ga. App. 542, 67 S. E. 272.

Code Civ. Proc. § 55 has application to domestic corporations only, and permits suit against an insurance company in the county where the cause of action arose, but does not admit of suit against a foreign company on a foreign cause of action.

suable in a venue regulated by other statutes of general application.⁷⁷ If the statute fixes a venue according to situation of property affected, as in the case of statutes regulating venue of insurance actions, it cannot apply to actions of a similar character but not affecting any property.⁷⁸

Statutes or constitutions providing that an action "may" be brought at a certain place are to be construed as permissive and not mandatory if other statutes prescribe other venue.⁷⁹ Many of these

Western Travelers' Acc. Ass'n v. Taylor, 62 Neb. 783, 87 N. W. 950, explaining Insurance Co. of North America v. McLimans, 28 Neb. 653, 44 N. W. 991. In the case last cited the question was as to the transitory nature of the action on a policy. Section 55 was quoted in that connection and as explained was not a sound basis for the decision.

⁷⁷ Civil Code, § 2334, does not apply to causes arising in another state. The former existing law controls such suits and action may be in a county where the corporation has an office and runs its road. South Carolina & G. R. Co. v. Dietzen, 101 Ga. 730, 29 S. E. 292.

Code, § 78, regulating actions "not required by the foregoing sections, * * * to be brought in some other county," authorizes suit to be brought in the county where defendant, or one of several defendants, resides, where the cause of action arose beyond the state against a foreign corporation. Chesapeake & O. R. Co. v. Cowherd, 96 Ky. 113, 27 S. W. 990.

The place where the Chesapeake & Ohio Railway Company may be doing business is not a proper venue for a foreign tort under Code, c. 123, § 1, but its statutory principal office within the state fixes it, or the residence of the president or chief officer in the county of suit. Ballard v. Chesapeake & O. Ry. Co., 42 W. Va. 1, 24 S. E. 602.

⁷⁸ Action on an accident policy is not controlled by a statute (Code Civ.

Proc. § 99, subd. 5), fixing venue of actions on insurance of property at the county where it lies. Mullen v. Northern Acc. Ina. Co., 26 S. D. 402, 128 N. W. 483.

⁷⁹ The constitutional provision must be construed as permissive (it reads, "may be sued") to avoid conflict with the statutes regulating venue of real actions. Fresno Nat. Bank v. Superior Court, 83 Cal. 491, 24 Pac. 157.

The words in the constitution, "subject to the power of the court to change the place of trial as in other cases," do not give the corporation an absolute privilege to be sued at its place of business like a natural person has to be sued at his residence. Trezevant v. W. R. Strong Co., 102 Cal. 47, 36 Pac. 395.

The statute providing that tort actions "may" be tried in the county where the tort was committed is permissive, not mandatory. It may be tried where plaintiff resides if defendant is served there, or where defendant resides, or where committed. Denver & R. G. R. Co. v. Cahill, 8 Colo. App. 158, 45 Pac. 285.

Practice Act, § 6, providing that actions against a railroad or bridge company "may" be brought in the county, etc., is permissive in addition to other parts of the statute and not mandatory and exclusive. O'Donoghue v. St. Louis Southwestern Ry. Co., 181 Ill. App. 286.

Code, § 3406, providing that a railroad company may be sued in any

statutes are so worded that the action may be either in the county of the principal place of business or wherever the corporation may be found, or may have an agency, or where the cause of action may have accrued or arisen,⁸⁰ but if the facts will support but one of the alternative places for trial, then it must be chosen.⁸¹ Not infrequently

county where the injury occurred is permissive and cumulative, not exclusive. *Williams v. East Tennessee, V. & G. Ry. Co.*, 90 Ga. 519, 16 S. E. 303.

⁸⁰ Plaintiff suing a corporation may choose any or the counties covered by the constitutional provision. *Hammond v. Ocean Shore Development Co.*, 22 Cal. App. 167, 133 Pac. 978.

Corporation with principal office in San Francisco and also an agency in Kern county has no right to be sued in the former for breach of a contract to sell land in Kern county which contract was also legally closed there. *Ivey v. Kern County Land Co.*, 115 Cal. 196, 46 Pac. 926.

Corporation is not privileged to be sued only where its principal office is located (Gen. St. 1883, pp. 187, 188, construed), but may be sued where plaintiff resides or where the contract was to be performed. *Denver & N. O. Const. Co. v. Stout*, 8 Colo. 61, 5 Pac. 627.

Action for services may be brought where they were performed for the corporation at a place of its business though its principal place was elsewhere. *General Reduction Co. v. Thorpe*, 11 Ga. App. 334, 75 S. E. 339.

In Idaho no statute gives to corporations, either foreign or domestic, the privilege of being sued only at their principal place of business or the residence of the designated agent. *Smith v. Inter-Mountain Auto Co.*, 25 Idaho 212, 136 Pac. 1125.

Debt is suable wherever the corporation is found and not only in the county of its principal office. *Peoria*

Ins. Co. v. Warner, 28 Ill. 429.

The code section (§ 1705) allowing suits against corporations where the office or agency is located is permissive only and does not prevent suit where the injury occurred. *Baldwin v. Mississippi & M. R. Co.*, 5 Iowa 518.

Civ. Code, § 51, providing that an action * * * "may be" brought in the county of the principal office or in which any of the principal officers reside or may be summoned, means that such actions as the section describes can be brought in those counties but may also be brought elsewhere. Hence action against a railroad for injuries received in its coal mine could be brought wherever an agent could be served. *Henry v. Missouri, K. & T. R. Co.*, 92 Kan. 1017, 142 Pac. 972.

Transitory action against a domestic corporation lies either in the county where it has its principal place of business or that where the cause of action arose (B. & C. Comp. § 55). *Cunningham v. Klamath Lake R. Co.*, 54 Ore. 13, 101 Pac. 213, rehearing denied 54 Ore. 13, 101 Pac. 1099; *Winter v. Union Packing Co.*, 51 Ore. 97, 93 Pac. 930; *Hildebrand v. United Artisans*, 46 Ore. 134, 114 Am. St. Rep. 852, 79 Pac. 347; *Bailey v. Malheur & H. L. Irrigation Co.*, 36 Ore. 54, 57 Pac. 910; *Holgate v. Oregon Pac. R. Co.*, 16 Ore. 123, 17 Pac. 859.

⁸¹ Must be at principal place of business if none of the others can be sustained. *Cohn v. Central Pac. R. Co.*, 71 Cal. 488, 12 Pac. 498.

See also cases cited, § 2979 et seq., *infra*.

it happens that all the existing factors determinative of venue are localized in one county, as where plaintiff's residence, defendant's place of business, and the place where the injury occurred, are all in one county. In such a case, of course, there is no option to sue elsewhere.⁸² No other than one of the venues fixed by such statutes can be chosen⁸³ and actions are to that extent localized at the designated counties, or one of them at plaintiff's option, the purpose of such localization being the convenience of persons dealing with the corporation⁸⁴ and perhaps also that of the corporation.⁸⁵

Statutes regulating the mode and place for serving process may have the effect of forcing the choice of a county in which it is possible to acquire jurisdiction by service.⁸⁶ Generally a statute regulating only the mode and place of service should not be construed either

⁸² *Hatcher v. Southern R. Co.*, 191 Ala. 634, 68 So. 55; *Cohn v. Central Pac. R. Co.*, 71 Cal. 488, 12 Pac. 498; *Roberson v. Greenleaf Johnson Lumber Co.*, 153 N. C. 120, 68 S. E. 1064.

⁸³ *Western Travelers' Acc. Ass'n v. Taylor*, 62 Neb. 783, 87 N. W. 950.

In an action by a personal representative for death he must sue where he resides and the corporation does business, or where injury occurred. *Alabama Great Southern R. Co. v. Ambrose*, 163 Ala. 220, 50 So. 1030.

Under Civ. Code, § 73, if the action against a carrier be not brought in one of the counties therein mentioned, jurisdiction cannot be taken over defendants' objection made by plea in abatement. *Harper v. Newport News & M. V. R. Co.*, 90 Ky. 359, 14 S. W. 346; *Sherrill v. Chesapeake, O. & S. W. R. Co.*, 89 Ky. 302, 12 S. W. 465; *Chesapeake, O. & S. W. R. Co. v. Heath's Adm'r*, 87 Ky. 651, 9 S. W. 832.

Action for services could not be brought where principal office was not located or contract was not made or to be performed or chief officer did not reside. *Ft. Jefferson Improvement Co. v. Greene*, 112 Ky. 85, 23 Ky. L. Rep. 1342, 65 S. W. 161.

Libel can be brought only where

plaintiff resides or defendant newspaper first published it or has an agent or office. *Jones v. Pulitzer Pub. Co.*, 256 Mo. 57, 165 S. W. 304; *Houston v. Pulitzer Pub. Co.*, 249 Mo. 332, 155 S. W. 1068, overruling *Julian v. Kansas City Star Co.*, 209 Mo. 35, 107 S. W. 496; *Cook v. Globe Printing Co. of St. Louis*, 227 Mo. 471, 127 S. W. 332.

⁸⁴ Such is the purpose of localizing actions in the county where the corporation conducts its business or the chief officer resides. *Emmons v. Lexington & C. County Min. Co.*, 112 Ky. 91, 23 Ky. L. Rep. 1445, 65 S. W. 593.

⁸⁵ Obviously the localizing of a suit at the county where the principal office is, or the agency out of which the cause arose, or the injury occurred, etc., is subservient to the convenience of the corporation as well. The convenience of the corporation is not an obvious purpose under those statutes which leave the action wholly transitory or which permit it to be brought in any remote county where property of the corporation is situated or operated or where an agent can be found.

⁸⁶ As to the place for service and persons to be served, see § 3007, *infra*, also § 2991 et seq., *infra*.

to extend⁸⁷ or restrict⁸⁸ the places where by law the action can be brought, but it is always a question of construction whether the particular statute was intended only to regulate process and the place of serving it. Actions begun by attachment or on constructive process

⁸⁷ Civil Code, § 51, subsec. 4, prescribing where summons may be served, is not to be taken as extending the venue to such county, but it is fixed by section 73. *Harper v. Newport News & M. V. R. Co.*, 90 Ky. 359, 14 S. W. 346.

A provision for service on certain persons found "in the county" does not extend the venue to any county where service can be had, the statute being one regulative of service only, but the word "county" implies that the county in which the suit may lawfully be laid is meant. *Code Civ. Proc.* §§ 73, 74, construed. *Western Travelers' Acc. Ass'n v. Taylor*, 62 Neb. 783, 87 N. W. 950.

The common-law rule that a corporation is suable for personal injuries only where the corporate property is situated, in whole or in part, was not changed by Act of March 22, 1817 (P. L. 129), providing that "suits may be brought * * * before any court or magistrate of competent jurisdiction." *Bailey v. Williamsport & N. B. R. Co.*, 174 Pa. St. 114, 34 Atl. 556.

The Act of July 9, 1901 (P. L. 614), for service of process "in the county wherein it is issued," * * * "(f) If the corporation has no office or place of business * * * in the county where the cause of action arose" by serving any member of its board, relates only to service and does not imply by the quoted words that summons can be legally issued or action brought elsewhere than at the principal office or domicile. *Park Bros. & Co. v. Oil City Boiler Works*, 204 Pa. St. 453, 54 Atl. 334.

The Act of 1901 (P. L. 614) applies

to foreign corporations as well as domestic, and affects service only where process is legally issued in the county. *Frick & Lindsay Co. v. Maryland, P., etc., Co.*, 44 Pa. Super. Ct. 518.

⁸⁸ A railroad may be sued at its residence for injury in another's cars in another county while running over tracks of defendant's line and where it has no agent (*Code*, § 2798); and the action and process need not be brought against it as a lessor and served on the lessee in the county of injury. *Southwestern R. Co. v. Vel-lines*, 14 Ga. App. 674, 82 S. E. 166.

Statutes merely prescribing how service shall be made and on whom are not to be construed as fixing venue where such persons are located. *Baldwin v. Mississippi & M. R. Co.*, 5 Iowa 518.

The statute (1 Wagn. St. 294, § 28) allows action to be brought either in the county where injury occurred or where defendant has or keeps an office or agent for transaction of ordinary business. Section 26, providing a means of sending process to another county, does not imply that action must be in the county where injury occurred. *Mikel v. St. Louis, K. C. & N. Ry. Co.*, 54 Mo. 145.

Laws 1903, p. 111, providing for appointment of a resident agent for service of a foreign corporation doing business in the state and requiring a statement of the principal place of business to be filed, was not intended to fix the place for suit, but only to afford evidence of location. *Cunningham v. Klamath Lake R. Co.*, 54 Ore. 13, 101 Pac. 1099, denying rehearing 54 Ore. 13, 101 Pac. 213.

may be thereby restricted in the venue,⁸⁹ but, if the process can be executed, may be brought in any venue allowable for the nature of the cause of action in question.⁹⁰

It is a usual rule by statute that if there be two or more defendants, the action may be in a county which is a proper venue as to either of them, and this has been applied to corporate defendants.⁹¹ Either venue may be chosen if there are two causes of action sued on to which different venues apply.⁹² Such a provision does not violate the right of trial by jury, though under it the process is sent to another county and defendant is obliged to attend in another county and be tried by a jury not of its vicinage.⁹³ By the better reasoning courts of general jurisdiction have cognizance of all transitory actions wherever the cause of action arose, and the venue is not jurisdictional any more than it is when the litigants are both natural persons.⁹⁴ In inferior courts the venue may be said to be jurisdictional,⁹⁵ but it would be more accurate to say that inferior courts are subject to

⁸⁹ See *Lewis v. Denney*, 4 Cush. (Mass.) 588, where the only "trustees" in a "trustee process" were corporations in a single county, which for that reason had to be chosen.

⁹⁰ An action begun by attachment is within the statute permitting suit where the cause arose. Civil Code, § 2334, applied. *Hazlehurst v. Seaboard Air-Line Ry.*, 118 Ga. 858, 45 S. E. 703.

⁹¹ Replevin against two corporations, one a railroad, may be brought where its line runs. *George R. Barse Live Stock Commission Co. v. Turner*, 56 Kan. 778, 44 Pac. 987.

As to the rule that two or more defendants may be sued where either resides or has a location, see also § 2979, *infra*.

⁹² *International & G. N. Ry. Co. v. Anderson County*, — Tex. Civ. App. —, 150 S. W. 239, *aff'd* 106 Tex. 60, 156 S. W. 499.

⁹³ *Halladay v. Detroit United Ry.*, 155 Mich. 436, 119 N. W. 445, 15 Det. L. N. 1050.

⁹⁴ *Briggs v. Nantucket Bank*, 5 Mass. 94.

The constitutional provision permits

suits in any of the counties described, but it may be entertained in other counties if service on the corporation is had and it fails to object or claim privilege. Hence default in another county is valid. *Bond v. Karma-Ajax Consol. Min. Co.*, 15 Cal. App. 469, 115 Pac. 254.

The statute confers a privilege. The venue is not jurisdictional. *Crystal River Lumber Co. v. Consolidated Naval Stores Co.*, 63 Fla. 119, 58 So. 129.

The venue is not made jurisdictional by the mere circumstance that the court by statute has cognizance of "all civil actions arising or happening within the county." Such statute includes all transitory actions by regarding them as arising within the county. *Briggs v. Nantucket Bank*, 5 Mass. 94.

The venue statutes relate only to jurisdiction of the person. *Ohio Southern R. Co. v. Morey*, 47 Ohio St. 207, 7 L. R. A. 701, 24 N. E. 269.

⁹⁵ The action must by a justice's transcript be laid in the township. *Iba v. Hannibal & St. J. R. Co.*, 45 Mo. 469.

territorial limitations on their jurisdiction, and that these cannot be exceeded. It is not a case, as in the selection of a venue, of choosing between two or more courts which have jurisdiction, but of choosing that inferior court which alone has jurisdiction of the action as laid and pleaded.⁹⁶

In several states the venue is jurisdictional and cannot be waived,⁹⁷ and such jurisdiction is exclusive in the county prescribed unless the circumstances are such that the statute gives an option to select another venue.⁹⁸ Where it is jurisdictional as to the corporation, it is not cured by a codefendant's default unless the venue was right because of his residence.⁹⁹ It is a general rule that where the venue is not jurisdictional of the action, the parties may waive it by submitting to trial without claiming the privilege of being sued in the prescribed place,¹ and in the federal courts the privilege of being sued in a district of residence or inhabitancy may be waived, that being distinctively a privilege as contrasted with jurisdiction based on citizenship.² Submission may be indicated by a general appearance,³ by removal of the cause to the wrong federal dis-

⁹⁶ See § 2968, *supra*, as to inferior jurisdiction over corporations.

⁹⁷ A state-owned bank held not competent to consent to suit elsewhere than in the county of its charter place of business. *Central Bank v. Gibson*, 11 Ga. 453.

The venue at the place of a domestic corporation's residence is jurisdictional of the subject-matter and not of the person and to refuse a change to the proper county was error. *Hunter v. D. W. Alderman & Sons Co.*, 79 S. C. 555, 61 S. E. 202.

⁹⁸ The statute makes jurisdiction exclusive in the county where the cause of action arose if there is a resident agent, but if no agent resides there, plaintiff may elect another venue. *Devereaux v. Atlanta Railway & Power Co.*, 111 Ga. 855, 36 S. E. 939.

Code Proc. § 160, prescribing in what counties corporations may be sued, is exclusive. The venue cannot be waived as in ordinary actions covered by sections 161 and 162, which

do not apply to corporations. *McMaster v. Advance Thresher Co.*, 10 Wash. 147, 38 Pac. 760.

⁹⁹ The wrong venue for the corporation is not cured by a defaulting codefendant's failure to object, unless he was sued in a county proper because of his residence. *Whitman County v. United States Fidelity & Guaranty Co.*, 49 Wash. 150, 94 Pac. 906.

¹ *Briggs v. Nantucket Bank*, 5 Mass. 94. Corporation can waive its privilege of being sued at its place of business. *Norberg v. Heineman*, 59 Mich. 210, 26 N. W. 481.

² *United States v. American Bell Tel. Co.*, 29 Fed. 17.

Privilege of being sued in district of domicile may be waived by general appearance even though neither party resides in the district of suit. *Central Trust Co. v. McGeorge*, 151 U. S. 129, 38 L. Ed. 98.

³ Privilege of venue is waived by general appearance. *Thompson v. Michigan Mut. Ben. Ass'n*, 52 Mich.

trict,⁴ by a motion which invokes the jurisdiction or demurrer to complaint,⁵ or by going to trial on the merits⁶ without having pleaded the matter in abatement according to the usual practice of the court,⁷ but after such a plea or objection is overruled, an involuntary answer over does not make a waiver.⁸ The Texas practice of entering a com-

522, 18 N. W. 247; *Exeter Nat. Bank v. Orchard*, 43 Neb. 579, 61 N. W. 833.

Waives objection in city court of New York that defendant is resident of another county, the subject-matter being within jurisdiction of the court. *Mulligan v. New York & Q. C. R. R.*, 89 N. Y. Supp. 288.

General appearance waives the privilege of being sued in the district of residence. *Flanders v. Aetna Ins. Co.*, 3 Mason 158, Fed. Cas. No. 4,852.

Appearance does not waive a foreign corporation's privilege of venue but only the objection to jurisdiction. *Atchison, T. & S. F. Ry. Co. v. Forbis*, 35 Tex. Civ. App. 255, 79 S. W. 1074.

⁴ Defendant by removing to a district in which it is not a resident waives that objection in the jurisdiction of the federal court. *Woodcock v. Baltimore & O. R. Co.*, 107 Fed. 767.

⁵ Appearance at return term and moving for continuance and for security for costs waives privilege of venue. *Gray v. Grand River Coal & Coke Co.*, 175 Mo. App. 421, 162 S. W. 277.

Demurring and moving to strike waived wrong venue. *Ohio Southern R. Co. v. Morey*, 47 Ohio St. 207, 7 L. R. A. 701, 24 N. E. 269.

Waived by moving to quash and for continuances. *Houston, E. & W. T. Ry. Co. v. Granberry*, 16 Tex. Civ. App. 391, 40 S. W. 1062.

Jurisdiction of the particular federal district may be waived by filing general demurrers. *Texas Co. v. Central Fuel Oil Co.*, 194 Fed. 1.

⁶ By appearing in a venue where it

was not suable and there defending a transitory action, a domestic corporation waived objection. *Oakleaf Mill Co. v. Lash*, 98 Ark. 394, 135 S. W. 872; *Rippstein v. St. Louis Mut. Life Ins. Co.*, 57 Mo. 86; *St. Louis & S. F. R. Co. v. Traweek*, 84 Tex. 65, 19 S. W. 370.

The privilege of a railroad corporation under Laws 1901, p. 21, to be sued at the place of injury or at plaintiff's residence is waived like any other by an appearance to the merits with a general demurrer and general denial. *Galveston, H. & S. A. Ry. Co. v. Baumgarten*, 31 Tex. Civ. App. 253, 72 S. W. 78.

Waived by pleading to merits. *St. Louis & S. F. R. Co. v. McBride*, 141 U. S. 127, 35 L. Ed. 659; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853; *Kelsey v. Pennsylvania R. Co.*, 14 Blatchf. 89, Fed. Cas. No. 7,679.

A national bank by defending on the merits waives its right to be sued in that state court of the county or city where it is located. *First Nat. Bank of Charlotte, North Carolina v. Morgan*, 132 U. S. 141, 33 L. Ed. 282.

Going to the merits after removal into the wrong district waives that objection. *Kreigh v. Westinghouse, Church, Kerr & Co.*, 214 U. S. 249, 53 L. Ed. 984.

⁷ *Briggs v. Nantucket Bank*, 5 Mass. 94.

Suit in the wrong county is waived if not objected to by answer or demurrer. *Globe Acc. Ins. Co. v. Reid*, 19 Ind. App. 203, 49 N. E. 291, 47 N. E. 947.

⁸ Going to trial after objection to venue is overruled does not waive it.

pulsory general appearance on the making of a motion to quash citation or service does not carry with it the waiver of venue.⁹ One who suffers a default waives the venue if service was good,¹⁰ but moving to open default and tendering answer as required does not waive it, no service having been had.¹¹ The venue of an action wholly or partly local cannot, ordinarily, be waived unless there is a statute permitting it.¹²

Officers and stockholders as such can neither make¹³ nor revoke a waiver.¹⁴ It is an act for the corporation. A stipulation in advance for a certain venue against the corporation has been held valid,¹⁵ and not obnoxious to a statute condemning agreements to accept service, enter appearance, or confess judgment,¹⁶ but it cannot be required of a foreign corporation as a condition of admission to the state.¹⁷

The venue will be presumed right, so far as necessary to support the judgment and the jurisdiction,¹⁸ but a consent to remove the

Spratley v. Louisiana & A. R. Co., 77 Ark. 412, 95 S. W. 776.

It is not waived by answering to the proper venue after demand for change and filing answer with the original clerk, and by resisting a motion to strike such answer, and accepting a notice of ruling on the motion to strike and then moving to strike the case from the calendar and transfer it as demanded. *State v. District Court of Clay County*, 120 Minn. 99, 139 N. W. 135. But it is not waived when seasonable objection is made. *Southern Pac. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 943; *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 36 L. Ed. 768.

⁹ The appearance entered conformably to statute is only such as a correct citation and service would have been equivalent to. It does not waive a plea of privilege of venue. *Kelly v. A. B. Crouch Grain Co.*, — Tex. Civ. App. —, 174 S. W. 630.

¹⁰ *Bond v. Karma-Ajax Consol. Min. Co.*, 15 Cal. App. 469, 115 Pac. 254.

¹¹ *Kelly v. A. B. Crouch Grain Co.*, — Tex. Civ. App. —, 174 S. W. 630.

¹² See § 2982, *infra*.

Appearance does not give consent

to suit in a county where the court has no jurisdiction because the action is localized elsewhere. *Hammel v. Fidelity Mut. Aid Ass'n*, 42 Wash. 448, 85 Pac. 35.

¹³ Under a constitution requiring all civil cases to be tried in the county of defendant's residence, a director's consent to suit in the wrong county is of no force. *Central Bank v. Gibson*, 11 Ga. 453.

¹⁴ A waiver cannot be revoked by intervening stockholders. *Central Trust Co. v. McGeorge*, 151 U. S. 129, 38 L. Ed. 98.

¹⁵ A stipulation that a particular venue be chosen, if suit against the corporation be brought, is valid. *Texas Moline Plow Co. v. Biggerstaff*, — Tex. Civ. App. —, 185 S. W. 341.

¹⁶ *Ft. Worth Board of Trade v. Cooke*, 6 Tex. Civ. App. 324, 25 S. W. 330.

¹⁷ An agreement to waive such a privilege as a condition of admission to do business in the state is void and a statute requiring it unconstitutional. *Southern Pac. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 943.

¹⁸ *Zindorf v. Western American Co.*,

case to a county where neither party resides, and where it cannot be sent with their consent, will not be presumed.¹⁹ Jurisdiction is not lost by dismissal of the party on whose residence the venue was based.²⁰

§ 2979. — **Residence, chief office or principal place of business.** While it has been said that "at common law" a corporation could be sued only at its chief place of business or domicile, this is inaccurate. What is meant is that it could not be served elsewhere, and hence in consequence it could not be sued elsewhere for want of means to acquire jurisdiction.²¹ This also may be true under the modern statutes, if they require a mode of service that can be accomplished only in a given county or counties; but if the mode so prescribed is not an exclusive one and service can be accomplished elsewhere, the venue is not restricted by such statutes.²² Thus, a provision for service on a lessor through the agency of the lessee's officers or agents has been held not to make the lessor suable only in the county where the injury occurred and where the lessee's agents may be served.²³

The statutes applicable to suits against natural persons are usually applied to suits against corporations, if there is no statute expressly applicable to the latter, and by such statutes it is generally enacted that civil actions shall be brought in the county where the defendant, or one of the defendants, resides, or is found,²⁴ or where the plaintiff

26 Wash. 695, 67 Pac. 355; State v. Superior Court of Pierce County, 14 Wash. 203, 44 Pac. 131; Snyder v. Philadelphia Co., 54 W. Va. 149, 63 L. R. A. 896, 102 Am. St. Rep. 941, 1 Ann. Cas. 225, 46 S. E. 366.

¹⁹ St. Louis & S. F. R. Co. v. Casselberry, — Tex. Civ. App. —, 139 S. W. 1161; St. Louis & S. F. R. Co. v. Kiser, — Tex. Civ. App. —, 136 S. W. 852.

²⁰ See § 2977, supra.

²¹ "At common law a corporation could only be sued in the territorial jurisdiction where it had its legal domicile, and that was where it had its chief place of business." Park Bros. & Co. v. Oil City Boiler Works, 204 Pa. 453, 54 Atl. 334, citing Bailey v. Williamsport & N. B. R. Co., 174 Pa. St. 114, 34 Atl. 556, wherefrom it appears that inability to serve

process on it elsewhere was the reason for the rule.

²² See § 2978, supra.

Under the statute, service may be had on an agent in any county, if the president be absent therefrom or a nonresident. It is not necessary to sue at the corporation's principal place of business. Peoria Ins. Co. v. Warner, 28 Ill. 429.

²³ Southwestern R. Co. v. Vellines, 14 Ga. App. 674, 82 S. E. 166, where the lessor was held suable at its own residence, though it might have been sued by service on the lessee's agent in the county where the injury occurred.

²⁴ The statute fixing venue for natural persons applies, and a corporation is suable where it has its principal place of business, but no part of its railroad, for an injury

resides.²⁶ Such statutes will be held applicable to corporations on the theory that they are to be sued like natural persons²⁷ and that though they have no "residence" in the technical sense, yet the place of business given to them or chosen by them is for this purpose equivalent to residence,²⁸ but the terms of the statutes may preclude such an application.²⁹ If the corporation is suable only where a natural person would be, a garnishment proceeding against it must be brought where he could be garnisheed, in absence of a statute specially prescribing another place.³⁰ Before the doctrine of corporate residence was developed by the United States Supreme Court, some authorities were inclined to find that the residence of the corporation was not necessarily at the charter place of business, but was where its stockholders resided.³¹ In North Carolina it was but recently denied

done in another county where its railroad runs. *Bristol v. Chicago & A. R. Co.*, 15 Ill. 436.

Action against joint tort-feasors may be brought where one lives and process may be sent, as in case of natural persons, to be served in the county where the corporation has its office. *Cobbey v. State Journal Co.*, 77 Neb. 619, 110 N. W. 643.

Insurance corporation of Charleston is a "resident" thereof within jurisdiction of the city court. *Cromwell's Ex'rs v. Charleston Insurance & Trust Co.*, 2 Rich. (S. C.) 512.

A railroad corporation is a person within the statute fixing venue for trespass. *Bartee v. Houston & T. C. Ry. Co.*, 36 Tex. 648.

See as to former and present federal statutes, § 2978, *supra*.

²⁶ *Glaize v. South Carolina R. Co.*, 1 Strob. (S. C.) 70.

Assumpsit on a bank note lies where holder lives (St. 1784, c. 28, § 13). *Brigge v. Nantucket Bank*, 5 Mass. 94.

²⁷ Assimilation to natural persons, see § 2926, *supra*.

As to the so-called "common-law doctrine" that they were like persons "residing" at the principal place of business and accordingly suable there, see § 2978, *supra*.

²⁸ See cases in the notes preceding, also in note following in this section.

²⁹ The provision that no "person" shall be sued out of the county in which "he" resides does not apply to corporations. *Baltimore & Y. Turnpike Co. v. Crowther*, 63 Md. 558, 1 Atl. 279.

³⁰ A trustee process, where the only trustees were corporations in a single county, must be brought there (Rev. St. c. 90, § 16). *Lewis v. Denney*, 4 Cush. (Mass.) 588.

³¹ A corporation was held to reside and be suable where some of its stockholders resided. *Wood v. Hartford Fire Ins. Co.*, 13 Conn. 202, 33 Am. Dec. 395.

It was held that a corporation was not to be regarded as dwelling in a place merely because its charter required it to keep and it did keep an office there. (This was decided partly on authority of the earlier cases of *Bank of United States v. Deveaux*, 5 Cranch 61, 3 L. Ed. 38, as to which see Chap. 13, § 390, *supra*.) *Wood v. Hartford Fire Ins. Co.*, 13 Conn. 202, 33 Am. Dec. 395.

A corporation has no commonancy and therefore is not within a statute fixing venue according to the residence of the person. *Taunton & S.*

that a corporation could have the quality or attribute of residence, and hence the plaintiff's residence was the place for suit,³² but statutes have been enacted there giving the corporation a locus for this purpose at its principal place of business,³³ so that the doctrine is immaterial except for the argument afforded by it. A foreign corporation, being incapable of a residence within any state but its domicile,³⁴ may be sued at the county of plaintiff's residence,³⁵ or elsewhere at his option,³⁶ in any county which the law permits to be chosen.³⁷

The "residence" of the corporation for such purpose is its principal place of business³⁸ though some authorities hold it to be a resident wherever it carries on business or has its operative properties.³⁹

B. Turnpike Corporation v. Whiting, 9 Mass. 321.

³² A corporation has no residence, and hence may be sued in any county where the plaintiff resides. *Morehead v. Atlantic & N. C. R. Co.*, 52 N. C. 500.

³³ See § 2978, *supra*.

³⁴ See Chap. 13, § 397, *supra*.

³⁵ *Ivanush v. Great Northern R. Co.*, 26 S. D. 158, 128 N. W. 333.

³⁶ *Thomas v. Placerville Gold Quartz Min. Co.*, 65 Cal. 600, 4 Pac. 641.

³⁷ See § 2978, *supra*.

³⁸ *Cohn v. Central Pac. R. Co.*, 71 Cal. 488, 12 Pac. 498; *Krogh v. Pacific Gateway & Development Co.*, 11 Cal. App. 237, 104 Pac. 698; *Bloom v. Michigan Salmon Min. Co.*, 11 Cal. App. 122, 104 Pac. 324; *Crookston v. Centennial Eureka Min. Co.*, 13 Utah 117, 44 Pac. 714; *Connecticut & P. Rivers R. Co. v. Cooper*, 30 Vt. 476, 73 Am. Dec. 319. But see *California Southern R. Co. v. Southern Pac. R. Co.*, 65 Cal. 394, 4 Pac. 344, denying the principle stated in the text because no statute defines residence.

Residence of president or vice president is residence of corporation (Civ. Code, § 73). *Harper v. Newport News & M. V. R. Co.*, 90 Ky. 359, 14 S. W. 346 (Civ. Code, § 474); *McDormant v. Louisville, C. & St. L. R. Co.*, 11 Bush (Ky.) 386.

Suit should be laid at the county of the principal office, such being its "residence" within the statute, and the residence of plaintiff also being there. Defendant (a railroad) is not a resident in all counties where its lines run. *Thorn v. Central R. Co.*, 26 N. J. L. 121.

"Residence" of corporation as fixed by its articles is at principal place of business chosen thereby, though it has other places of business. *Rossie Iron-Works v. Westbrook*, 59 Hun (N. Y.) 345, 13 N. Y. Supp. 141.

Domestic corporation cannot be said to "reside or be found" in a county where its officer was served, not being the county of its principal office. *Holgate v. Oregon Pac. R. Co.*, 16 Ore. 123, 17 Pac. 859.

A corporation "resides at the commencement of the action" in the principal place of its business (Code Civ. Proc. § 101, and must be sued there if objection to suit elsewhere be made. *Gotthelf v. Merchants' Bank*, 33 S. D. 259, 145 N. W. 542.

³⁹ A railroad company has its residence in each county where it has an office or agency. (Questioned, however, if the statute applies to them.) *New Albany & S. R. Co. v. Haskell*, 11 Ind. 301.

A resident corporation cannot be sued elsewhere than where its residence is if it demands a change; but

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The principal place established by law, not the one actually and wrongfully maintained elsewhere, is to be chosen,⁴⁰ and when this place is attached to the franchise it binds a holder thereof by succession.⁴¹ A corporation may be "found" in any place where it is carrying on business,⁴² although this has been denied in Oregon which asserted the doctrine that it was incapable of being found anywhere.⁴³ Within a constitutional provision that certain actions shall be tried in the county where a defendant party resides, a corporation has

a railroad company has a residence in each county where its road passes. *Richardson v. Burlington & M. R. Ry. Co.*, 8 Iowa 260; *Baldwin v. Mississippi & M. R. Co.*, 5 Iowa 518.

A turnpike corporation must be regarded as residing and suable wherever its road runs, there being no law or charter provision fixing for it a legal residence. *Baltimore & Y. Turnpike Co. v. Crowther*, 63 Md. 558, 1 Atl. 279.

Any county where defendant's railroad runs and it has a station and a ticket agent is a residence. Not only its general office is such. *Schoch v. Winona & St. P. R. Co.*, 55 Minn. 479, 57 N. W. 208.

A corporation having its main office with office furniture and records in one county where its president and secretary reside may be sued there for an injury done in another county where its railroad line is situated and all its substantial property. *Jensen v. Philadelphia, M. & S. St. Ry. Co.*, 201 Pa. 603, 51 Atl. 311.

A railroad corporation is a resident wherever its line is located and it has a public business and an agent who can be served. *Tobin v. Chester & L. Narrow Gauge R. R.*, 47 S. C. 387, 58 Am. St. Rep. 890, 25 S. E. 283.

⁴⁰ An action to enjoin the corporation from removing its general offices from the place where by law they are established should be brought at that place alleged to be the lawful place, and not at the actual place where

they unlawfully are. *International & G. N. Ry. Co. v. Anderson County*, 106 Tex. 60, 156 S. W. 499, aff'g on other grounds — *Tex. Civ. App.* —, 150 S. W. 239, which on this point held the contrary.

⁴¹ *International & G. N. R. Co. v. Anderson County*, — *Tex. Civ. App.* —, 174 S. W. 305.

⁴² See the following cases decided under the former federal statute, and holding the corporation to have been "found" within a district and hence suable there. *Ex parte Schollenberger*, 96 U. S. 869, 24 L. Ed. 853; *Knott v. Southern Life Ins. Co.*, 2 Woods 479, Fed. Cas. No. 7,894; *Fonda v. British American Assur. Co.*, Fed. Cas. No. 4,904, 6 Cent. L. J. 305; *Blackburn v. Selma, M. & M. R. Co.*, 2 Flip. 525, Fed. Cas. No. 1,467.

A nationally incorporated railroad company, which owned land in the territory but had sold all its railroad properties and franchises under congressional sanction to another company and had no officer or meetings within the territory, was not "found" there within Act July 2, 1890 (26 St. 209, c. 647), merely by reason of its president's casual presence. *Territory v. Baker*, 12 N. M. 456, 78 Pac. 624, judgment aff'd 196 U. S. 432, 49 L. Ed. 540.

⁴³ A corporation is not and cannot be "found" in any county within L. O. L. § 44, regulating venue. *Davies v. Oregon Placer & Power Co.*, 61 Ore. 594, 123 Pac. 906.

been considered as being in the county where any of its instrumentalities cause injury,⁴⁴ and statutes may ascribe a place of domicile or residence under such a clause to the corporation wherever it operates or has been located.⁴⁵ Some of the statutes prescribe the place of trial at the principal place of business, thus excluding counties where there are minor places of business or agencies.⁴⁶ Others expressly permit suit to be brought in any county where the corporation carries on business, or has an agency, or where any of its railroads run or other operative property is situated,⁴⁷ but if the right to sue at a place other than the principal place is conditioned on any fact, as residence of plaintiff, such condition is essential.⁴⁸ For this purpose the principal place of business is either that established by the charter, or one selected by the corporation.⁴⁹ Such place is not lost

⁴⁴ Backwater in one county from dam in another is a nuisance done in the first-mentioned county. *Central Georgia Power Co. v. Stubbs*, 141 Ga. 172, 80 S. E. 636.

⁴⁵ *Etowah Milling Co. v. Crenshaw*, 116 Ga. 406, 42 S. E. 709.

The corporation has a residence and is suable in equity as well as at law wherever the road is or has been located though abandoned or not completed (Code, § 3406). *Savannah, F. & W. Ry. Co. v. Atkinson*, 94 Ga. 780, 21 S. E. 1010.

⁴⁶ Kirby's Dig. § 6067, allowing suit to be brought where the corporation is "situated" or where it has its "principal place" of business, etc., does not permit suit for wages at a minor place of business kept for convenience. (This was adhered to on rehearing but qualified in language as to railroads operating within a county.) *Spratley v. Louisiana & A. Ry. Co.*, 77 Ark. 412, 95 S. W. 776.

Action for death by wrongful act should be in county of corporate residence under Act of 1850. *Southwestern R. Co. v. Paulk*, 24 Ga. 356.

⁴⁷ See § 2981, *infra*.

⁴⁸ Domestic corporation must be sued at its principal, not a branch, place of business when plaintiff is a nonresident. *Spere v. Troy Laundry*

Machinery Co., 44 N. Y. App. Div. 390, 60 N. Y. Supp. 1080.

See also § 2981, *infra*, for a Texas statute which makes the right to sue in any county where the road runs depend on plaintiff's nonresidence in the state.

⁴⁹ Where charter fixes local place of business, the corporation cannot be regarded as residing everywhere that it does business. *Central Bank v. Gibson*, 11 Ga. 453.

As to whether obtaining its charter by application to a particular county court obliges the corporation to have its residence there, see *Etowah Milling Co. v. Crenshaw*, 116 Ga. 406, 42 S. E. 709.

Where a corporation is not by charter located in any county but may operate in all, it may be sued where it locates an office for the purpose of electing officers and carrying on finances. *Dade Coal Co. v. Haslett*, 83 Ga. 549, 10 S. E. 435.

"Principal place of business" is where the governing power of the corporation is exercised by the corporate directors and principal officers. *Mullen v. Northern Acc. Ins. Co.*, 26 S. D. 402, 128 N. W. 483.

The principal office will be presumed to be where the principal officers have their offices, though the arti-

or changed by the corporation's becoming inactive and holding its annual meetings elsewhere.⁵⁰ A corporation is "situated" within the meaning of a statute in any county where it carries on business through an agent exercising discretion in its behalf.⁵¹

If by terms of positive enactment or by analogy to natural persons the venue of actions against corporations generally is prescribed as the county wherein is its "residence" or principal place of business, but as to certain kinds of actions or classes of corporations another venue is specially prescribed, then all but those specially prescribed must be brought at the county of the principal place of business.⁵² This is merely an outworking of the rule laid down in

cles proposed a different place, not shown to have ever been established, and though defendant's railroad was wholly in other counties. *Boyd v. Blue Ridge R. Co.*, 65 S. C. 326, 43 S. E. 817.

When a place is fixed by law the corporation cannot, nor can its successor, depart therefrom and establish a principal office elsewhere. *International & G. N. R. Co. v. Anderson County*, 106 Tex. 60, 156 S. W. 499, same case on second appeal, — Tex. Civ. App. —, 174 S. W. 305.

⁵⁰ Place of business held to have been at L. notwithstanding no meetings were held there for a long time due to lease of road and cessation of all activities and to resolving removing place for annual meetings to another county. *Eel River R. Co. v. State*, 155 Ind. 433, 57 N. E. 388.

Virtual removal of its activities from its charter place of business does not deprive the corporation of its right to begin its suit there. *Garrett & Co. v. Bear*, 144 N. C. 23, 56 S. E. 479.

⁵¹ A produce buying corporation "is situated" in a county where it buys through its purchasing agent and forwards what it buys though its main office is elsewhere (Code Civ. Proc. § 55). *Fremont Butter & Egg Co. v. Snyder*, 39 Neb. 632, 58 N. W. 149.

⁵² A change to the corporation's principal place of business will be allowed if none of the conditions prescribed by the constitution is met, e. g., where action is in L. county on a contract made in S. to be performed outside the state and broken outside the state. *Cohn v. Central Pac. R. Co.*, 71 Cal. 488, 12 Pac. 498.

Fraud in sale of shares by defendant is a transitory action not otherwise given a venue, and by Code Civ. Proc. § 395, must be tried where defendant resides, that is, its principal place of business. *Krogh v. Pacific Gateway & Development Co.*, 11 Cal. App. 237, 104 Pac. 698.

Except where otherwise provided by law, a domestic railroad must be sued where it has its principal office. *White v. Atlanta, B. & A. B. Co.*, 5 Ga. App. 308, 63 S. E. 234. Liability by reason of being successor must be sued there. *Id.* Thus, a statute covering contracts and also injuries from running engines and cars does not apply to actions against railroads for tortious injuries not so caused. *Georgia Railroad & Banking Co. v. Kirkpatrick*, 35 Ga. 144; *Wallace v. Thomas*, 34 Ga. 543.

For damages from noncompliance with an order of the Railroad Commission to put down a sidetrack, the suit should be at the principal office, that being the only "court of com-

the section last preceding, that the general venue is to be chosen unless the case falls within the special statute⁵³ and is subject, too, to the rule that a merely permissive venue cannot be claimed as an absolute privilege but presents a right to sue either at the principal place of business or at the special venue.⁵⁴ In Louisiana,⁵⁵ aside from

petent jurisdiction," since the statutes giving venue elsewhere do not cover such a cause of action. *English v. Central of Georgia R. Co.*, 7 Ga. App. 263, 66 S. E. 969.

Under the constitution, "equity cases shall be tried in the county where a defendant resides against whom some substantial relief is prayed"; and hence injunction to prevent an obstruction of water flow by a corporation, not being for damages, must be brought in the county where its principal office is (statutes construed). *Etowah Milling Co. v. Crenshaw*, 116 Ga. 406, 42 S. E. 709.

Prior to 1859, suit against a railroad company for breach of contract had to be sued where the principal office was. *Speer v. Atlantic & W. P. R. Co.*, 30 Ga. 135.

Action for breach of contract by process under Act of 1856 and not by notice under Act of 1854 must have been brought where principal place of business was. *Speer v. Atlantic & W. P. R. Co.*, 30 Ga. 135.

Except such corporations, railroads and the like, as may be sued in any county where their franchises are exercised, the statutes make no special provision for venue of actions against corporations; and therefore suit should be at the principal place of business or domicile if the corporation is domestic (statutes construed). *Plummer-Lewis Co. v. Francher*, 111 Miss. 656, 71 So. 907.

A company incorporated as a "mutual protection company" could be sued only where its chief office was, whereas a life insurance company could be sued in any county. *Sargent*

v. Mutual Life Ins. Ass'n, 7 Ohio Dec. 646, 4 Cinc. L. Bul. 659.

On a complaint not disclosing the place of a contract but disclosing the principal place of defendant's business, the action should be brought at the latter, it being the "residence" of defendant at which "all other" actions shall be brought (L. O. L. § 44). *Davies v. Oregon Placer & Power Co.*, 61 Ore. 594, 123 Pac. 906.

Must be sued at its residence unless the facts will sustain one of the exceptional venues, or there is a pleaded joint liability with other defendants. *Behrens v. Brice*, 52 Tex. Civ. App. 221, 113 S. W. 782.

A suit for breach of sale contract made in Dallas county and to be performed by shipment from a point in another state and by payment in Dallas by plaintiff cannot be brought in a county other than Dallas where defendant had no agent (Vernon's Sayles' St. §§ 5, 24), but must be at its principal office in Dallas. *Texas Moline Plow Co. v. Biggerstaff*, — Tex. Civ. App. —, 185 S. W. 341.

The place of business at or nearest Charleston of the Chesapeake & Ohio Railway Company having been fixed by statute as the principal office unless it should choose to locate its principal office within the state, and no other having been chosen, is the place to bring action for a foreign cause of action. *Ballard v. Chesapeake & O. Ry. Co.*, 42 W. Va. 1, 24 S. E. 602.

⁵³ See § 2978, *supra*.

⁵⁴ See § 2978, *supra*.

⁵⁵ *Caldwell v. Vicksburg, S. & P. R. Co.*, 40 La. Ann. 753, 5 So. 17, re-

provisions in special charters, nonfeasant negligence must be sued for in the corporate domicile but active wrongs, or "trespass," in the parish where they occurred.

Under the statutes permitting action to be in the county where any of several defendants resides or has its place of business, that of a co-defendant of the corporation may be chosen though the corporation could not be sued there;⁵⁶ but this cannot be done unless

viewing earlier cases cited in sections following.

A charter exemption from suit except at the domicile in all actions but trespass permits suit in the parish where the act occurred only when wrong was done or unlawful entry made. Suit for damages for permissive taking of land is not included. *St. Julien v. Morgan's Louisiana & T. R. & S. S. Co.*, 39 La. Ann. 1063, 3 So. 280.

By its charter as well as by the Code, *Morgan's Louisiana & T. R. & S. S. Co.* can be sued in the parish where it occurred for trespass or for trespass on the case whenever force direct or indirect is involved. The charter did not supersede the general law. *State v. Judge of Twenty-Sixth Judicial District Court*, 33 La. Ann. 954.

A corporation impliedly assuming another's liability *ex delicto* must be sued in the parish of its domicile. *Police Jury Parish of Iberville v. Texas & P. R. Co.*, 122 La. 388, 47 So. 692.

It has been held that there was nonfeasant negligence where there was defective construction of a bridge (*Caldwell v. Vicksburg, S. & P. R. Co.*, 40 La. Ann. 753, 5 So. 17), failure to keep up a levee as agreed (*Montgomery v. Louisiana Levee Co.*, 30 La. Ann. 607) and failure to provide safe appliances to servant (*Devons v. Lee Logging Co.*, 121 La. 518, 46 So. 612).

⁵⁶ The general rule of suing where defendant or one of defendants resides applies to corporations. *Eel River R. Co. v. State*, 155 Ind. 433, 57

N. E. 388; *Gray v. Grand River Coal & Coke Co.*, 175 Mo. App. 421, 162 S. W. 277; *Smith v. Patterson*, 159 N. C. 138, 74 S. E. 923.

For breach of a bond on which a railroad corporation and others are joint obligors suit may be brought where any of them resides (Civ. Code, § 5872), and one residing where suit was brought will sustain it, though as to the corporation the wrong venue was chosen. *Waycross Air-Line R. Co. v. Offerman & W. R. Co.*, 114 Ga. 727, 40 S. E. 738.

May be brought where one corporation was situated and summons may be sent out where it and defendant were sued as joint tortfeasors. *Baltimore & O. R. Co. v. McPeck*, 16 Ohio Cir. Ct. 87, 8 Ohio Cir. Dec. 742.

The exceptional provision that action may be brought "in any county where any one of the defendants resides" (R. S. 1198, subd. 4) does not mean where a corporate defendant not residing or domiciled but having an agent might be sued (subd. 21) hence co-defendants of the railroad must be sued at the general venue. *Red River, S. & W. Ry. Co. v. Blount*, 3 Tex. Civ. App. 282, 22 S. W. 930. Had the contract been performable at the county of such agency all could have been sued there, but the court, examining it ruled that it was not performable there. *Id.*

A foreign associate corporation may be sued on a joint liability where the domestic one is suable. *Houston East & W. T. Ry. Co. v. Granberry*, 16 Tex. Civ. App. 391, 40 S. W. 1062.

Under the laws of Wyoming as con-

a cause of action is pleaded against such co-defendant⁵⁷ and, of course, it must be seen to that a means exists for serving the corporation defendant in such a case.⁵⁸ In Texas a statute permits a connecting carrier to be sued in the county where the initial one is sued.⁵⁹

In the federal courts the venue is now made either the "residence" of the plaintiff or that of the defendant if the suit is one founded on diversity of citizenship. With certain statutory exceptions all other suits must be brought where defendant is an "inhabitant."⁶⁰ It is further provided that, if the district contains more than one division, suit must be brought (except local actions) in the division where a sole defendant resides, or in either division if there are two or more defendants residing in different divisions in the district.⁶¹ The

strued by the courts of that state an action for the joint negligence of an individual residing in one county and a domestic corporation having its principal office in another county was rightly brought in the county where the individual has his residence. *Harrison v. Carbon Timber Co.*, 14 Wyo. 246, 83 Pac. 215.

⁵⁷ *D. T. McClellan & Co. v. American Tie & Timber Co.*, 135 Ga. 370, 69 S. E. 486; *Behrens v. Brice*, 52 Tex. Civ. App. 221, 113 S. W. 782.

⁵⁸ As to service, see §§ 2988 et seq., *infra*.

⁵⁹ Under Gen. Laws 1905, p. 29, a connecting carrier when properly served can be sued in the county where the initial carrier may be and is sued on a contract of connecting carriage. *St. Louis, I. M. & S. F. Ry. Co. v. White* (Tex. Civ. App.), 103 S. W. 673.

A foreign corporation whose railroad extends to the state boundary and there connects with a domestic line is not "operating any part of its road" within the state and though it is a connecting carrier it cannot be sued in any county where the other extends (Gen. Laws 1899, c. 125, p. 214) but must be sued where it has its chief office. *St. Louis, I. M. & S. R. Co. v. J. H. White & Co.*, 97 Tex. 493, 80 S. W. 77.

Such statute does not apply where the two corporations had separate contracts, each delivering to the other in turn, and no joint contract. *Texas & P. Ry. Co. v. Lynch*, 97 Tex. 25, 75 S. W. 486.

⁶⁰ Judicial Code, § 51, quoted § 2978, *supra*.

By an amendment in 1887 it was provided that a corporation ["person"] shall not be sued except in that district where it resides or the plaintiff resides when jurisdiction is based wholly on diversity. The effect of this was to repeal the right to sue it where it was "found" as alternately provided in the earlier statute, so that since then it cannot be sued outside of its domicile wherever it may have a usual place of business by a plaintiff residing in another district. *Southern Pac. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 943; *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 36 L. Ed. 768.

⁶¹ Judicial Code, § 53.

Under a former statute substantially like the present it did not matter that plaintiff did not reside in the division; and he may sue a foreign corporation in any division where it is found. *Dinzy v. Illinois Cent. R. Co.*, 61 Fed. 49.

residence and inhabitancy of the corporation for this purpose has already been treated of.⁶² National banks are declared by statute to be citizens of the states in which they are located⁶³ but no similar provision having been made as to nationally incorporated railroad companies, it has been held that they are not citizens of any state for the purpose of jurisdiction.⁶⁴ Such a corporation is nevertheless a resident for the purpose of venue in a state and district where it has a principal office located.⁶⁵ In bankruptcy the proceeding for adjudication may be brought in a district where the corporation has for six months had its actual "principal place of business for the preceding six months" rather than where it was fixed by the articles.⁶⁶ In patent infringement cases also there is a special provision fixing place for trial at the place where defendant is an inhabitant or shall have committed acts of infringement and have a regular and established place of business.⁶⁷

Dissolution and forfeiture suits should be brought in the domicile county, unless the statute allows some other to be chosen.⁶⁸

§ 2980. — Place of injury, or of contract, or of accrual of cause. As has been mentioned in the preceding sections, the statutes often provide that certain causes of action, or causes of action against certain corporations, may be sued where the cause of action arose or where the injury occurred or where the contract sued on was made, was to be performed or was broken. It has also been explained that these statutes control the venue of those actions only which come within their terms, leaving other actions against corporations to be

⁶² See § 396, *supra*.

⁶³ Judicial Code, § 24, ¶ 16.

⁶⁴ *Bankers' Trust Co. v. Texas & P. R. Co.*, 241 U. S. 295, 60 L. Ed. 1010.

⁶⁵ *In re Dunn*, 212 U. S. 374, 53 L. Ed. 558.

A national corporation may be sued in any federal district where it does business though its principal office is in another state. *Van Dresser v. Oregon Ry. & Nav. Co.*, 48 Fed. 202.

⁶⁶ *Construing Judicial Code, § 58, and Bankruptcy Act, § 2, subd. 1. In re Wenatchee-Stratford Orchard Co.*, 205 Fed. 964.

See also § 403, *supra*, for full treatment.

⁶⁷ Judicial Code, § 48. As to such

inhabitancy and residence, see § 391, *supra*.

⁶⁸ Dissolution proceedings must be brought in the domiciliary county. *Great Western Life Assur. Co. v. State*, 181 Ind. 28, 102 N. E. 849, rehearing denied 103 N. E. 843.

Forfeiture suit by information in nature of quo warranto is properly brought in county of principal office. *Eel River R. Co. v. State*, 143 Ind. 231, 42 N. E. 617, same case on second appeal 155 Ind. 433, 57 N. E. 388.

See § 2978, *supra*, as to venue in actions by the state.

See also chapter on Forfeiture, Dissolution and Winding Up, *infra*.

controlled by the general statutes governing venue.⁶⁹ Within the class of actions covered they have been held applicable to actions in rem by attachment as well as to those in personam by service.⁷⁰ Some causes of action necessarily subsist in more than one county at the time of action, having had their inception in one county and their consummation in another, and as to these suit may be in either county where there was a complete cause of action. It is, therefore, necessary to inquire what construction shall be given the language of these statutes and what actions fall within their terms. The place "where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs," is a permissive venue in California⁷¹ and other states have statutes more or less similar.⁷² When the statute is so worded it may be sued on either in the county where made or the one where performance was due⁷³ and also at the principal place of business or at any other venue which the statutes make optional⁷⁴ this option being for the plaintiff to exercise and defendant's privilege of being sued at its place of business being subordinate thereto.⁷⁵

A further condition of fact imposed by some of the statutes is that the cause of action must have arisen from an agency within the county and that service can there be had on the agent.⁷⁶ An

⁶⁹ See §§ 2978, 2979, *supra*.

⁷⁰ An action begun by attachment is within Civ. Code, § 2334, prescribing the place where the cause of action arises. *Hazlehurst v. Seaboard Air-Line Ry.*, 118 Ga. 858, 45 S. E. 703.

⁷¹ See California Const. art. 12, § 16.

⁷² "Made or to be performed," Code, § 3406. *Georgia Railroad & Banking Co. v. Seymour*, 53 Ga. 499. Civ. Code, §§ 72, 73. *Owensboro Shovel & Tool Co. v. Moore*, 154 Ky. 431, 157 S. W. 1121.

Where cause of action "accrued." *Pipkin v. National Loan & Investment Ass'n*, 80 Mo. App. 1.

Rev. St. 1895, art. 1194, § 23, specifies "in which plaintiff's cause of action or any part thereof arose." *Floresville Oil & Manufacturing Co. v. Texas Refining Co.*, 55 Tex. Civ. App. 78, 118 S. W. 194.

⁷³ *Central of Georgia R. Co. v. Crapps*, 4 Ga. App. 550, 61 S. E. 1126.

Action on contract for common carriage of live stock may be in county where made. *Nashville, C. & St. L. R. Co. v. Carrico*, 14 Ky. L. Rep. (abstract) 431.

Action for loss of goods by carrier may be brought where the contract was made (Civ. Code, § 73). *Adams' Exp. Co. v. Crenshaw*, 78 Ky. 136, holding that statute makes it immaterial whether defendant was corporation or partnership.

See also this section, note 95, *infra*.

⁷⁴ See §§ 2978, 2979, *supra*.

⁷⁵ *Ivey v. Kern County Land Co.*, 115 Cal. 196, 46 Pac. 926. See also *General Reduction Co. v. Tharpe*, 11 Ga. App. 334, 75 S. E. 339. See also other cases cited §§ 2978, 2979, *supra*.

⁷⁶ See references to statutes in cases cited *infra*, and consult local statutes. See also *Central Georgia Power Co. v.*

option to sue where the cause arose is perfectly harmonious with a general provision for suit wherever an office is kept or an agent resides.⁷⁷ Such a law may require that the agency shall have existed when the cause of action arose and also when service was had⁷⁸ and such an agency can exist without any fixed office, provided it can be regarded as locally fixed and not roving.⁷⁹ The county of the principal place of business is to be resorted to, if by reason of the want of an agent it cannot be sued where it arose.⁸⁰ It suffices if only one of the co-defendants have an agent served in the county, where the others can be brought in by other modes of service⁸¹ and in

Parnell, 11 Ga. App. 779, 76 S. E. 157.

Trespass by a corporation not in the county of its principal office, cannot be sued where it occurred unless there is also an agent, agency or place of business there. *Tuggle v. Enterprise Lumber Co.*, 123 Ga. 480, 51 S. E. 433.

Under Code, § 3406, it is not necessary that there be an agent resident in that county on whom service could be perfected. *Mitchell v. Southwestern R. R.*, 75 Ga. 398.

Under Acts of 1912, p. 68, § 4, enabling certain corporations to be sued where the cause of action originated, and providing also how and where service shall be made "if the cause of action arises in a county where the * * * company has no agent," it is not necessary that there be any agent there to give cognizance of the action. *Central Georgia Power Co. v. Stubbs*, 141 Ga. 172, 80 S. E. 636.

⁷⁷ A statute giving plaintiff the "option" to sue in a county where the agency of the corporation is, out of which the cause of action grew, "as though the principal resided therein" is harmonious with one for suit in "any county where the corporation has an office * * * or any person resides upon whom process may be served." *New Albany & S. R. Co. v. Haskell*, 11 Ind. 301.

⁷⁸ Under R. S. 1881, § 309, the agent must have been such in the county

when suit was brought and the cause of action must have grown out of the business of such office. *Indiana Ins. Co. v. Capehart*, 108 Ind. 270, 8 N. E. 285.

An insurance company may be sued on a policy where the agency was when the policy was issued. *Merritt v. Cotton States Life Ins. Co.*, 55 Ga. 103. Such agency must also be there when suit is brought (construing Code, §§ 3408, 3409). *Empire State Ins. Co. v. Collins*, 54 Ga. 376.

⁷⁹ An agency for sales on commission held by a resident of the county constitutes an agency out of which a cause based on one of such sales grew although no office was maintained by the agent (Code, § 3500). *Lake v. Western Silo Co.*, 177 Iowa 735, 158 N. W. 673.

⁸⁰ For ejection of passenger it may be brought where the company's residence is if it has no agent where cause of action arose, i. e., where he was ejected. *Georgia Southern & F. R. Co. v. Pearson*, 120 Ga. 284, 47 S. E. 904.

⁸¹ County where injury occurred was proper where one corporate defendant had an office and agency there, the others though having no agent there being brought in by perfected service of second originals. *Roy v. Georgia Railroad & Banking Co.*, 17 Ga. App. 34, 86 S. E. 328.

Georgia the agents of the lessee or operator of a railroad line may be served to bind the lessor.⁸³ An injury occurring beyond the state, and hence out of any county, does not fall within such special statutory venue, and is to be sued on at the principal place of business⁸³ or in any other county where by statute suit is allowed to be brought.⁸⁴ A cause of action growing out of an agency of the corporation, includes actions on contracts negotiated by the agency though the breach sued for occurred in some other county or place.⁸⁵

The "contract" referred to in such statutes is the one sued on rather than the one which preceded it or was the principal one in the transaction.⁸⁶ Accordingly action on a breach of warranty lies at the place where the goods were sold.⁸⁷ An implied contract to repay money is within these statutes and arises where the payment was made and the duty to repay accrued⁸⁸ and action on an implied contract to repay money after a rescission of the original

⁸³ A lessor railroad is suable where the injury occurred though it has no agent or place of business in that county, being served under Civ. Code, § 2801, by service on the lessee's depot agent and mailing a copy to the president. *Georgia Railroad & Banking Co. v. Bennefield*, 138 Ga. 670, 75 S. E. 981.

⁸⁴ For injury done in another state, it must be in the county where the principal office is located by charter, though the active office is a branch one. *Atlanta, K. & N. R. Co. v. Wilson*, 116 Ga. 189, 42 S. E. 356.

⁸⁵ The statute (Civ. Code, § 2334) does not apply to foreign torts. Action for breach of duty of carrier by delay in carrying to another state arises therein, and is suable in any county where service may be had. *Wright v. Southern R. Co.*, 7 Ga. App. 542, 67 S. E. 272.

⁸⁶ An agency for sale of steamship tickets fixes venue of an action for failure to furnish proper transportation on a ticket bought there. *Zabron v. Cunard S. S. Co.*, 151 Iowa 345, 34 L. R. A. (N. S.) 751, 131 N. W. 18.

Evidence held to show action for nonacceptance growing out of a coal

purchase in A. county by an agent there, though payment was to be made at an office in another county. *Thistle Coal Co. v. Rex Coal & Mining Co.*, 132 Iowa 592, 109 N. W. 1094.

⁸⁷ Suit for nondelivery of goods by reshipped railroad under reissued bills of lading should be brought where they were issued rather than where the original bills were issued at the origin of the shipment. *Central of Georgia R. Co. v. W. T. Kuhns Lumber Co.*, 16 Ga. App. 700, 86 S. E. 56.

⁸⁸ *Cook v. W. S. Ray Mfg. Co.*, 159 Cal. 694, 115 Pac. 318.

⁸⁹ An action by a station agent to recover the amount of an overpayment made by him is on an implied contract "made or to be performed" in the county where the overpayment took place (Code, § 3406). *Georgia Railroad & Banking Co. v. Seymour*, 53 Ga. 499.

An overpayment of freight beyond the legal rate may be sued for at the place of shipment, that being the place where the contract was made (Act of March 4, 1869, amending Code, § 3329). *Arnold & Du Bose v. Georgia Railroad & Banking Co.*, 50 Ga. 304.

contract lies at the place of the rescission.⁸⁹ Similarly an action for services rendered may be brought at the place of rendition, though the principal place of business was elsewhere.⁹⁰

The cause of action on a contract "accrues" or "arises" at the place where the act is done or omitted which gives the right to sue,⁹¹ such as the place where default in payment occurred,⁹² or where the event occurs which matures the right, such as death of insured where

⁸⁹ A cause of action based on rescission will be presumed to have arisen where the acts necessary to effect rescission should have been done. *Hammond v. Ocean Shore Development Co.*, 22 Cal. App. 167, 133 Pac. 978.

A cause of action for recovery of money paid under a contract rescinded for fraud did not arise in Mono county where it was dated in San Francisco, paid there, and presumably rescinded there. *Hammond v. Ocean Shore Development Co.*, 22 Cal. App. 167, 133 Pac. 978.

⁹⁰ *General Reduction Co. v. Tharpe*, 11 Ga. App. 334, 75 S. E. 339.

⁹¹ A cause of action for the value of merchandise sold accrues in the county where it is loaded for shipment to defendant. *Merchants' & Planters' Oil Co. v. Seeligson* (Tex. App.), 15 S. W. 712.

A contract of sale by telephone between two counties for delivery of merchandise in G county for shipment to F county and payment in G, gives rise to a cause of action in G county on refusal to accept. *Planters' Cotton Oil Co. v. Whitesboro Cotton Oil Co.*, — Tex. Civ. App. —, 146 S. W. 225.

For failure to deliver goods sold may be sued in the county where plaintiff's manager closed the contract by telephone and where drafts were to be payable for the price. *Floresville Oil & Manufacturing Co. v. Texas Refining Co.*, 55 Tex. Civ. App. 78, 118 S. W. 194.

A contract for sale of rice by a

factor gives rise to a cause of action in part in the county where a solicitor obtained the contract for defendant. *Mangum v. Lane City Rice Milling Co.*, — Tex. Civ. App. —, 95 S. W. 605.

A cause of action for agreed commissions on placing loans arose in the county where defendant's money was loaned by which the commission accrued and where the agent lived. *Equitable Mortg. Co. v. Weddington*, 2 Tex. Civ. App. 373, 21 S. W. 576.

A cause of action for failure to deliver wool sold for shipment out of the state accrues where the contract was made. *Western Wool Commission Co. v. Hart* (Tex.), 20 S. W. 131.

⁹² Where corporation carried on the business in suit, which suit was for recovery of money held to plaintiff's use. *Edwards v. Van Cleave*, 47 Ind. App. 347, 94 N. E. 596.

A cause of action for breach accrued in Springfield where the contract was made by persons in St. Louis and while in Springfield with a corporation of that place to prepare plans for a building in Springfield, but the plans were made in St. Louis, delivered in Springfield and default in payment there made. *Barnett, Haynes & Barnett v. Colonial Hotel Bldg. Co.*, 137 Mo. App. 636, 119 S. W. 471.

A cause of action for nondelivery of goods to be paid for by drafts through a bank on shipment from another place arises in part at the place where sale was negotiated and drafts

the action is on a life policy.⁹³ A carrier's undertaking is of ubiquitous character extending into more than one county and the cause of action may be said to arise in any county where the carrier failed in any part of its undertaking⁹⁴ or alternatively in the county where made.⁹⁵

The contract is "made" at the place where execution of it is completed⁹⁶ and a mere modification does not make the contract a new

were to be collected. *Rhyme Milling Co. v. Cunningham*, — Tex. Civ. App. —, 171 S. W. 1081.

Action for breach of a grain buying contract arose in the county where the grain was bought and drafts in payment were given which were dishonored. *Kell Milling Co. v. Bank of Miami*, — Tex. Civ. App. —, 155 S. W. 325.

A cause of action for breach of an agreement to pay for supplies furnished to farmers arose in the county where they were furnished. *Houston Rice Milling Co. v. Wilcox & Swinney*, 45 Tex. Civ. App. 303, 100 S. W. 204.

A contract of sale of goods to be loaded in G county and paid for by drafts drawn there and shipped to another county may be sued on in G county, the drafts with bill of lading attached not having made it a contract elsewhere contrary to intention. *Gulf, W. T. & P. Ry. Co. v. Browne*, 27 Tex. Civ. App. 437, 66 S. W. 341.

Policy silent as to place for payment is payable at place of issuance and is suable there. *S. M. Smith Ins. Agency v. Hamilton Fire Ins. Co.*, 69 W. Va. 129, 71 S. E. 194.

Services performed on a ranch may be sued for in the county where it is. *Gay Ranch Co. v. Rowland* (Tex. Civ. App.), 50 S. W. 1086.

A cause for labor and materials in repairing a machine arises where it was delivered to its owner, a corporation of another county, and may be sued there, no other agreement appearing (Stat. 1913, § 2619). *State*

v. Bisjord, 161 Wis. 118, 152 N. W. 847.

⁹³ *Rippstein v. St. Louis Mut. Life Ins. Co.*, 57 Mo. 86 (Code Civ. Pr. 55); *Bankers' Life Ins. Co. of Lincoln v. Robbins*, 53 Neb. 44, 73 N. W. 269; *Hildebrand v. United Artisans*, 46 Ore. 134, 114 Am. St. Rep. 852, 79 Pac. 347.

⁹⁴ The county where live stock was delivered in bad condition may be chosen as the place where injury occurred though it may have begun in transit before it reached that county. *Central R. Co. v. Pickett*, 87 Ga. 734, 13 S. E. 750.

Suable where goods were destroyed by fire awaiting delivery at destination by defendant carrier. *Central Railroad & Banking Co. v. Smith*, 54 Ga. 499.

Ejection from a train in consequence of a refusal to provide a return ticket to a live stock shipper is a personal injury suable in the county where it occurred, and a plea so stating gives plaintiff a better writ. *St. Louis, I. M. & S. R. Co. v. J. H. White & Co.*, 97 Tex. 493, 80 S. W. 77.

⁹⁵ Under Civ. Code, § 2334, a suit for breach of a contract of affreightment may be brought either where the contract was made or where delivery was undertaken. *Friedman v. Seaboard Air-Line Ry.*, 124 Ga. 472, 52 S. E. 763. See also *Adams Exp. Co. v. Crenshaw*, 78 Ky. 136; *Nashville, C. & St. L. R. Co. v. Carrico*, 14 Ky. L. Rep. (abstract) 431.

⁹⁶ A contract is "made" (Civ.

one.⁸⁷ A connecting carrier's contract is made where the shipment originates, the initial carrier being regarded as agent⁸⁸ but this could not be true where there were several and distinct shipments on reissued bills of lading.⁸⁹ It is "to be performed" where any act is required to be done, and consequently may be sued wherever a breach can be said to have occurred.¹ In Kentucky it is not regarded as "to be performed" in a county unless it is essentially to be performed there rather than in another county or in several counties² and it is to be sued where goods were prepared for sale³ or delivered for shipment,⁴ or where work was done,⁵ rather than at the place for payment or final delivery. Under the law of California, above quoted, it depends on the form which the action takes, and therefore if it sounds in breach rather than in performance that county may be chosen in which defendant was put in default of performance, hence at the place of refusal to perform according to tender and demand.⁶ Where a statute regulating venue of insurance actions

Code, § 72) at the place where one party signs and remails the draft of it previously prepared and signed by the other and transmitted for completion of execution. *Swann-Day Lumber Co. v. Cornett*, 161 Ky. 98, 170 S. W. 516. And an immaterial alteration does not prevent this. *Id.*

Policy not valid until countersigned by agent at a certain place is a contract of that place. *S. M. Smith Ins. Agency v. Hamilton Fire Ins. Co.*, 69 W. Va. 129, 71 S. E. 194.

⁸⁷ A telegraphic modification of a contract does not make a new one. Therefore the place where the original contract was made is the place where assumpsit founded thereon arises. *Ferguson v. Grottoes Co.*, 92 Va. 316, 23 S. E. 761.

⁸⁸ *Pittsburg, C. C. & St. L. R. Co. v. Viers*, 113 Ky. 526, 24 Ky. L. Rep. 356, 68 S. W. 469; *Nashville, C. & St. L. R. Co. v. Carrico*, 95 Ky. 489, 26 S. W. 177.

⁸⁹ *Central of Georgia R. Co. v. W. T. Kuhns Lumber Co.*, 16 Ga. App. 700, 86 S. E. 56.

¹ Where breach of a merger contract took place. *Atlanta, B. & A.*

R. Co. v. Atlantic Coast Line R. Co., 138 Ga. 353, 75 S. E. 468.

² The contract must specify or contemplate that it is to be performed principally or essentially in a single county, not in several, or else venue must be laid on the place of making or at the principal place of business (contract to sell on commission in many counties). *Job Iron & Steel Co. v. Clark*, 150 Ky. 246, 150 S. W. 367.

³ *Glasscock v. Louisville Tobacco Warehouse Co.*, 31 Ky. L. Rep. 702, 103 S. W. 319.

⁴ Contract for sale of goods "f. o. b." at point of shipment was not one to be performed at place of destination. *Southern Coal & Coke Co. v. Bowling Green Coal Co.*, 161 Ky. 477, 170 S. W. 1185.

⁵ Action on contract to do construction work may be brought where it was to be done. *Covington v. Limerick*, 19 Ky. L. Rep. 330, 40 S. W. 254.

⁶ Contract to sell land is broken wherever there is a failure to deliver the deed on full payment made according to terms of the contract. *Ivey v. Kern County Land Co.*, 115 Cal. 196, 46 Pac. 926.

prescribes the location of the insured property as the proper venue, it cannot be taken as applying to all insurance actions but only as to those on policies covering property risk.⁷

A tort may have its inception in one county, become a complete cause of action in another, and continuing cause injury in still others. Some statutes prescribe the place where the cause "arose," others where it "accrued," others where the "injury occurred," and still others use language varying even from these.⁸ The decisions indicate that these mean substantially the same, and action should be brought for damage to property where it was injured,⁹ conversion where detention of the chattel began,¹⁰ nuisance¹¹ or negligence where it became injurious,¹² refusal by carrier to accept goods where refused.¹³ Tort action for personal injury should be brought where it occurred,¹⁴ wrongful interference with a passenger's rights where it occurred,¹⁵ malicious prosecution at the place where it was insti-

⁷ *Mullen v. Northern Acc. Ins. Co.*, 26 S. D. 402, 128 N. W. 483.

⁸ The place "where the obligation or liability arises." California Const. art. 12, § 16.

⁹ Killing an animal on defendants' railroad. *Georgia Railroad & Banking Co. v. Monroe*, 49 Ga. 373.

¹⁰ Action to recover chattels and damages for detaining them sounds in tort and may be brought where detention occurred, though possession grew out of contract. *Hileman v. Day Bros. Lumber Co.*, 111 Ky. 557, 23 Ky. L. Rep. 758, 64 S. W. 419.

¹¹ The statute (Acts 1912, p. 68, § 4) making all railroad and electric companies suable in the county where the cause of action originated for injury to person or property, enables suit for both such injuries to be brought in a county where plaintiff's farm lies for a nuisance of backwater caused by a power dam in another county owned by a power company with principal offices in a third county. *Central Georgia Power Co. v. Stubbs*, 141 Ga. 172, 80 S. E. 636; *Central Georgia Power Co. v. Parnell*, 11 Ga. App. 779, 76 S. E. 157.

¹² A tort by negligently omitting to label an explosive is "committed" where an explosion occurs though the negligence originates elsewhere at place of sale. *Peaslee-Gaulbert Co. v. McMath's Adm'r*, 148 Ky. 265, 39 L. R. A. (N. S.) 465, Ann. Cas. 1913 E 392, 146 S. W. 770, Winn, J., dissents.

¹³ In county where it, a carrier, refused to carry plaintiff lumber as tendered, the complaint declaring that it was done pursuant to a conspiracy to further an illegal combination and having laid no venue but in the title thereof. *Chase v. South Pac. Coast R. Co.*, 83 Cal. 468, 23 Pac. 532.

¹⁴ *Jager v. California Bridge Co.*, 104 Cal. 542, 38 Pac. 413; *Lewis v. South Pac. Coast R. Co.*, 66 Cal. 209, 5 Pac. 79.

¹⁵ A suit for false arrest for stealing a ride arises where the arrest is first made, if at all, not where plaintiff was jailed after the train stopped; and one for violation of a passenger's rights by such arrest also arises where the acts took place. *Summers v. Southern R. Co.*, 118 Ga. 174, 45 S. E. 27.

In *Hatcher v. Southern R. Co.*, 191

tuted,¹⁶ false arrest where made, not the place of jailing thereafter,¹⁷ false imprisonment in any county where it continued,¹⁸ libel where circulated,¹⁹ or where first circulated,²⁰ or published.²¹ In Texas fraud may be sued for in the county where committed.²² It suffices that any part of the injury occurred within the county²³ and some statutes expressly so state. In one or more states the law permits the choice of the county where the injury occurred or an agency exists, if the plaintiff is a resident in that county, or in an adjacent county.²⁴ Whether this requires a residence at the time of the in-

Ala. 634, 68 So. 55, ejection of a passenger was held a personal injury suable where it occurred.

¹⁶ Civ. Code, § 72. *Winn v. Carter Dry Goods Co.*, 102 Ky. 370, 19 Ky. L. Rep. 1418, 43 S. W. 436.

¹⁷ *Summers v. Southern R. Co.*, 118 Ga. 174, 45 S. E. 27, where a passenger was arrested on a train.

¹⁸ False imprisonment of plaintiff conveyed while under arrest on a train may be brought in either of the three counties traversed. *Evans v. Maysville & B. S. R. Co.*, 25 Ky. L. Rep. 1258, 77 S. W. 708.

¹⁹ Newspaper corporation of another county may be sued in residence of plaintiff for libel circulated there. *Tingley v. Times-Mirror Co.*, 144 Cal. 205, 77 Pac. 918; *Brady v. Times-Mirror Co.*, 106 Cal. 56, 39 Pac. 209.

²⁰ *Jones v. Pulitzer Pub. Co.*, 256 Mo. 57, 165 S. W. 304; *Houston v. Pulitzer Pub. Co.*, 249 Mo. 332, 155 S. W. 1068, which overruled *Julian v. Kansas City Star Co.*, 209 Mo. 35, 107 S. W. 496, and *Cook v. Globe Printing Co.*, 227 Mo. 471, 127 S. W. 332. It was finally settled in Missouri by these cases that a libel could not be sued in any or every county in the state where the newspaper might circulate, but must be sued either where the first circulation occurred or else in some one of the other allowable venues, such as plaintiff's residence or a place where defendant had an agency.

²¹ Libel must be sued either where the principal office is, or where publication occurred. Remailing to the author does not publish it where he resides. *Wallace v. Southern Exp. Co.*, 7 Ga. App. 565, 67 S. E. 694.

²² A fraud in obtaining goods from an insolvent and appropriating the proceeds without sharing equally with other creditors may be sued where the fraud was done (R. S. art. 1194, § 7). *Galveston Shoe & Hat Co. v. Rowe*, 49 Tex. Civ. App. 336, 109 S. W. 1101.

A cause for fraudulently obtaining possession of goods arises in part in a county where at a meeting of creditors a representation was made by which possession was secured. *Galveston Shoe & Hat Co. v. Rowe*, 49 Tex. Civ. App. 336, 109 S. W. 1101.

Deceit committed in a county by agents may be sued there. *Western Cottage Piano & Organ Co. v. Griffin*, 41 Tex. Civ. App. 76, 90 S. W. 884; *McCord-Collins Commerce Co. v. Levi*, 21 Tex. Civ. App. 109, 50 S. W. 606.

²³ It is not necessary that the injury (on a train) should have occurred wholly within the county (Code 1907, § 6112). *Southern R. Co. v. Harrington*, 166 Ala. 630, 139 Am. St. Rep. 59, 52 So. 57.

²⁴ Under Code, § 6112, personal injury actions may be brought "where the injury occurred" without regard to whether the corporation does busi-

jury or at the time of the bringing of the action, or whensoever, is wholly a question of the wording and construction of the statute, and it must be carefully read. Under the Alabama statute a residence within the county when the suit is begun will satisfy the statute, though it is afterwards lost or changed.²⁵ In Louisiana, as stated in the preceding section, the right to choose the venue where the injury was done or suffered depends on whether the action sounds in active wrong, malfeasance or trespass. If so it can be sued there,²⁶ and if not so the suit must be at the domicile or situs of the corporation.²⁷ Some of the statutes applicable to particular kinds of corporations, for instance railroads, enact a special or particular venue for actions of a class, and provide that "all other actions" shall be suable at a prescribed place. Under such a statute of North Carolina all actions against all railroads except actions for allowing fire to escape may be

ness there, or may be brought where "plaintiff resides" if it "does business by agent" there. Other actions may be brought in any county where it does business by agent. *American Coal Corporation v. Roux*, 192 Ala. 574, 68 So. 970.

Action for "personal injury" is not restricted to direct physical hurt to the body. Ejection from a train, therefore, gives rise to cause of action in county where it occurred and where plaintiff resides and defendant does business by agent. It cannot be sued elsewhere (Code, § 6112). *Hatcher v. Southern Ry. Co.*, 191 Ala. 634, 68 So. 55.

When the action is *ex delicto* and not for personal injuries (injury to real property by nuisance) Code, § 6110, allows it to be brought where the injury "occurred," though the company was not doing business there by agent; or where defendant has a permanent residence, if any. *Alabama Western R. Co. v. Wilson*, 1 Ala. App. 306, 55 So. 932.

²⁵ Construing Code 1907, § 6112. *Southern R. Co. v. Harrington*, 166 Ala. 630, 139 Am. St. Rep. 59, 52 So. 57.

²⁶ Slander of title being in the na-

ture of a trespass to the land may be brought where it lies (Code Prac. art. 165, ¶ 9). *Labarre v. Burton-Swartz Cypress Co.*, 126 La. 982, 53 So. 113.

Ejection of passenger at point beyond his station sounds in trespass, and under particular charter could be sued where it occurred. *Dave v. Morgan's Louisiana & T. R. & S. S. Co.*, 46 La. Ann. 273, 14 So. 911.

An action for causing death may be brought against a railroad company in the parish where it was done (Code Prac. art. 165, ¶ 9). *Houston v. Vicksburg, S. & P. R. Co.*, 39 La. Ann. 796; 2 So. 562.

Killing a mule on tracks is a trespass. *State v. Judge of Twenty-Sixth Judicial District Court*, 33 La. Ann. 954.

See also cases cited § 2979, *supra*.

²⁷ Action for damages for land permissively used for railroad purposes without condemnation is not for trespass. *St. Julien v. Morgan's Louisiana & T. R. & S. S. Co.*, 39 La. Ann. 1063, 3 So. 280.

Action for injury to goods in transit is not in trespass. *Gossin's Heirs v. Williams & Morgan's Louisiana & T. R. & S. S. Co.*, 36 La. Ann. 186.

brought in an adjacent county to that where the cause of action arose.²⁸

A statute applying to railroads and covering injuries due to running of engines and cars does not apply to injuries on railroads from other causes.²⁹ A provision for actions "for damages" because of tort will not be construed as applying to actions because of tort but not for damages³⁰ and when the action is essentially *ex contractu* it must be laid in a venue proper for contract actions, though it sounds in damages and is based on a breach partaking of the nature of tort.³¹ Actions for "personal injury" include any tort to the person.³²

Not the domicile but the place where an act was to be done is the place for suing for a penalty for failure to do it.³³

²⁸ A railroad corporation may "in all other cases" than for setting out fires (Rev. § 419) be sued in a county adjoining that where the cause of action arose (Rev. § 424). *Forney v. Black Mountain R. Co.*, 159 N. C. 157, 74 S. E. 884. And it applies to all railroads. *Propst v. Southern R. Co.*, 139 N. C. 397, 51 S. E. 920.

The expression "all other actions" used in a more general sense was construed in a similar inclusive sense in *Western Travelers' Acc. Ass'n v. Taylor*, 62 Neb. 783, 87 N. W. 950.

²⁹ Under special statute of 1863 as to the Western and Atlantic Railroad, an action for loss of goods shipped should have been brought where the office was located, not at destination of shipment. The general act governs because the special act applied only to damages from running locomotives, etc. *Wallace v. Thomas*, 34 Ga. 543.

By amendment of Laws of [pamph.] 1859, p. 48, by Code, § 3313, a cause of action suable in the county must have been caused "by running of cars or engines" or else out of a contract "performable" in the county; hence a trespass to land could only be sued where the principal office was. *Georgia Railroad & Banking Co. v. Kirpatrick*, 35 Ga. 144.

Running a hand car is running "cars or engines" (Code, § 3320).

Thomas v. Georgia Railroad & Banking Co., 38 Ga. 222.

Trespass on land by constructing a roadbed is suable where it was done. By amendment of Code, § 3369, it was no longer restricted to injuries "in or by the running of cars or engines." *Central Railroad & Banking Co. v. Carswell*, 54 Ga. 251.

³⁰ *Etowah Milling Co. v. Crenshaw*, 116 Ga. 406, 42 S. E. 709.

³¹ A supersedeas bond in an injunction suit may be enforced where it is payable (office of the obligor) or where made (county where injunction was had) but not where the damage accrued by delay. The action is contract wise and not tortwise. *Waycross Air-Line R. Co. v. Offerman & W. R. Co.*, 114 Ga. 727, 40 S. E. 788.

³² It is not necessary that there be physical bodily hurt to constitute a "personal injury" within Code, § 6112, and therefore ejection from a train makes a cause of action suable where it occurred. *Hatcher v. Southern R. Co.*, 191 Ala. 634, 68 So. 55. See also *Summers v. Southern R. Co.*, 118 Ga. 174, 45 S. E. 27, on similar facts.

³³ Failure to enter satisfaction of mortgage is a wrong done in the county of record; hence a statutory penalty for such failure, recoverable

§ 2981. — Any county in state, or where agency or business is conducted, or railroad or other property is situated. A distinct type of statutes regulating the venue of actions against corporations is that which permits or requires it to be laid at one of the counties indicated by the description of place described in the title of this section. Usually such a venue is alternative and optional with that at the principal place of business or that at the place, situs or origin of the cause of action.³⁴ Under statutes making a corporation suable in any county where it has an agency or conducts its business or has property,³⁵ "an agency or place of business" is any place where its ordinary business operations are conducted through its representatives dealing with third persons³⁶ and the place of "doing business by

personally by the person requesting it, is to be brought in that county rather than the one of corporate domicile (Code, §§ 6110, 6112). *Drennen Motor Car Co. v. Evans*, 192 Ala. 150, 68 So. 303.

³⁴ Civil Code 1852, § 796, providing that plaintiff may institute action in any county where the corporation "has an office or an agent upon whom process may be served," was repealed by Civ. Code 1881, and by Burns' R. S. 1894, § 1315. *Globe Acc. Ins. Co. v. Reid*, 19 Ind. App. 203, 47 N. E. 947, on rehearing 49 N. E. 291, overruling *Evansville & I. R. Co. v. Spellbring*, 1 Ind. App. 167, 27 N. E. 239.

In actions against railroads the "venue" or place of trial "shall be laid in some county wherein the track of said company is situated" (Acts 1868-69, c. 257). *Graham v. Charlotte & S. C. R. Co.*, 64 N. C. 631.

Under Laws 1903, p. 39, providing for appointment of a resident agent for service on foreign corporations, action may be brought where such agent resides. The former state of the law is pro tanto changed. (The court leaves open the question whether it may still be sued where it has its principal place of business as was the former law.) *Cunningham v. Klamath Lake R. Co.*, 54 Ore.

13, 101 Pac. 213, rehearing denied 101 Pac. 1099.

In West Virginia the Act of 1887 requiring appointment of an attorney to accept service related solely to domestic corporations both resident and nonresident; hence it was not repealed by the Act of 1905 relating to foreign and nonresident domestic corporations. *Lemon v. Imperial Window Glass Co.*, 199 Fed. 927. Accordingly a nonresident domestic corporation is suable in the county where the agent resides and his power is recorded if it has complied with the Act of 1887. If it has not complied it may under the Act of 1905 be sued by serving the state auditor but is suable in any county in the state. *Id.*

See statutes construed in §§ 2978-2980, *supra*.

³⁵ Railroad corporation is suable wherever it has property and a place of business and where its road runs. *Alabama & T. Rivers R. Co. v. Burns, McKibbin & Co.*, 43 Ala. 169.

³⁶ Where an insurance agent does business is "an agency or place of doing business" within Civ. Code, § 2145. *Aetna Ins. Co. v. Brigham*, 120 Ga. 925, 48 S. E. 348.

Electric power plant where there are laborers and a superintendent is a place of business. *Central Georgia*

agent" has a very similar meaning.³⁷ The term agent includes officers³⁸ but not agents for other corporations,³⁹ casual and occasional agencies or transactions and traveling agents being excluded.⁴⁰ The

Power Co. v. Parnell, 11 Ga. App. 779, 76 S. E. 157.

So as to a clay mine where there were laborers and a superintendent. *General Reduction Co. v. Tharpe*, 11 Ga. App. 334, 75 S. E. 339.

An office where books and records are kept and a large part of business is done, is "an established place of business" within a statute prescribing where it may sue, although the clerk's residence is elsewhere. *Androscoggin & K. R. Co. v. Stevens*, 28 Me. 434.

"An" established place of business does not mean "the" established usual principal place of business. *Rhodes v. Salem Turnpike & C. Bridge Corporation*, 98 Mass. 95.

Toll house where agent collects tolls and sells tickets is "an established or usual place of business" within the county, though the principal place of business was in another county. *Rhodes v. Salem Turnpike & C. Bridge Corporation*, 98 Mass. 95.

The corporation's place of business with the secretary in charge is an office kept within the county. *Tausig v. St. Louis & K. R. Co.*, 186 Mo. 269, 85 S. W. 378.

Touching at a wharf and taking and discharging passengers and freight there is "doing business" there (Bal. Code, § 4854). *Sievers v. Dalles, P. & A. Nav. Co.*, 24 Wash. 302, 64 Pac. 539.

³⁷ Receiving freight and passengers at a station, where a station agent was no longer kept, is "doing business by agent" there (Code 1907, § 6112). *Louisville & N. R. Co. v. Dawson*, 14 Ala. App. 272, 68 So. 674.

³⁸ The president whose office is in the county is an agent or representative there, regardless of any private

understanding between him and other officers on the subject. *Sharp v. Damon Mound Oil Co.*, 31 Tex. Civ. App. 562, 72 S. W. 1043.

The county where the vice president lives and in which he carries on much corporate business for the company with stationery indicating an office there is regarded as having an agency of the corporation. *Gulf, B. & K. C. Ry. Co. v. Texas & N. O. R. Co.* (Tex. Civ. App.), 64 S. W. 692.

The treasurer, custodian of money and books, is an "agent" within Rev. St. art. 1198, subd. 21; and the fact that he was a plaintiff would not affect the right to sue the company there, service being had on an officer not adversely interested. *Red River, S. & W. Ry. Co. v. Blount*, 3 Tex. Civ. App. 282, 22 S. W. 930.

³⁹ An agent of another road merely selling tickets good over defendant's lines is not defendant's agent, and, if it has no line in the county, it cannot be sued there for personal injuries (Laws 1901, p. 31, § 27). *Doster v. Ft. Worth & D. C. Ry. Co.*, 49 Tex. Civ. App. 47, 107 S. W. 579.

⁴⁰ Casual sales through brokers in a place are not a doing business there by agent, and the corporation is not suable there in assumpsit (Code, § 4207). *International Cotton Seed Oil Co. v. Wheelock*, 124 Ala. 367, 27 So. 517.

An action on an accident policy for an accident occurring in another state may be brought only where it has its principal place of business or where it has an agency carrying on business (Code Civ. Proc. § 55), and not in a county where an officer is casually found endeavoring to adjust the claim of insured. *Western Travel-*

"residence" of an officer was held to mean his official residence.⁴¹ If acts done in a county can be considered those of an agent they may constitute the doing of business there, but not where they are in law those of an independent contractor.⁴² A statute of this kind must be limited by the provisions of other statutes in force or subsequently enacted which restrict the place of trial to the locality of the cause of action.⁴³ By their express terms some of these statutes are limited to plaintiffs residing in the county of such agency or branch⁴⁴ or to

er's Acc. Ass'n v. Taylor, 62 Neb. 783, 87 N. W. 950.

A traveling solicitor is not an agent in a county, when casually there, to support a venue in such county. Mangum v. Lane City Rice Milling Co., — Tex. Civ. App. —, 95 S. W. 605.

⁴¹ A statute providing for attachment where the secretary "resided" in another town than that where business was carried on, was construed to mean where his official duties were performed rather than where literally he "resided." Adams v. Willimantic Linen Co., 46 Conn. 320.

⁴² Buying and shipping lumber through an agent is transacting business. Strandall v. Alaska Lumber Co., 73 Wash. 67, 131 Pac. 211.

A financial corporation of S county does not "transact business" in K county by agent (Rem. & Bal. Code, § 206), by making a contract with a construction corporation of the latter to finance the state certificates received for the work under which contract the construction company was bound to make collections and remit to the other. State v. Superior Court King Co., 86 Wash. 657, 150 Pac. 1149.

⁴³ The act for leasing the Western & Atlantic Railroad, in providing that suits might be brought in any county through which the road runs, did not enable plaintiff to choose a different venue from that fixed by Civ. Code, § 2334, it being a later act. Le Croix v. Western & A. R. Co., 118 Ga. 98, 44 S. E. 840.

⁴⁴ In Kentucky action against the carrier for injuries cannot be brought in a county where the line passes but in which plaintiff did not reside and was not injured, nor in a county where he resides but in which it has no agent for service, unless it passes there. Fisher v. Cleveland, C, C. & St. L. Ry. Co., 169 Fed. 956.

A nonresident cannot sue a domestic corporation at a branch place of business. Speare v. Troy Laundry Machinery Co., 44 N. Y. App. Div. 390, 60 N. Y. Supp. 1080.

Evidence held to show residence of plaintiff in the county. Allen v. Cincianati, N. O. & T. P. R. Co., 143 Ky. 723, 137 S. W. 230.

Laws 1901, p. 31, c. 27 enacts that railroads may be sued for personal injuries where the injury occurred or plaintiff at the time resided; provided, that if its line does not run in plaintiff's county or the county of injury, then the nearest county to plaintiff's shall be taken in which the line runs or there is an agent; provided also that a nonresident may sue in any county where it has an agent and operates. It further enacts that an injury within one-half mile of a county boundary may be sued in either county. See Doster v. Ft. Worth & D. C. R. Co., 49 Tex. Civ. App. 47, 107 S. W. 579. The subsequent Act of 1905 (Laws 1905, pp. 29, 20) relates only to cases of connecting carriers. *Id.*

Under some statutes the right to sue for a personal injury at the county

nonresident plaintiffs⁴⁵ and to causes of action arising from the transactions of such agency⁴⁶ and by the requirement that service be there had on the agent or some one competent for that purpose.⁴⁷

where it occurred is limited to such plaintiffs as reside there. Others limit the right to sue at the county of an agency other than the principal office to such plaintiffs as have their residence there. See § 2980, *supra*.

⁴⁵ McEachin's Dig. art. 1830, § 26, fixing venue of actions against railroad companies for injuries to person, under a proviso that if plaintiff "is a nonresident of the state" the railroad may be sued in any county where its road runs or operates, is to be strictly construed as to non-residence. *Pecos & N. T. Ry. Co. v. Thompson*, 106 Tex. 456, 167 S. W. 801, *rev'g* — Tex. Civ. App. —, 140 S. W. 1148.

A transient not having a residence elsewhere and sojourning in Texas cannot come under it. *Id.* And the fact that no definite county in Texas could be fixed as the principal place of sojourning is not material if he was not a nonresident of the state. *Id.*

A transient must sue under the general provisions of the statute at the county where the injury occurred, he not having a residence in which alternatively he might sue. *Id.*

In an earlier case a contrary conclusion was reached. It was held that to be a resident some permanency of habitation as a home was required; hence a transient last domiciled in New York was a nonresident and not a resident in the county where he sojourned. *Ft. Worth & D. C. Ry. Co. v. Monell*, 50 Tex. Civ. App. 287, 110 S. W. 504. This must be regarded as overruled by the preceding decision.

A brakeman of roving occupation who had no fixed home but had an intention to return at some future time and resume his domiciliary resi-

dence in another state, is a resident of the county to which he returns at the end of his runs, where he sleeps and eats, though he has no fixed room or habitation. *Gulf, C. & S. F. R. Co. v. Johnson* (Tex. Civ. App.), 82 S. W. 822, *rev'd* on other grounds 99 Tex. 337, 90 S. W. 164.

One who had a residence at one time in M county but who for several weeks had lived where his work took him in P county was not a resident in P county. *Galveston, H. & S. A. Ry. Co. v. Cloyd* (Tex. Civ. App.), 78 S. W. 43.

Texas Rev. St. 1895, arts. 1230, 1235, relating to service of process on "nonresidents" do not affect this statute or control the venue. *Gulf, C. & S. F. Ry. Co. v. Rogers*, 37 Tex. Civ. App. 99, 82 S. W. 822.

This statute confers an absolute privilege on defendant railroad if claimed. *Gulf, C. & S. F. R. Co. v. Rogers*, 37 Tex. Civ. App. 99, 82 S. W. 822.

⁴⁶ Action on a policy may be brought in the county where it was issued by a local agent, though signed elsewhere at the principal office (Civ. Code, § 71). *Kentucky Mut. Security Fund Co. v. Logan's Adm'r*, 90 Ky. 364, 14 S. W. 337.

Any action after 1859-60 may be brought in a county where defendant has an agency and not only those which arose out of the business of that agency (statutes and amendments construed). *Toppins v. East Tennessee, V. & G. R. Co.*, 73 Tenn. (5 Lea) 600. Such a provision is somewhat similar in effect to those which permit the venue to be chosen where the cause of action arose or the injury occurred. See § 2980, *supra*.

⁴⁷ In another county than its prin-

Other statutes of this type apply to particular kinds of causes of action, such as actions against common carriers or railroad corporations,⁴⁸ or insurance contracts,⁴⁹ or injuries to person or property.⁵⁰

A railroad does not extend or operate in the county if its lines do not run there, and its operations are not carried into that county;⁵¹ neither can a connecting carrier be sued in a county where the lines of a third corporation not sued extend, under a statute contemplating only that any one of parties can be sued where any of another party's lines extend.⁵² The operation of a line of road, or the existence of

cipal place of business only if it has a branch or other place of business and is served on an agent there in charge. *Beal-Doyle Dry Goods Co. v. Odd Fellows Bldg. Co.*, 109 Ark. 77, 158 S. W. 955.

Action on fire policy may be brought under general statute wherever agent resides and is served. *Indiana Mut. Fire Ins. Co. v. Routledge*, 7 Ind. 25.

By statute (Code, art. 75, § 22a) an insurance company may be sued for loss in a county where it has an accredited agent who is served. (The title of the act is to be read with the text to ascertain the intent that suit shall be in the county where the agent is.) *Henderson v. Maryland Home Fire Ins. Co.*, 90 Md. 47, 44 Atl. 1020.

Statutes limiting place for service, see §§ 2996, 3007, *infra*.

⁴⁸ See *Spratley v. Louisiana & A. R. Co.*, 77 Ark. 412, 95 S. W. 776, in which it was held that action against a railroad company for wages was not an action against a "carrier" within the statute.

Assumpsit lies. Alabama & T. Rivers R. Co. v. Burns, McKibbin & Co., 43 Ala. 169.

Railroad corporation may be sued in county where it carries on business though its principal place is elsewhere (Code Civ. Proc. § 984). *Poland v. United Traction Co.*, 88 N. Y. App. Div. 281, 85 N. Y. Supp. 7, *aff'd* 177 N. Y. 557, 69 N. E. 1129.

⁴⁹ The statute applicable to freeholders privileging them to be sued in the county of their residence does not apply. *Home Protection v. Richards & Sons*, 74 Ala. 466. So as to policy of life insurance. *Mobile Life Ins. Co. v. Pruett*, 74 Ala. 487.

⁵⁰ Action for personal injury may be in any county where defendant railroad's line runs. *South Florida R. Co. v. Weese*, 32 Fla. 212, 13 So. 436.

For injury to property in any county where defendant has an agency and transacts business. *Dennis v. Atlantic Coast Line R. R.*, 86 S. C. 258, 69 S. E. 465.

See also, *supra*, notes 44, 45, as to residence affecting such actions.

⁵¹ Where a railroad's engines and cars pass over a bridge and a railroad appurtenant thereto and into a county, but under a contract between the bridge company and the railroad company whereby they are virtually hired by the bridge company, the railroad line does not pass into that county under the meaning of the Kentucky statutes. *Fisher v. Cleveland, C., C. & St. L. Ry. Co.*, 169 Fed. 956.

Checking baggage to a station on another line is not "operating" there. *Gulf, C. & S. F. Ry. Co. v. Jackson* 4 Willson Civ. Cas. Ct. App. § 47, 15 S. W. 128.

⁵² Laws 1899, p. 214, c. 125, providing as to connecting railroads that suit for loss or damages may be brought "against any one or all of

a residence, or other determinative fact at the time of bringing the action is the test under some statutes.⁵³ It is a matter of wording and construction which time is required. The road need not be operated if the statute merely requires that it "pass" or extend into the county⁵⁴ and the defendant need not be an operating owner.⁵⁵

§ 2982. — Local actions. The distinction between local and transitory actions is not well defined under the various statutes that regulate actions against corporations. The effect of requiring or permitting an action to be brought in a particular county or in any of certain counties where there is an office, agency or place of business, or where the cause of action arose or the injury occurred, or where the corporate property or railroads extend, is to localize to that extent actions which at common law were transitory.⁵⁶ Statutes of the kinds

such railroad corporations * * * in any county in which either of such railroads extends or is operated," does not permit suit where neither extends but where a third line extends, whose owner is not sued. *Atchison, T. & S. F. R. Co. v. Forbis*, 35 Tex. Civ. App. 255, 79 S. W. 1074.

⁵³ The operation of a line of road by one joint tortfeasor in the county at the time action is brought will support venue as to both, though it had not acquired such line when the cause accrued. *Knott v. Dubuque & S. C. Ry. Co.*, 84 Iowa 462, 51 N. W. 57.

A railroad company may be sued where plaintiff resides at the time of the action, he suing as administrator, and where the line of the road passes, though intestate was killed in another county where he and plaintiff then resided and where defendant's main office is. *Louisville & N. R. Co. v. Hoskin's Adm'r*, 32 Ky. L. Rep. 1263, 108 S. W. 305.

Situation of property in the county when the cause of action arose will not sustain suit there if none was there when action was commenced (Act March 17, 1856, P. L. 388, § 1) on summons served in another county.

Hawn v. Pennsylvania Canal Co., 154 Pa. St. 456, 26 Atl. 544.

⁵⁴ A road running into a county will sustain venue there even though trains have never been operated on it. The statute (Civ. Code Prac. § 73) only requires that the line of the "carrier passes" into the county. *Louisville, H. & St. L. R. Co. v. Sanders' Adm'r*, 29 Ky. L. Rep. 212, 92 S. W. 937.

⁵⁵ A lessee of a railroad may be sued where the leased line runs. *Cleveland, C., C. & I. Ry. Co. v. McLean*, 1 Ohio Cir. Ct. 112, 1 Ohio Cir. Dec. 67.

⁵⁶ Local and transitory enumerated, see *McLeod v. Connecticut & P. R. R. Co.*, 58 Vt. 727, 6 Atl. 648.

Action for personal injury under a foreign statute held transitory. *McLeod v. Connecticut & P. R. R. Co.*, 58 Vt. 727, 6 Atl. 648.

An action for wrongful death against a carrier is "in one sense made local at the option of the plaintiff," that is where injury occurred; or it is transitory and suable at any of the places allowed by the Code. *Chesapeake, O. & S. W. R. Co. v. Heath's Adm'r*, 87 Ky. 651, 9 S. W. 832.

Action to enforce a judgment is

described in the sections just preceding are not ordinarily construed as applying to local actions so as to make them wholly or partially transitory. Those generally regarded as local are also local under statutes applying to corporate actions, unless a different intent appears.⁵⁷ It may be assumed therefore as a general rule, subject to exceptions that, as in actions between natural persons, any action affecting the title to or status of land or seeking redress for injury to it is local.⁵⁸ If prayed as incidental relief it may be transitory.⁵⁹ This rule had its genesis in the common-law requirement that a venue be laid where the cause of action had its situs, and of course a cause of action relating to land could have no other situs than the land itself.⁶⁰ The statutes which now enact the same rule are based on different considerations, and are designed to obviate the incon-

local so far that it may be begun in the court whence execution issued, or where defendant resides, and it is transitory to the extent that it may be where defendant is summoned (Civ. Code, § 474). *McDormant v. Louisville, C. & L. B. Co.*, 11 Bush (Ky.) 386.

⁵⁷ Action by corporation for damages to its track and culvert must be brought where they are situated. Rev. St. c. 90, § 16, applies only to transitory actions. *Vermont & M. R. Co. v. Orcutt*, 16 Gray (Mass.) 116.

The addition of section 16 to Rev. St. C. 90, was not to make actions against corporations local but to give corporations a locality or residence for the purpose of being sued. *Raymond v. Lowell*, 6 Cush. (Mass.) 524, 53 Am. Dec. 57.

An action against a railroad company for damage to land by fire is local to the place where the land is (Rev. § 419), and is not one of the actions which can be brought where plaintiff resides (Rev. § 424). *Perry v. Seaboard Air Line R. Co.*, 153 N. C. 117, 68 S. E. 1060.

The statute allowing suit against railroads in any county where the road extends or is operated (R. S. art. 1198, § 21) is subordinate to the provision that "suits for the re-

covery of lands or damages thereto" must be brought where the land lies (R. S. art. 1198, § 13). *Ft. Worth & D. C. Ry. Co. v. Jenkins* (Tex. Civ. App.), 29 S. W. 1113.

⁵⁸ A suit to compel transfer of mining shares is not a real action. *Eddy v. Houghton*, 6 Cal. App. 85, 91 Pac. 397.

Railroad corporation is a "person" within Pasch. Dig. art. 1423, fixing venue at the county where a trespass was committed. *Bartee v. Houston & T. C. Ry. Co.*, 36 Tex. 648.

⁵⁹ A complaint to cancel the record of a mortgage though prima facie local is transitory where that is incidental to the main relief of an accounting against the corporation. *State v. District Court Clay County*, 120 Minn. 99, 139 N. W. 135.

⁶⁰ As explained in *Stephen on Pleading* (Tyler's Ed.), the law required the venue to be laid truly at the place of the principal facts, and even after juries ceased to be the witnesses as well as the triers of the facts this remained true as to actions affecting land because the situs of it was material to the issues and had to be proved as laid. See *Stephen on Pleading*, p. 271 et seq. See also Professor Hepburn's article on *Venue*, 40 Cyc. 1 et seq.

venience of trial and judgment in a place remote from the fixed subject-matter of the action. The historical view is of little practical importance, at least in such a limited consideration as a work on Corporations admits of.⁶¹ The federal statutes provide that "any suit of a local nature, at law or in equity, where the land or other subject matter of a fixed character lies partly in one district and partly in another, within the same state, may be brought in either district,"⁶² and if the action be to enforce a legal or equitable lien on person-
 alty,⁶³ or realty,⁶⁴ or any claim to such property,⁶⁵ or to remove any incumbrance lien or cloud therefrom⁶⁶ it may be brought in the district designated and actual or constructive process against defendants residing outside of such district may be had.⁶⁷ A venue

⁶¹ An action to declare a deed a mortgage and to redeem must be brought where the land lies under Code Civ. Proc. § 392, the land being the subject of the action. *Baker v. Fireman's Fund Ins. Co.*, 73 Cal. 182, 14 Pac. 686.

Eminent domain proceedings by express provision (Code Civ. Proc. § 1243) are to be brought where the land is. *California Southern R. Co. v. Southern Pac. R. Co.*, 65 Cal. 409, 4 Pac. 388, 85 Cal. 394, 4 Pac. 344.

⁶² United States Judicial Code, § 55. And if defendant resides in a different district within the same state, plaintiff may have original and final process against him. Section 54.

⁶³ A stockholders' suit to restrain enforcement of a contract for sale of stock is not one for the enforcement of "any legal or equitable lien or claim against * * * personal property" (U. S. Rev. St. § 738) within the state of the corporate domicile. *Lengel v. American Smelting & Refining Co.*, 110 Fed. 19.

⁶⁴ While a suit for specific performance would be transitory and suable anywhere, a suit also asking enforcement of a lien on oil wells, etc., is to be laid where the property is situated regardless of residence of the parties, jurisdiction being supported by the requisite diversity. *Texas Co. v. Cen-*

tral Fuel Oil Co., 194 Fed. 1.

⁶⁵ The right to abate a nuisance to plaintiff's land in Georgia arising from the use of defendant's property in Tennessee is not a claim to real property in Tennessee. *Ladew v. Tennessee Copper Co.*, 218 U. S. 357 (see discussion at p. 368), 54 L. Ed. 1069.

⁶⁶ Incumbrances on corporate stock within the state may be removed, though some of the stockholders are nonresidents of the district in which suit is brought to which they are joined as defendants. *Schultz v. Diehl*, 217 U. S. 594, 54 L. Ed. 896; *Jellenik v. Huron Copper Min. Co.*, 177 U. S. 1, 44 L. Ed. 647.

⁶⁷ The present law is found in U. S. Judicial Code, § 57, and in terms applies to "any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought," etc. By construction with section 51, which specifically provides that all suits shall be brought where defendant is an inhabitant, or, in diverse citizenship cases, where either he or plaintiff resides, and which also specifically excepts suits mentioned in certain sections including section 57, it is implied that actions described by the words above in quotations

of insurance actions fixed at the location of the property affected cannot apply where the insurance was not one on property.⁶⁸

Though it has been said that the venue, so far as local, cannot be waived,⁶⁹ as may be done when the corporation is defendant in a transitory action ⁷⁰ the better reasoning is that it may be waived in actions for trespass,⁷¹ which an early case was inclined to regard as transitory when a corporation was defendant under a statute permitting suit at the principal place of business.⁷²

§ 2983. Change or venue or place of trial; transfer of cause—In general. As in actions between natural persons, there may either be a change of venue to that county or place where the defendant has an absolute privilege to be sued, or on grounds or prejudice or other cause preventing a fair trial or for convenience of trial.⁷³ The venue is not always a matter of absolute privilege, but it may be left to discretion of the court.⁷⁴ Wherever the venue is of right fixed at any particular county, as in the county of the principal place of business, and there is no other counter privilege or cause, as the residence of plaintiff, a change if seasonably demanded must be granted ⁷⁵

shall be brought in the district where the land lies. See also sections 54, 55.

⁶⁸ So held as to an accident policy. *Mullen v. Northern Acc. Ins. Co.*, 26 S. D. 402, 128 N. W. 483.

⁶⁹ In so far as an action may be transitory (on a contract) the objection that it was not brought in the right county may be waived; but jurisdiction will not thereby be conferred on a local portion of the action affecting real estate. *Emmons v. Lexington & C. C. Min. Co.*, 112 Ky. 91, 23 Ky. L. Rep. 1445, 65 S. W. 593.

⁷⁰ See § 2978, *supra*.

⁷¹ Action for trespass to real and personal property is local to the county where the land lies, but after joining in trial elsewhere the corporation could not object. *Blackford v. Lehigh Valley R. Co.*, 53 N. J. L. 56, 20 Atl. 735.

⁷² *Edwards v. Union Bank*, 1 Fla. (Branch) 136.

⁷³ Corporate parties though not named in the statute have the same

right as natural persons to a change. *Commercial Ins. Co. v. Mehlman*, 48 Ill. 313, 95 Am. Dec. 543. Compare *Plummer-Lewis Co. v. Francher*, 111 Miss. 656, 71 So. 907, holding that a corporation cannot have change to its residence as natural person could.

⁷⁴ Change from the county of suit to that of place of business is not a matter of right but of cause as in other cases. *Fresno Nat. Bank v. Superior Court*, 83 Cal. 491, 24 Pac. 157.

Change will not be allowed as a privilege unless the statute properly construed gives it. *Denver & R. G. R. Co. v. Cahill*, 8 Colo. App. 158, 45 Pac. 285, refusing change of tort action to county where it occurred.

As to when the venue is matter of right and when not, see §§ 2978-2981, *supra*.

⁷⁵ The court has no discretion. *Speare v. Troy Laundry Machinery Co.*, 44 N. Y. App. Div. 390, 60 N. Y. Supp. 1080.

Change to the corporation's princi-

without conditions.⁷⁶ Even if suit is laid in what would be a proper venue with the corporation as sole defendant, addition of other defendants may entitle them to a change;⁷⁷ and change cannot be avoided by asking judicial leave to amend by omitting such defendants, since the action of the court is thus invoked in the case,⁷⁸ nor by impleading other defendants who reside in the county but are unrelated to the cause of action or are not served.⁷⁹ Change will be made if the plaintiff selects his own residence but some condition necessary to support that venue is lacking.⁸⁰ The principal defendant's privilege controls rather than that of formal or merely proper parties.⁸¹ In the federal

pal place of business in a proper case is mandatory. *Woods Gold Min. Co. v. Royston*, 46 Colo. 191, 103 Pac. 291.

Changed to place of residence. *Thorn v. Central R. Co.*, 26 N. J. L. 121.

Changed where both resided in corporation's residence. *Rossie Iron-Works v. Westbrook*, 59 Hun (N. Y.) 345, 13 N. Y. Supp. 141.

Accounting suit in which money judgment is sought is governed by Code Civ. Proc. § 984, and trial must be changed to the county where both reside. *Finch School v. Finch*, 144 N. Y. App. Div. 687, 129 N. Y. Supp. 1.

Right is absolute if seasonably demanded to change to the proper county. *Ivanusch v. Great Northern R. Co.*, 26 S. D. 158, 128 N. W. 333.

⁷⁶ A right of removal to another county given by statute cannot be conditioned by the court. *Williamsport & E. R. Co. v. Cummins*, 8 Watts (Pa.) 450.

⁷⁷ When a stockholder is joined as defendant in a suit on the corporate contract (as may be done in California), the stockholder's privilege of being sued in the place of his residence entitles defendants to a change to that place. *Griffin & Skelly Co. v. Magnolia & Healdsburg Fruit Cannery Co.*, 107 Cal. 378, 40 Pac. 495.

So by suing newspaper corporation

where libel was circulated but joining its editor who lived in the county where it was published. *Brady v. Times-Mirror Co.*, 106 Cal. 56, 39 Pac. 209.

Where one defendant corporation is not a proper party and another asks for a change to a county other than its residence (the residence of an individual defendant who asks the change), the change may be made to the residence of an individual defendant. *Eddy v. Houghton*, 6 Cal. App. 85, 91 Pac. 397.

⁷⁸ Motion is decided on existing state of the case and parties. *Brady v. Times-Mirror Co.*, 106 Cal. 56, 39 Pac. 209.

⁷⁹ *Brady v. Times-Mirror Co.*, 106 Cal. 56, 39 Pac. 209.

⁸⁰ Where the plaintiff's residence may be laid as the venue, provided the defendant corporation is served there, but it was served elsewhere, the case should be transferred on motion of defendant. *Woods Gold Min. Co. v. Royston*, 46 Colo. 191, 103 Pac. 291.

⁸¹ Where there are numerous defendants, all residing in other counties, except those who are not necessary though proper defendants, it was error to deny a change to the residence of one of them against whom the main relief was sought. *Bailey v. Cox*, 102 Cal. 333, 36 Pac. 650.

courts statutory provision is made for transfer to another division in the same district by agreement and for transfer when a new court is erected.⁸²

There is nothing, apparently, peculiar to corporations in the law regulating the grounds and occasions for a change on account of prejudice, difficulty of getting a fair trial, or convenience. As to such grounds of change consult the local statutes and any standard work on practice.

§ 2984. — Application and procedure. The ordinary procedure is by application or motion addressed to the court for an order for the desired change,⁸³ and since answering waives the privilege⁸⁴ it should be made before answer, unless based on a ground like convenience of witnesses, in which case the answer must come in before it can be told what the issues will be or what witnesses will be needed.⁸⁵ In New York the statute requires a demand on the adverse party for a change before moving, and such demand may be satisfied by amending the complaint and serving it as amended with a new and correct venue therein laid;⁸⁶ but if the demand is not complied with inside of the time allowed, then within a further time motion must be made to the court for the change.⁸⁷ It may be pleaded to the jurisdiction as a matter of privilege in Texas, and perhaps other states.⁸⁸ In the federal courts a case may be transferred to another division of the same district by stipulation of parties or on order of the court.⁸⁹

⁸² United States Judicial Code, § 58, regulates transfer of causes by agreement to another division in the same district. Section 59 regulates transfer of causes on creation of a new district or division.

⁸³ There must be an objection and claim of privilege or the failure to change venue is not error. *Crystal River Lumber Co. v. Consolidated Naval Stores Co.*, 63 Fla. 119, 58 So. 129. See other cases cited in this section, *infra*.

⁸⁴ See § 2978, *supra*.

⁸⁵ Claim of change as a right must be made before answer time expires (Rev. § 425). *Garrett & Co. v. Bear*, 144 N. O. 23, 56 S. E. 479.

Change for convenience of witnesses cannot be asked until after answer. *Thomas v. Placerville Gold*

Quartz Min. Co., 65 Cal. 600, 4 Pac. 641.

⁸⁶ *Conroe v. National Protection Ins. Co.*, 10 How. Pr. (N. Y.) 403.

⁸⁷ Motion for change to the defendant corporation's principal place of business must be made within ten days after five days' demand (Code Civ. Proc. § 986). If not so made it is waived but a change on ground of convenience of witnesses may thereafter be granted. *Duche v. Buffalo Grape Sugar Co.*, 11 Abb. N. Cas. (N. Y.) 233. See also *Conroe v. National Protection Ins. Co.*, 10 How. Pr. (N. Y.) 403.

⁸⁸ As to requisites of such a plea, see § 3069, *infra*.

⁸⁹ Any civil cause, at law or in equity, may, "On written stipulation of the parties or of their attorneys of

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The application may be made and sworn to by a competent corporate officer.⁹⁰ A showing of grounds is required unless change is a matter of right,⁹¹ and the burden is on the moving corporation defendant.⁹² In so far as the nature of the cause of action is material the complaint alone will be considered, but the affidavits and the answer, if any, may be considered on the questions of fact involved,⁹³ or the certificate of incorporation may be used to show the place of business.⁹⁴ The affidavits or plea should be positive and certain as to the material facts and should not leave inferences open which if true would defeat the right to the change.⁹⁵ In those states where

record signed and filed with the papers in the case, in vacation or in term, and on written order of the judge signed and filed in the case in vacation or on the order of the court duly entered or of record in term, be transferred to the court of any other division of the same district, without regard to the residence of the defendants, for trial." U. S. Judicial Code, § 58.

Upon creation of a new district or division or the transfer of territory to or from a division, civil causes pending shall be tried in the old or the new "as may be agreed upon by the parties or as the court shall direct." U. S. Judicial Code, § 59.

⁹⁰The statute, requiring application to be made by a party to the record and verified by his affidavit, is satisfied by application of the corporation subscribed by the secretary and sworn to by him. *Commercial Ins. Co. v. Mehlman*, 48 Ill. 313, 95 Am. Dec. 543.

The affidavit of prejudice may be made by the secretary or any other officer or agent of the corporation. *St. Louis, O. H. & C. Ry. Co. v. Fowler*, 113 Mo. 458, 20 S. W. 1069.

An attorney cannot make affidavit for a change of venue, which the statute requires to be by the "party." The affidavit must be by such officers or agents as customarily by statute make oaths for it. *Western Bank v. Tallman*, 15 Wis. 92.

⁹¹*Miller & Lux v. Kern County Land Co.*, 134 Cal. 586, 66 Pac. 856.

⁹²To show that breach of obligation did not occur where suit is brought. *Chase v. South Pac. Coast R. Co.*, 83 Cal. 468, 23 Pac. 532.

⁹³The answer and affidavits will be considered only on the question of residence. *Eddy v. Houghton*, 6 Cal. App. 85, 91 Pac. 397.

⁹⁴The certificate of incorporation designating its principal office proves and fixes its legal residence. *Woods Gold Min. Co. v. Royston*, 46 Colo. 191, 103 Pac. 291.

⁹⁵Under the statute the corporation must show that no defendant resides in the county. *Bloom v. Michigan Salmon Min. Co.*, 11 Cal. App. 122, 104 Pac. 324.

An affidavit that defendant's "home" is in a certain county will be taken to mean its residence or general office. *State v. District Court Clay Co.*, 120 Minn. 99, 139 N. W. 135.

Must show that demand for change has been made and refused. *Gotthelf v. Merchants' Bank*, 33 S. D. 259, 145 N. W. 542.

The affidavit should aver positively that defendant had its principal place of business in the county to which change is sought "at the time of commencement of the action." An affidavit that it had it there several weeks after action begun is bad. *Gott-*

the change to a privileged venue may be resisted, as where the court has discretion, or when a counter motion to retain the venue on grounds of convenience or other cause is made, the affidavits in support of such opposition or counter motion must fully and clearly show grounds for retention.⁹⁶

The proper order is for a change to the right venue, and not a dismissal,⁹⁷ and if the court inadvertently makes a wrong change, it can be set aside and the case recalled.⁹⁸ After the change the action should proceed in the new venue like any other action, there being nothing about a corporate party to invoke a different procedure. Accordingly it has been held that a quo warranto by the prosecuting attorney, when changed, does not entail a substitution as relator of the prosecuting attorney of the new county.⁹⁹

III. PROCESS, SERVICE AND APPEARANCE

§ 2985. Form and sufficiency of original process—In general. As an introduction to this subchapter it must be said again that the general law of process, service and appearance as applied in actions between natural persons underlies and forms a predicate for the law on the same subjects as applied to corporations. This work is not

held *v. Merchants' Bank*, 33 S. D. 259, 145 N. W. 542.

A plea of privilege of venue should negative all the exceptional venues besides the one claimed, but matters shown by the petition need not be pleaded unless to deny them. *Mangum v. Lane City Rice Milling Co.*, — Tex. Civ. App. —, 95 S. W. 605.

The jurisdictional fact of an agency to support a venue other than the corporate domicile must be established by plaintiff insisting on it. *Cannel Coal Co. v. Luna*, — Tex. Civ. App. —, 144 S. W. 721.

The affidavit may be amended by permitting the president to swear to it instead of the attorney. *Kelly v. A. B. Crouch Grain Co.*, — Tex. Civ. App. —, 174 S. W. 630.

⁹⁶ Where the court has power in discretion to change from the privileged venue, and a motion to change to it is made, a counter affidavit re-

sisting the change to the place of defendant's business should show the inconvenience to be entailed by such change, names of witnesses, disclosure and advice of counsel. *Crookston v. Centennial Eureka Min. Co.*, 13 Utah 117, 44 Pac. 714.

⁹⁷ A change on demand to an improper county is error though on proper demand change could have been made to another county. *Atlantic Coast Line R. Co. v. Spencer*, 166 N. C. 522, 82 S. E. 851.

Dismissal will not be made because of a wrong venue but only a transfer to the proper one, if seasonably asked. *Allen-Fleming Co. v. Southern R. Co.*, 145 N. C. 37, 58 S. E. 793.

⁹⁸ *Baker v. Firemen's Fund Ins. Co.*, 73 Cal. 182, 14 Pac. 686.

⁹⁹ The suit is civil. *Eel River R. Co. v. State*, 155 Ind. 433, 57 N. E. 388.

the place to look for such general law. It must be sought in the statutes and in works on general practice, and it may be taken as a fair working assumption that the general law will apply to corporations along with such express provisions as the statutes may superadd and such further principles as the decisions herein contained have evolved on the subject. Although it has seldom arisen as a question, the rule seems clear that a corporation plaintiff may have any process which a natural plaintiff might have¹ subject to the possible exceptions of process peculiar to an action which no corporation can maintain and of process, if any such there be, which issues by a method which no corporation is capable of invoking. No cases have been found, however, which adjudicate the point. Indorsement of the writ, or other like act to be done by the corporation, may be well done by its agent in its behalf.² In modern practice its attorney represents it in such matters as causing the issuance of writs for it.³

The common-law method of coercing a corporation to answer to an action was by *precipe quod reddat* and distress on its lands and goods; it had no body to be taken on a *capias* or otherwise to be summoned into the jurisdiction. The reason for this method of process was found in the necessity for an actual appearance of the defendant before the court, and when actual appearance ceased to be requisite, the courts and legislatures were free to devise other and less circuitous process. The method devised was by summons.⁴ Chancery, unless the statute gave it, had no means of coercing an answer

¹ May have an order of arrest against defendant in libel action. *Knickerbocker Life Ins. Co. v. Ecclesine*, 34 N. Y. Super. Ct. 76, *aff'd* 11 Abb. Pr. (N. S.) 385.

² An indorsement of the writ in the corporate name "by" R. M. implies that he was agent of it and a statement of that fact need not be added. *Middlesex Turnpike Corporation v. Tufts*, 8 Mass. 266.

³ See § 2933, *supra*, and see also § 1941, *supra*, as to power of attorney at law of corporation.

⁴ The common-law process was by *precipe quod reddat* (in nature of a summons) and was served on the head man or visible agent or chief clerk. On default of appearance there was

a *distringas* and distress infinite. Since formal appearance is dispensed with and defendant on being summoned is deemed to have appeared, *distringas* is no longer necessary. *State Bank v. Van Horn*, 4 N. J. L. 382. But this does not apply to courts of limited jurisdiction (justices of the peace) and if the precise manner of summons and service of same prescribed for them is not followed, they gain no jurisdiction without an appearance. *Id.*

It is not material whether corporation appears after service on president and cashier. *Meriwether v. Bank of Hamburg*, Dud. L. (S. C.) 36.

A summons or *venire facias* in the first instance and then a *distringas*

from a corporation. Its members could not be taken or personally punished for contumacy, except perhaps as a last resort.⁵ A subpoena in the first instance was the proper process from chancery, to be followed by distringas if it did not appear and answer, and ultimately sequestration. If all these failed an attachment of members, at least those summoned, might issue.⁶ At the present time the statutes of the several states very generally regulate the form and sufficiency of the original process or summons. If not otherwise provided the corporation will be treated as within the word "person" in the statutes prescribing the mode of summoning and serving persons,⁷ but a "short summons" or other special form cannot be issued against a corporation if by nature applicable only to a natural person.⁸ Some of them provide a distinctive process on domestic, as distinguished from foreign corporations, and where this is so the process suitable for a domestic corporation will not suffice for a foreign one and vice versa;⁹ and if the process for a specified class of foreign corporations

if no appearance be made. *Bank of Vincennes v. State*, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234.

"Process must be by summons and not by attachment" and taking of bail. (The nature of the two processes is explained in the opinion.) *Lynch v. Mechanics' Bank*, 13 Johns. (N. Y.) 127.

Ejection against a corporation cannot be commenced by declaration but only by summons. *Brown v. Syracuse & U. R. Co.*, 5 Hill (N. Y.) 554.

Cannot be attached but must be brought in by summons or distringas. *Glaize v. South Carolina R. Co.*, 1 Strob. (S. C.) 70.

See also 1 Bl. Comm. 477; 3 Bl. Comm. 289.

⁵ *McKim v. Odom*, 3 Bland (Md.) 407.

⁶ *McKim v. Odom*, 3 Bland (Md.) 407.

⁷ Person as including corporation in acts relating to process and service, see *Facts Pub. Co. v. Felton*, 52 N. J. L. 161, 19 Atl. 123 (service in disposition proceedings by landlord); *Hinekley v. Bluehill Granite Co.*, 16 Me. 370; *McKendrick v. Western*

Zinc Min. Co., 165 Cal. 24, 130 Pac. 865; *Douglass v. Pacific Mail S. S. Co.*, 4 Cal. 304 (constructive service); *Dock v. Elizabethtown Steam Mfg. Co.*, 34 N. J. L. 312.

A statute authorizing actions to be commenced "in the same manner that personal actions are commenced against individuals" warrants the same kind of process, e. g., attachment. *Ruthe v. Green Bay & M. R. Co.*, 37 Wis. 344.

⁸ "Short summons" by a justice being applicable only to persons cannot be used against corporations. *Johnson v. Cayuga & S. R. Co.*, 11 Barb. (N. Y.) 621.

Justice can bring in foreign and domestic corporations like natural persons by "short summons." *Wilde v. New York & H. R. Co.*, 1 Hilt. (N. Y.) 302.

⁹ *How. St. §§ 6861, 6862*, relating to first process out of justice's court against corporations apply only to domestic corporations. *Reath v. Western U. Tel. Co.*, 89 Mich. 22, 50 N. W. 817. The same is true of *How. St. § 8137. Id.*

Process on a domestic corporation

is prescribed, other foreign ones not of that class cannot be so brought into court.¹⁰ Notices incident to the progress of a proceeding are to be distinguished from original process, and a statute extending to corporations the right to the same notice that natural persons have is not to be regarded as repealing those which fix the kind of process and service by which corporations are to be brought into court.¹¹ A process prescribed for a certain kind of proceeding, being inherently incapable of application to corporations, entails resort to the regular corporation process if jurisdiction can be at all acquired in such a proceeding against a corporation. Such an instance is afforded by forcible entry and detainer procedure.¹² It has been held that even when the charter prescribes the form of service it is merely remedial in that respect; and hence the legislature impairs no contract right by enacting a different mode of service.¹³ Neither does the constitutional right to be sued like a natural person entitle the corporation to be served by inapplicable forms of summons which may issue against natural persons.¹⁴ In the federal law courts process is to be in the form provided by the federal statute, as respects seal, signature and teste; but in other matters of form it is adapted "as near as may be" to the forms and modes existing at the time in like causes in the courts of record of the state within which the federal court is held.¹⁵

in the manner provided for foreign corporations and not according to the statute for domestic ones gives no jurisdiction. *Boyle v. Oro Plata Mining & Milling Co.*, 14 Ariz. 484, 131 Pac. 155.

See also chapter on Foreign Corporations, *infra*.

¹⁰ A railroad terminating opposite the city of St. Louis and having only a freight and ticket office in that city with its chief office in Chicago, where the corporate domicile is, does not have its "chief office" in St. Louis and cannot be sued by ordinary process like domestic railroad corporations (1 Wagn. St. 292, § 19). *Robb v. Chicago & A. R. Co.*, 47 Mo. 540.

¹¹ A statute giving chancery jurisdiction where an equity of redemption is to be sold and providing that "corporations shall have the same notice now provided for natural persons" (Acts 1872, p. 53) was held not to re-

peal the statutes relating to process on corporations. Notice of sale or the like was meant. *Vicksburg & M. R. Co. v. McCutchen*, 52 Miss. 645.

¹² The statutes governing forcible entry and detainer proceedings make no provision for service capable of application to corporations; and the provision as to posting applies only on a return of not found, etc., to the summons. Hence, service should be by the regular mode in such proceeding. *Missouri, K. & E. Ry. Co. v. Hoereth*, 144 Mo. 136, 45 S. W. 1085.

¹³ A charter mode of service peculiar to the corporation may be repealed by enacting a uniform mode of service. No obligation of contract is impaired. *Cairo & F. R. R. Co. v. Hecht*, 29 Ark. 661, *aff'd* 95 U. S. 168, 24 L. Ed. 423.

¹⁴ *Johnson v. Cayuga & S. R. Co.*, 11 Barb. (N. Y.) 621.

¹⁵ U. S. Rev. St. § 911 provides as to

In federal courts of equity and admiralty it is "according to the principles, rules and usages which belong to courts of equity and of admiralty, respectively, except when it is otherwise provided by statutes or by rules of court made in pursuance thereof; but the same shall be subject to alteration and addition by the said courts respectively, and to regulation by the Supreme Court, by rules prescribed, from time to time, to any district court not inconsistent with the laws of the United States."¹⁶ New Equity Rule 7, pursuant to this has declared that "the process of subpoena shall constitute the proper mesne process in all suits in equity * * * to require the defendant to appear and answer the bill."¹⁷ In admiralty the process in personam is "by a simple warrant of arrest of the person in the nature of a *capias*, or * * * with a clause therein" for attachment of goods, etc., "if he be not found"; "or by a simple monition in the nature of a summons to appear and answer."¹⁸ So far as they go these statutes and rules apply to process against corporations out of the federal courts, no special forms for corporations being provided for.

The process, as in the case of actions against natural persons, must describe with sufficient certainty the nature and object of the action,¹⁹ and the return day, or answer day, must be stated as required²⁰ and the court or clerk before which or with whom the answer must be filed, to wit that wherein the action must be tried.²¹ A

form that "all writs and process" shall be (a) under seal of the issuing court, (b) signed by its clerk, (c) and shall bear teste of the proper judge or clerk in the case of a vacancy.

Except in equity or admiralty the other matters of form are not provided for by statute and the state practice is followed in such matters of form except where it is impracticable to do so. It conforms only "as near as may be." U. S. Rev. St. § 914 (Conformity Act). *Middleton Paper Co. v. Rock River Paper Co.*, 19 Fed. 252, 253. See also 1 Rose's Code of Federal Procedure, p. 763, § 836.

¹⁶ U. S. Rev. St. § 913.

¹⁷ See New Equity Rules, 226 U. S. appendix p. 2.

¹⁸ Admiralty Rules No. 2.

¹⁹ "The said action is brought to

recover the sum of \$1,500.00 due from defendant to plaintiff on a certain policy of insurance described in the complaint" suffices where the suit is by insured against insurer and its stockholders under a statute. *Tabor v. Goss & Phillips Mfg. Co.*, 11 Colo. 419, 18 Pac. 537.

Action must be by summons which must in assumpsit and actions on the case state the cause of action as fully as in a declaration. *Rowley v. Chautauqua County Bank*, 19 Wend. (N. Y.) 26.

²⁰ A summons from a justice returnable sooner than the statute allows is null. *Sherwood v. Saratoga & W. R. Co.*, 15 Barb. (N. Y.) 650.

²¹ By statute this must be the county for the place of trial (statutes construed). *Graham v. Charlotte & S. C. R. Co.*, 64 N. C. 631.

requirement that it name "all the parties" is jurisdictional,²² but the corporate officers' names need not be stated in order to comply with such a statute.²³ The common-law command to take security or bail to appear should be omitted, for the reasons before mentioned.²⁴ Where there is a statute, as in California, empowering the court to devise "any suitable process or mode of proceeding" to effectuate its jurisdiction, it may bring the corporation into court by an order to show cause; and this may be served on the attorneys of record, if the corporation is already in court in a related proceeding.²⁵

The return being the complement of the writ must show all things not otherwise apparent which are essential to the validity of the service.²⁶

§ 2986. — Direction and command of writ; name and description. Process against a corporation must run against it in the corporate name, and not against its officers or agents,²⁷ or members, or corpora-

²² If the citation fails to name the co-defendants no jurisdiction is acquired by the justice. *Hunt v. Atchison, T. & S. F. R. Co.* (Tex. Civ. App.), 28 S. W. 460.

²³ Officers' names, when not parties, need not be stated (*Sayles' Ann. Civ. St.* 1897, art. 1214). *Yates v. Royston State Bank*, 62 Tex. Civ. App. 256, 131 S. W. 255.

²⁴ A *si te fecerit securum* clause need not be inserted in summons against a corporation. *Whitaker v. Buffalo Cotton Mfg. Co.*, 2 How. Pr. (N. Y.) 97.

²⁵ Code Civ. Proc. § 187, applied in a contempt proceeding. *Golden Gate Hydraulic Const. Min. Co. v. Superior Court*, 65 Cal. 187, 3 Pac. 628.

²⁶ Validity as shown by return, see also § 3012, *infra*.

²⁷ *Louisiana*. *State v. Voorhies*, 50 La. Ann. 671, 23 So. 871; *State v. Montegudo*, 48 La. Ann. 1417, 20 So. 911.

Missouri. *Blodgett v. Schaffer*, 94 Mo. 652, 7 S. W. 436.

North Carolina. *Hassell & Co. v. Daniels' Roanoke River Line Steamboat Co.*, 168 N. C. 296, 84 S. E. 363;

Plemmons v. Southern Improvement Co., 108 N. C. 614, 13 S. E. 188. A corporation must be proceeded against by summons; and a warrant to take the body of the president against whom by name it was directed is bad and will not support judgment against the corporation. *North Carolina Mut. Ins. Co. v. Hicks*, 48 N. C. 58.

Texas. *Mutual Life Ins. Co. of New York v. Uecker*, 46 Tex. Civ. App. 84, 101 S. W. 872; *Texas-Mexican Ry. Co. v. Wright* (Tex. Civ. App.), 29 S. W. 1134; *Phoenix Fire Ins. Co. of Brooklyn v. Cain* (Tex. Civ. App.), 21 S. W. 709; *Texas & P. Ry. Co. v. Florence* (Tex. App.), 14 S. W. 1070. A command to summon "S., agent for the" Gulf, C. & S. F. Ry. Co., is not a summons to it. *Gulf, C. & S. F. Ry. Co. v. Rawlins*, 80 Tex. 579, 16 S. W. 430. So held of garnishment summons. *Sun Mut. Ins. Co. v. Seeligson*, 59 Tex. 3.

West Virginia. *Fidelity Insurance, Trust & Safe-Deposit Co. v. Shenandoah Valley R. Co.*, 33 W. Va. 761, 11 S. E. 58.

tors,²⁸ and this applies to subpoenas out of chancery,²⁹ and to extraordinary writs, like mandamus,³⁰ and process special to statutory actions.³¹ In special kinds of writs wherein the court is by law required to give directions how they shall be served, a direction to served "as by law provided" sufficiently points out that the ordinary mode is to be followed.³²

The general rule is that both the writ and declaration should set forth accurately the names of both parties.³³ The name of the corporation plaintiff should be correctly set out in the process³⁴ as well as the corporation defendants who are called on to answer. If it be directed to the officers by their individual names with added words descriptive of their relation to the corporation it will be invalid.³⁵ The process need not describe defendant as a corporation.³⁶ In Texas,

²⁸ Summons in names of corporations is bad. *Campbell v. Brunk*, 25 Ill. 225.

²⁹ The subpoena to a corporation impleaded supplementally must run to it and not to its president. *Walker v. Hallett*, 1 Ala. 379.

A subpoena to persons whom the bill shows to be directors is invalid. *Thoroughgood v. Georgetown Water Co.*, 9 Del. Ch. 84, 77 Atl. 720.

³⁰ In a mandamus to compel action by the corporation or its directors the citation should be addressed to it and not to the president. *Knoll v. Levert*, 136 La. 241, 66 So. 959.

³¹ A warrant in a statutory proceeding before a justice for killing animals should run against the corporation rather than its officer. *Aycock v. Wilmington & W. R. Co.*, 51 N. C. 231.

³² A direction to serve "as by law provided, by copy, on or before" a day certain is a sufficient direction how mandamus shall be served to comply with Rev. Laws 1905, § 4560, amended by Laws 1909, c. 408. *State v. Brotherhood of American Yeomen*, 111 Minn. 39, 126 N. W. 404.

³³ *Stout v. Baltimore & O. R. Co.*, 64 W. Va. 502, 131 Am. St. Rep. 940, 63 S. E. 317, citing *Krell Piano Co. v. Kent*, 39 W. Va. 294, 19 S. E. 409;

Hart v. Baltimore & O. R. Co., 6 W. Va. 336.

"Distillery" for "Distilling" held not fatal variance from declaration. *First Nat. Bank of Ceredo v. Huntington Distilling Co.*, 41 W. Va. 530, 56 Am. St. Rep. 878, 23 S. E. 792. See also *Stephen, Pleading* (Tyler's Ed.), p. 285.

³⁴ *Pendleton v. Bank of Kentucky*, 17 Ky. (1 T. B. Mon.) 171, where plaintiff's name misdescribed in the writ was correctly set out in the declaration.

³⁵ See the cases above cited and see also the following: Summons to "H. H. Hitt, of Hitt Lumber Co." is personal to him and does not bring the H. H. Hitt Lumber Co., the nominal defendant, into court. *H. H. Hitt Lumber Co. v. Turner*, 187 Ala. 56, 65 So. 807.

A citation issued from a justice court commanding the officer to summon one "T. W. House, President of Merchants' & Planters' Oil Company." The return showed that the citation had been served as directed. The court held that the corporation was not thereby brought into court as the citation was not upon the corporation. *Butler v. Holmes*, 29 Tex. Civ. App. 48, 68 S. W. 52.

³⁶ *German Ins. Co. of Freeport v.*

where by alleging the name and residence of the agent the citation may be served on him, it is not obligatory to so direct it, for under the law it may also command generally that the defendant be summoned without specifying such agent.³⁷ A further rule is that it must run against the very corporation which is the intended defendant, and not against some other corporation of similar name or one related in some way to the one intended.³⁸ A misnomer is not fatal to the judgment if it does not mislead and if it be proved that the right corporation was served though by the wrong name; otherwise when the wrong corporation, that is one not intended, was served.³⁹ Hence a service on the agent of the wrong corporation cannot be regarded as a service on the right corporation by a wrong name.⁴⁰ Such a misnomer, therefore, as consists in use of "railway" or "railroad" each for the other,⁴¹ or "corporation" for "company,"⁴² or the use

Frederick, 57 Neb. 538, 77 N. W. 1106.

The name without description as a corporation is sufficient. *Fisher v. Traders' Mut. Life Ins. Co.*, 136 N. C. 217, 48 S. E. 667.

It is sufficient that the full corporate name be set out in the summons, although no recital that it is a corporation be made. A failure to describe the defendant as a corporation can be cured by amendment. *Snyder v. Philadelphia Co.*, 54 W. Va. 149, 63 L. R. A. 896, 102 Am. St. Rep. 941, 1 Ann. Cas. 225, 46 S. E. 366.

³⁷ The practice in Texas is to allege in the petition the name of the agent of the corporation, with his residence, on whom it is desired that service be had.

The name of the officer or agent to be served need not be stated in the petition (complaint) and citation under the Texas statutes. To do so is a mere practice of convenience and merely avoids the necessity of taking proof of agency on a default. *Illinois Steel Co. v. San Antonio & G. S. Ry. Co.*, 67 Fed. 561.

Citation to summon defendant corporation is valid though the petition alleges the name of the president and

prays that "the defendant be cited as the law directs." *National Equitable Soc. of Belton v. Tennison*, — Tex. Civ. App. —, 174 S. W. 978.

Where the petition alleged who was president of defendant and prayed process against defendant, a direction in the citation to summon "B., president of [name of defendant]" is good. *Galveston & B. R. Ry. Co. v. Shepherd*, 21 Tex. 274.

³⁸ Must run against the very corporation to be served, though its agent is also served as agent of another defendant. *Pennsylvania Co. v. Sloan*, 1 Ill. App. 364.

³⁹ See § 743, *supra*.

Black, Judgments, § 213; *Freeman, Judgments* (4th Ed.), § 154, p. 279.

⁴⁰ *Little Rock Trust Co. v. Southern Missouri & A. R. Co.*, 195 Mo. 669, 93 S. W. 944.

⁴¹ *Alabama & V. R. Co. v. Bolding*, 69 Miss. 255, 30 Am. St. Rep. 541, 13 So. 844; *Central & M. R. Co. v. Morris*, 68 Tex. 49, 3 S. W. 457; *Galveston, H. & S. A. R. Co. v. Donahoe*, 56 Tex. 162.

⁴² *Varney & Evans v. Hutchinson Lumber & Manufacturing Co.*, 64 W. Va. 417, 63 S. E. 203.

of the former name by mistake,⁴³ or even an abbreviation to initials of the corporation,⁴⁴ have been held not material; otherwise where the word "railroad" was incorrectly inserted in the name.⁴⁵ Unless seasonably objected to in a proper manner by plea in abatement for misnomer or by motion, such a misdescription will be waived;⁴⁶ for the writ is not made void thereby⁴⁷ and it may be cured by the pleadings supplying the correct name, or by the court's judicial knowledge of it,⁴⁸ or by amendment.⁴⁹

§ 2987. — **Attachment, arrest, sequestration or distraint.** Process of attachment and garnishment against the corporation either as the principal debtor or as the garnishee are made the subject of an ensuing chapter, and the reader is referred thereto.⁵⁰ By federal statute attachment may not be made against property of a national bank prior to judgment in any state court. This rule obtains whether the corporation be solvent or insolvent.⁵¹ Arrest of the person of the defendant on original process is, like the common-law *capias*, a process

⁴³ Where the name of an old corporation is by mistake used in the writ which is then served on the new as intended, it is a mere misnomer. *Sherman v. Connecticut River Bridge*, 11 Mass. 338.

⁴⁴ Use of initials "B. & O. R. R. Co." held not such misnomer as would vitiate judgment. *Stout v. Baltimore & O. R. Co.*, 64 W. Va. 502, 131 Am. St. Rep. 940, 63 S. E. 317.

⁴⁵ *Southern Pacific Railroad Co.* is not a valid description of *Southern Pacific Co.*; *Southern Pac. Co. v. Block*, 84 Tex. 21, 19 S. W. 300.

⁴⁶ Misnomer is no defect if service is made on the corporation and it does not take proper objection. *American Surety Co. of New York v. Maryland Casualty Co.*, 97 Kan. 275, 155 Pac. 59.

A *capias* by wrong name and a declaration by right name, if properly pleaded, will afford cause to abate the action. *Beene v. Cahawba & M. R. Co.*, 3 Ala. 660.

After return to mandamus respondents cannot object that the writ runs to them as individuals when it should run to the corporation. *Fuller v.*

Plainfield Academic School, 6 Conn. 532.

Mode of taking objection, see §§ 3014, 3069, *infra*.

⁴⁷ Interpolation of word "Oil" in name *Crew Levick [Oil] Co.* *Lyon v. Crew Levick Co.*, 63 Ill. App. 329.

⁴⁸ Want of the words "and Company" in the name of the corporation in the writ is cured by declaration by the corporation in its full name of "President, Directors and Company," etc., where no plea in abatement for misnomer is interposed. *Pendleton v. Bank of Kentucky*, 1 T. B. Mon. (Ky.) 171. The same would be true if the court could judicially notice the corporate existence, for thereby the true and full name would be known. *Id.*

⁴⁹ See § 3014, *infra*.

⁵⁰ See chapter on Attachment and Garnishment, *infra*.

⁵¹ *Meyer v. First Nat. Bank of Ooeur D'Alene*, 10 Idaho 175, 77 Pac. 334; *Van Reed v. People's Nat. Bank of Lebanon*, 173 N. Y. 314, 105 Am. St. Rep. 666, 66 N. E. 16; *Willard Mfg. Co. v. Merchants' Nat. Bank*, 130 N. C. 609, 41 S. E. 870.

inherently impossible of application to a corporate defendant, which has no body to be taken. Whether it may have such process when it is the plaintiff depends on the terms of the statute covering such process and on its capacity to maintain the action or suffer the injury for redress of which the defendant may be arrested.⁵² Sequestration at the common law was the ultimate original process resorted to after distress had failed to coerce an appearance.⁵³ It is not to be confused with the statutory sequestration which in New York is available as a remedy of creditors. Distrain or distringas was the ancient process as already explained to coerce an appearance.⁵⁴ A jurisdiction in rem, or quasi in rem, may be gained by attachment,⁵⁵ but it must strictly accord with the statute.⁵⁶

§ 2988. Service of process—In general. The service must be according to the statute applicable to the particular class of corporations to which defendant belongs⁵⁷ and to the court (such as a justice of the peace) which entertains the action,⁵⁸ and to the kind of writ or process.⁵⁹ It must be on the very corporation which is the defendant⁶⁰ through an officer or agent competent to represent it for that purpose.⁶¹

⁵² As to the right of any plaintiff to have arrest of defendant, see local statutes and decisions.

⁵³ See § 2985, *supra*.

⁵⁴ See § 2985, *supra*.

⁵⁵ See § 2977, *supra*.

⁵⁶ See § 2989, *infra*, and chapter on Attachment and Garnishment, *infra*.

⁵⁷ Foreign corporation coming in consents to be served like domestic corporations. *Chicago & A. R. Co. v. Walker*, 9 Lea (Tenn.) 475.

⁵⁸ Inferior courts must serve according to the statute controlling them, and service which would be good in a superior court will not suffice where the statute does not apply to the inferior courts. *Delaware, L. & W. R. Co. v. Ditton*, 36 N. J. L. 361.

The special provision as to service in actions before a justice (Code Civ. Proc. § 912) prevails over the general provisions (section 73); hence a return conforming to the latter is bad if it omits anything required by the former. *Campbell Printing Press &*

Manufacturing Co. v. Marder, Luse & Co., 50 Neb. 283, 61 Am. St. Rep. 573, 69 N. W. 774.

⁵⁹ As to the mode of service of attachment and garnishment, see generally chapter on Attachment and Garnishment, *infra*.

Garnishment is within a statute regulating the mode of serving "process." *Boyd v. Chesapeake & O. Canal Co.*, 17 Md. 195, 79 Am. Dec. 646.

⁶⁰ Suit was brought against a railroad company to enforce a railway lien. The summons was served on another railroad company, which had no connection with the construction of the road in question or the question of a lien upon it. The court held that the question raised was not one of misnomer but of service upon the proper party. *Little Rock Trust Co. v. Southern Missouri & A. R. Co.*, 195 Mo. 669, 93 S. W. 944.

⁶¹ See § 2991 et seq., *infra*, as to the proper officers and agents.

The privilege of one attending as a nonresident witness and available to him as a defendant is not available to the domestic corporation codefendant of which he is an officer; hence service on him as its officer is good, while that on him for himself is bad.⁶² However, if there was a fraud in inveigling a natural person to a place where he might be served, it would be voidable; and the same has been held of a foreign corporation whose officer was so served.⁶³ Doubtless the same rule would apply to a domestic corporation, if, say, its officer were inveigled into a county fraudulently and there served. One service will suffice for a corporation which is sued in two different rights both of which pertain to it.⁶⁴ The service must be on persons representative of the corporation and competent for this purpose⁶⁵ or some constructive service in lieu thereof⁶⁶ at the proper place⁶⁷ and accomplished in the proper mode and time⁶⁸ by a qualified officer or server,⁶⁹ who must thereupon make due return or proof of his doings with the process;⁷⁰ or instead of service there must be waiver or acknowledgment of service or voluntary appearance.⁷¹

§ 2989. — *Necessity of strict procedure.* The statutory method,⁷² including the persons to be served,⁷³ is essential to jurisdiction and

⁶² Breon v. Miller Lumber Co., 83 S. C. 221, 24 L. R. A. (N. S.) 276, 137 Am. St. Rep. 803, 65 S. E. 214.

⁶³ Columbia Placer Co. v. Bucyrus Steam Shovel & Dredge Co., 60 Minn. 142, 62 N. W. 115. In this case there was nothing to indicate that the foreign corporation was or was not doing business within the state. At any rate the sole ground of decision was the fraud. It might therefore be regarded as a precedent applicable alike to domestic and foreign corporations.

As to the necessity that the officer of a corporation shall be representatively present in the state on the regular business of the corporation to be eligible for service, see chapter on Foreign Corporations, *infra*.

⁶⁴ A railroad corporation sued as a principal defendant and also as lessee of another may be served by one service in both capacities. Snipes v. Atlanta & W. P. R. Co., 7 Ga. App. 700, 87 S. E. 1046.

⁶⁵ See § 2991 et seq., *infra*.

⁶⁶ See § 3005, *infra*.

⁶⁷ See § 3007, *infra*.

⁶⁸ See § 3009, *infra*.

⁶⁹ See § 3011, *infra*.

⁷⁰ See § 3012, *infra*.

⁷¹ See §§ 3017, 3018, *infra*.

⁷² Holgate v. Oregon Pac. R. Co., 16 Ore. 123, 17 Pac. 859; Latham Co. v. J. M. Radford Grocery Co., 54 Tex. Civ. App. 510, 117 S. W. 909; Hamburg-Bremen Fire Ins. Co. v. Moses, 2 Posey Unrep. Cas. (Tex.) 438. See also generally the cases throughout this subchapter. Many cases assume that strict conformity to statute is required and without so stating pass on to consider the sufficiency of the service to meet this requirement.

This "rule is especially exacting in reference to corporations." Kernan v. Northern Pac. R. Co., 103 Wis. 356, 79 N. W. 403.

⁷³ The statute must be strictly followed as to the persons to be served. Adkins v. Globe Fire Ins. Co., 45 W. Va. 384, 32 S. E. 194.

strictness is especially requisite in inferior courts⁷⁴ and in actions begun by attachment of property,⁷⁵ or by substituted or constructive service.⁷⁶ Anything short of this will be of no avail though in fact the corporation had notice of the proceeding.⁷⁷ It is necessary that the return shall show a substantial conformity to every requirement of the statute.⁷⁸

§ 2990. — In federal courts. By virtue of the Conformity Act the service "as near as may be" follows the state practice in common law causes, an exception being that the service is to be made by the marshal. In equity and admiralty the Conformity Act does not apply but the service is made on the same persons as in law cases.⁷⁹ In

⁷⁴ A justice's process can only be served according to the statute applying to justices of the peace. *Farmers' Loan & Trust Co. v. Warring*, 20 Wis. 290.

In justice's court no jurisdiction is had over a foreign corporation by service on its agent. The statute (1 Comp. L. § 1624) is exclusive. *American Exp. Co. v. Conant*, 45 Mich. 642, 8 N. W. 574.

Under Act of 1847 (Laws 1847, p. 646, § 45), removing the prohibition on justices of the peace to entertain jurisdiction of actions against corporations, the process must be served within his county and must conform to the statute and be served in due time, and the corporation must be an inhabitant of the county at least by having its line there. *Sherwood v. Saratoga & W. R. Co.*, 15 Barb. (N. Y.) 650.

⁷⁵ See generally chapter on Attachment and Garnishment, *infra*.

If the action be begun by attachment the service must be such as would sustain judgment by default. Hence defective service coupled with notice to the proper officer is insufficient to sustain a levy. *Kieley v. Central Complete Combustion Mfg. Co.*, 147 N. Y. 620, 42 N. E. 260, rev'g 13 N. Y. Misc. 85, 34 N. Y. Supp. 106.

⁷⁶ *Staunton Perpetual Building &*

Loan Co. v. Haden, 92 Va. 201, 23 S. E. 285.

⁷⁷ Service of process will be sufficient to bring a corporation into court only where such service complies with the regulations imposed by statute with regard thereto. Where, therefore, the legislature has prescribed a definite method in accordance with which service of process shall be made upon a corporation, a corporation defendant is not required to appear where service is made in a manner substantially otherwise, although it appear that the process has reached it in fact. *Eisenhofer v. New Yorker Zeitung Pub. & Prtg. Co.*, 91 N. Y. App. Div. 94, 86 N. Y. Supp. 438 (foreign corporation). See also *El Paso & S. W. R. Co. v. Kelly* (Tex. Civ. App.), 83 S. W. 855.

⁷⁸ See § 3012, *infra*.

⁷⁹ U. S. Rev. St. § 914. And see 1 Rose's Code of Federal Procedure, p. 841, § 901. As to equity and admiralty process see U. S. Rev. St. § 913, and New Equity Rule 7, and Admiralty Rules No. 2. See also *Lemon v. Imperial Window Glass Co.*, 199 Fed. 927.

Although the state laws do not control process in equity in federal courts (U. S. Rev. St. § 914) yet the state law prescribing who may be served to bring a domestic corporation into

practice, however, it has developed that many deviations from state practice have been required by the necessities of practicality.⁸⁰ In patent infringement cases the ordinary service is permissible if the corporation is an inhabitant of the district, or alternatively service may be on an agent, and the latter is the only mode if the corporation is not an inhabitant.⁸¹

§ 2991. Person to be served—In general. The prime requirement is that the person served must be one who is for that purpose a representative of the corporation⁸² and not the agent of its receiver,⁸³

court will apply as inherent in the law of the corporate creation and existence. *Atlas Glass Co. v. Ball Bros. Glass Mfg. Co.*, 87 Fed. 418, appeal dismissed, 93 Fed. 987 (mem. dec.).

⁸⁰ See 1 *Rose's Code of Federal Procedure*, p. 793, § 853.

⁸¹ *Judicial Code*, § 48; *National Elec. Signalling Co. v. Telefunken Wireless Tel. Co.*, 194 Fed. 893; *Weller v. Pennsylvania R. Co.*, 113 Fed. 502; *United States Gramophone Co. v. Columbia Phonograph Co.*, 106 Fed. 220.

⁸² *Polacsek v. American Iron & Steel Mfg. Co.*, 164 N. Y. App. Div. 925, 149 N. Y. Supp. 372.

That a person must be served, and that he must be representative of the corporation to acquire jurisdiction in personam, see *Swann v. Mutual Reserve Fund Life Ass'n*, 100 Fed. 922. The person must be one whose relations to the corporation or the claim make it reasonable that the corporation will be notified. *King Tonopah Min. Co. v. Lynch*, 232 Fed. 485.

Service on one not the agent confers no jurisdiction, though he and the plaintiff's attorney notified the corporation of the action. *Kingman & Co. v. Mann*, 36 Ill. App. 338.

Service on a temporary trustee under invalid appointment as receiver is not sufficient to bind the corporation. *Youree v. Home Town Mut. Ins. Co.*, 180 Mo. 153, 79 S. W. 175.

⁸³ A station or depot agent on a

road in the hands of a receiver cannot be served under a statute applying only where one company permits another to operate its road. *Ex parte Charles*, 106 Ala. 203, 18 So. 73.

An agent of the state under a receiver in possession is not an agent of the corporation. *Cherry v. North & S. R. Co.*, 59 Ga. 446.

Inoperative railroad corporation in receiver's hands could not have a station agent where it would violate the receivership. *Heath v. Missouri, K. & T. Ry. Co.*, 83 Mo. 617.

Agent of receivers at their office and station was not agent of railroad. *Vickery v. Omaha, K. C. & E. Ry. Co.*, 93 Mo. App. 1.

Ticket agent of receivers cannot be served for corporation. *Cincinnati & M. R. Co. v. Orme*, 1 Ohio Cir. Ct. 511, 1 Ohio Cir. Dec. 285.

The reason for the foregoing decisions is that the receiver and his agents are not representative of the corporation. It is true that a federal receiver may by virtue of a federal statute be served in the same way that a corporation might have been, whose railroad is in his hands, but the converse of this is not true, because there is ordinarily no such statute. It has been held under this statute (24 U. S. St. 554) that service on a station agent of the receivers binds them though the sheriff intended to summon the corporation and re-

nor can it be on the receiver himself;⁸⁴ and if there are two or more corporations that representation must be for the corporation which is to be served and not for the other one,⁸⁵ though they may in fact be related to each other, as in the case of a lessor and lessee,⁸⁶ or lines using a union station,⁸⁷ or as connections in a system or through line,⁸⁸ or by traffic arrangements.⁸⁹ In a few states the statutes

turned accordingly. *Proctor v. Missouri, K. & T. Ry. Co.*, 42 Mo. App. 124.

⁸⁴ Receiver in charge is not chief officer. *Youree v. Home Town Mut. Ins. Co.*, 180 Mo. 153, 79 S. W. 175. See also §§ 2993, 2994, *infra*.

⁸⁵ *American Bell Tel. Co. v. Pan Elec. Tel. Co.*, 28 Fed. 625.

Two corporations had contract relations but wholly distinct organizations, dissimilar interests and separate officers. They were originally joined in an action as defendants. Process was served on a party as agent of one only of the corporations. He did not represent in any manner the corporation which he was thus assumed to represent, although he did as a matter of fact represent the other corporation. The court held that the service was insufficient to bring either corporation into court. *International Text-Book Co. v. Heartt*, 136 Fed. 129.

⁸⁶ The lessee's station agent is not competent to receive summons to the lessor of a road. The statute naming station agents means those sustaining that relation to defendant. *Le Roy & C. Val. Air-Line R. Co. v. Sidell*, 62 Kan. 349, 63 Pac. 599.

Service on agent of controlling company is not service on operating company. *Pittsburgh, C., C. & St. L. Ry. Co. v. Copenhagen*, 31 Ohio Cir. Ct. 515.

⁸⁷ A railroad in whose station injury occurred cannot be served through the agent of another corporation which leased the station. *Texas & P. Ry. Co. v. Neal* (Tex. Civ. App.), 33 S. W. 693.

A person in charge of a joint rail-

road freight house employed and paid by other railroads, but approved by defendant, and reporting to them only is not defendant's "local agent" under Texas statutes though its freight passes through that house. *Mexican Cent. R. Co. v. Pinkney*, 149 U. S. 194, 37 L. Ed. 699. But a ticket agent at a union depot owned by a separate corporation is "an acting ticket agent" (G. S. 1894, § 5202) of one of the corporations using such depot for a compensation. *Hillary v. Great Northern Ry. Co.*, 64 Minn. 361, 32 L. R. A. 448, 67 N. W. 80.

An officer or agent of a union depot company selling tickets for the lines using such depot, may be regarded as agent for one of them. *Union Pac. Ry. Co. v. Novak*, 61 Fed. 573.

⁸⁸ President of initial carrier is not "freight or passenger agent" of terminal carrier. *Louisville & N. R. Co. v. S. D. Chestnut & Bro.*, 115 Ky. 43, 24 Ky. L. Rep. 1846, 72 S. W. 351, distinguishing cases where terminal carrier was held suable where shipment originated as in the place "where the contract was made."

Agent of a connecting railroad company is not competent. *Royce v. Chicago & N. W. R. Co.*, 90 Wash. 378, 156 Pac. 16; *Arrow Lumber & Shingle Co. v. Union Pac. R. Co.*, 53 Wash. 629, 102 Pac. 650. But an agent of one of several roads operated as one system may be served as agent for other component corporations. *Van Dresser v. Oregon Ry. & Nav. Co.*, 48 Fed. 202.

⁸⁹ The agent of one of several railroad corporations whose lines were

allow an owner to be served by process delivered to and served on agents of the lessee or operating company⁹⁰ and a foreign receiver operating the defendant's railroad has been held to be within this statute.⁹¹ If the person served have a dual agency whereby he represents more than one of the defendants or different corporations, a service on him for one is of no effect to bring in the other. The process must go against each and be served on each.⁹² A doctrine exists that if two corporations or more are mere forms by which one entity conducts its affairs, the agent of any is the agent of all.⁹³ If they are in fact nothing but forms no exception can be taken to this doctrine, because a form without substance can have no business activity and consequently no agent; but a reading of some of the cases just cited leaves a grave question in the mind whether the fact was as the decision predicates it. Some of the other cases herein cited, which have held the lessee's agent incompetent for service on the lessor and which have distinguished between related distinct corporations, might with equal fidelity to the facts apparent in the opinions have been decided according to the doctrine that the subsidiary corporations were naught but forms. It seems necessary to state that the

operated as one system under a common trade name, is not an agent for another of such corporations, though he, like other agents, sold tickets to points on the other lines in the system. *Barnard v. Springfield & N. E. Traction Co.*, 274 Ill. 148, L. R. A. 1916 F 451, 113 N. E. 89, aff'g 194 Ill. App. 218.

One railway company is not an agent for another merely because it issues through bills of lading and tickets. *Royce v. Chicago & N. W. R. Co.*, 90 Wash. 378, 156 Pac. 16.

⁹⁰ See *Maysville & B. S. R. Co. v. Ball*, 108 Ky. 241, 21 Ky. L. Rep. 1693, 56 S. W. 188; *Maysville & B. S. R. Co. v. Shofstall*, 15 Ky. L. Rep. 632, 24 S. W. 1068.

Under a statute which provides that lessor railroad corporations may be held liable for claims against lessee railroad corporations, it does not necessarily follow that service of process upon the agent of a lessee corporation is sufficient to bring the lessor corporation into court. *Perry v.*

Brunswick & W. R. Co., 119 Ga. 819, 47 S. E. 172.

⁹¹ A depot agent of a line of road operated by foreign receivers under a contract to prorate expenses and revenues is an agent of the Georgia corporation also, though he accounts to the receivers. Code, § 3369 applies. (The resident director was also served in this case.) *Georgia Southern R. Co. v. Bigelow*, 68 Ga. 219.

⁹² *Pennsylvania Co. v. Sloan*, 1 Ill. App. 364.

⁹³ The agent of a subsidiary corporation may be treated as agent for the principal one, if the subsidiary one is a mere local name for the other. *Postal Tel. Cable Co. v. Thornton*, 153 Ky. 176, 154 S. W. 1100.

A domestic corporation formed, owned and operated as part of one line or route by a foreign corporation under a 999-year lease, was held a mere agency of the foreign corporation by which it was doing business in the state; and the foreign corporation was therefore suable by serv-

doctrine, notwithstanding its firm establishment in the states cited, is one to be received with caution and applied only within the limits of the predicated facts.⁹⁴ It is quite logical, however, to disregard a mere trade name under which the agency operates and to regard the real principal as having been well served in such a case.⁹⁵

A de facto officer or agent⁹⁶ or an acting officer⁹⁷ though he has not formally accepted the office,⁹⁸ or an agent liable for a misdemeanor for acting without a license,⁹⁹ is competent. A somewhat difficult

ice on the other. *Buie v. Chicago, B. I. & P. R. Co.*, 95 Tex. 51, 55 L. R. A. 861, 65 S. W. 27.

General agent of controlling road and system which embraced defendant corporations' roads may be served to bind them. *Pecos & N. T. Ry. Co. v. Cox*, — Tex. Civ. App. —, 150 S. W. 265. See also *Pecos & N. T. R. Co. v. Cox*, — Tex. Civ. App. —, 141 S. W. 327.

A local agent of the lessor or owner may be served as agent of the operating company. *St. Louis & S. F. R. Co. v. Casselberry*, — Tex. Civ. App. —, 139 S. W. 1161; *St. Louis & S. F. R. Co. v. Kiser*, — Tex. Civ. App. —, 136 S. W. 852.

Nonresident may sue foreign controlling corporation for injury in another state where plaintiff was employed by a domestic subcorporation wholly owned by defendant. *St. Louis & S. F. R. Co. v. Arms*, — Tex. Civ. App. —, 136 S. W. 1164.

⁹⁴ Where, as in some of the cases last cited, the domestic corporation is formed to hold or operate properties in the state in connection with or as a part of a system belonging to a foreign corporation, the domestic corporation cannot be treated as an unsubstantial form for the purpose of service without also treating it as such for other purposes going to the substantial rights of the two corporations, and thus ignoring the subsidiary corporation, whether domestic or foreign, as a party in litigation. The rule (see this section, *supra*) that one

having a dual agency may be served for either of his corporate principals would seem adequate to cover such a situation.

As to distinction between foreign principal and local subsidiary corporations, see *United States v. American Bell Tel. Co.*, 29 Fed. 17.

⁹⁵ Agent of "Erie Despatch" held agent of Erie Railroad Co., though former was a mere trade name of an organization for securing traffic for lines of its members, of which Erie R. Co. was the principal. *Bell Jones Co. v. Erie R. Co.*, 168 Iowa 96, 150 N. W. 7.

⁹⁶ *Stillman v. Associated Lace Makers' Co.*, 14 N. Y. Misc. 503, 35 N. Y. Supp. 1071; *Berrian v. Methodist Society*, 13 N. Y. Super. Ct. 682, 4 Abb. Pr. 424.

Under the statute for serving notice of attachment of stock, de facto secretary may be served. *McCall v. Byram Mfg. Co.*, 6 Conn. 428.

⁹⁷ *Russell v. Pittsburgh Life Insurance & Trust Co.*, 62 N. Y. Misc. 403, 115 N. Y. Supp. 950.

Acting president. *Chamberlin v. Mammoth Min. Co.*, 20 Mo. 96.

Acting secretary under appointment, where elected secretary refused to serve. *Perry District Fair Society v. Zenor*, 95 Iowa 515, 64 N. W. 598.

⁹⁸ *Danville & W. R. Co. v. Brown*, 90 Va. 340, 18 S. E. 278.

⁹⁹ The fact that it is a misdemeanor to act as agent for an unlicensed foreign insurer does not prevent service on an agent so acting. *State v.*

question of fact arises where one was agent for the defendant but has become agent for a successor in operation or for a receiver, and where it is contended that the new agency has been attended by a termination of the old. A complete novation of principals in such a case will, of course, put an end to the representation of the old one.¹ A receiver, if such that he may be considered a representative of the corporation, may be served, it seems,² but in the absence of a statute qualifying him to receive service for the corporation it is not easy to see how he can be its representative, since his appointment and authority emanates from the court and not from the corporation. Of course he may also be an officer or agent of the corporation and be served as such without regard to his receivership.³ The wife of an agent or officer is not a competent substitute or alternate for him,⁴ nor is an officer's clerk an agent for the corporation.⁵

The scope of the agent's or officer's authority must cover reception of service not only generally but also with respect to the particular action. To this generally expressed rule may be related wholly or partly all of the many statutes which point out who shall be served, but especially that large class of statutes which provide for service on local agents having some connection in place or business with the origin of the cause of action.⁶ It is the authority of the agent rather than the accomplishment of its ends which clothes the agent with

United States Mut. Acc. Ass'n, 67 Wis. 624, 31 N. W. 229.

The statute (Laws 1880, c. 240) declaring such misdemeanor did not repeal the provisions contained in R. S. § 2637, subd. 9, for service on such corporations. *State v. Northwestern Endowment & Legacy Ass'n*, 62 Wis. 174, 22 N. W. 135.

¹ As to the effect of termination of agency, see § 3002, *infra*.

² That receivers may be competent representatives to be served, see *International & G. N. R. Co. v. McCulloch* (Tex. Civ. App.), 24 S. W. 1101.

³ As to the status and representation of a receiver, see generally chapter on Receivers, *infra*.

A federal receiver under the statute (24 U. S. Stat. 554) is to be served in the same manner as the corporation might be served under the laws

of the state in which he is operating its properties. *Proctor v. Missouri, K. & T. R. Co.*, 42 Mo. App. 124.

⁴ An agent's wife cannot be served in his absence. *Water Front Coal Co. v. Smithfield Marl, Clay & Transportation Co.*, 114 Va. 482, 76 S. E. 937. See also *Shenandoah Valley R. Co. v. Griffith*, 76 Va. 913, where a similar service was made but objection came too late.

⁵ Service on the president's phonographer and private secretary, returned as service on the defendant's "secretary," the president having been absent from office and full disclosure having been made to the sheriff, is bad. *Collier v. Morgan's Louisiana & T. R. & S. S. Co.*, 41 La. Ann. 37, 5 So. 537.

⁶ See generally § 2994 et seq., *infra*.

capacity for service.⁷ If the authority of the agent only extends to intrastate causes of action he cannot be served in actions based on foreign causes,⁸ but officers not under such restricted authority may be served as to foreign causes.⁹

The second requirement of good service is that the person prescribed, or one of those prescribed, must be served,¹⁰ and this is now almost entirely, if not always, a matter of statute. At common law and in the absence of a statute the president, or corresponding head officer, is to be served.¹¹ The variety of these statutes is great, but as will presently be seen they are susceptible of classification by types into (a) those which prescribe that service shall if possible be made on the president or chief officer, and alternately if he be not found on officers or lower rank or agents, (b) those in which it is prescribed that service may be made on agents and officers of the enumerated classes alike without any precedence, (c) those which prescribe for railroads and other special classes of corporations, including foreign corporations, a distinctive personnel for service, (d) those which require the appointment of a designated agent for service with a record of his name and appointment, (e) those which prescribe a

⁷ A medical representative with appropriate authority may be one "who adjusts or settles a loss," though he fail to effect settlement. *Commercial Mut. Acc. Co. v. Davis*, 213 U. S. 245, 53 L. Ed. 782.

⁸ Since the Washington statute (Pierce's Code, § 7216) requires that the resident agent of a foreign corporation be authorized to accept service "in any action" pertaining to property or transactions "within the state," service on such agent cannot be made in action on an Idaho cause. *Olson v. Buffalo Hump Min. Co.*, 130 Fed. 1017.

⁹ Under Pierce's Code, § 332, subd. 9 "in a civil action against a foreign corporation doing business in the state," the secretary may be sued. This statute co-exists with section 7216 relating only to designated resident agents. *Smith v. Empire State-Idaho Mining & Development Co.*, 127 Fed. 462.

¹⁰ *Great West Min. Co. v. Woodmas*

of Alston Min. Co., 12 Colo. 46, 13 Am. St. Rep. 204, 20 Pac. 771; *Camph v. Solomon*, 125 N. Y. Supp. 456; *Tenement House Department City of New York v. Atlantic Realty Co.*, 121 N. Y. Supp. 229. Service on personal co-defendant in possession of property but not shown to be one of the statutory officers, is invalid. *Aiken v. Quartz Rock Mariposa Gold Min. Co.*, 6 Cal. 186. Agent in charge of branch store, not being within the statute (Laws 1893, p. 409, § 7, subd. 8), is not competent for service. *D. M. Osborne & Co. v. Columbia County Farmers' Alliance Corporation*, 9 Wash. 666, 38 Pac. 160.

As to the various designated officers and agents, see §§ 2992-3001, *infra*.

¹¹ *De Wolf v. Mallett's Adm'r*, 33 Ky. (3 Dana) 214; *Martin v. Atlas Estate Co.*, 72 N. J. Eq. 416, 65 Atl. 881; *Wartrace v. Wartrace & B. G. Turnpike Co.*, 42 Tenn. (2 Cold.) 515.

mode for special kinds of process or proceeding by pointing out the persons to be served therewith.¹² These are the main types, though perhaps others might be pointed out. The kinds of statutes above denoted as (c) and (d) often complement or merge into (a) and (b). The law applicable to corporations in general controls in respect to all which are not within statutes specially applicable.¹³ Unless the statute differentiates them actions at law and in equity proceed by the same service on the same persons¹⁴ subject to the necessity on a bill seeking discovery, where chancery practice is followed, of issuing subpoena to those individuals who are joined for that purpose as co-defendants.¹⁵ If there is no statute differentiating them foreign corporations are deemed to be represented by the same persons within the territory where the process runs as are domestic ones;¹⁶ and may be served in the person of its competent officers or agents there found; and for this purpose it has been held that an officer who is casually in the state may be served, though he could not be if the

¹² Under Civ. Code, § 36, three grades of persons are pointed out for service, first the president, etc., or chief officer, second the cashier, treasurer, secretary, clerk, general or special agent, third any person authorized to transact business in the name of the corporation. *Toledo, W. & W. Ry. Co. v. Owen*, 43 Ind. 405.

¹³ Special provisions for certain kinds of corporations imply that all others must be served in the manner general to corporations. *D. M. Osborne & Co. v. Columbia County Farmers' Alliance Corporation*, 9 Wash. 666, 38 Pac. 160.

¹⁴ *Bailey v. Malheur & H. L. Irrigation Co.*, 36 Ore. 54, 57 Pac. 910. Though the Chancery Act (P. L. p. 511, art. 2, § 5) of 1902 does not mention corporations but only "persons" in prescribing for service, the corporation may be served on an officer, since "person" includes corporation and the corporation act allows such service. *Martin v. Atlas Estate Co.* (N. J. L.), 65 Atl. 881.

¹⁵ As to chancery process at common law, see § 2985, *supra*.

Joining officers for discovery, see § 3026, *infra*.

¹⁶ Foreign corporations are served in the same way as domestic ones. *City Fire Ins. Co. v. Carrugi*, 41 Ga. 660.

Code, § 2613, applies to a foreign as well as a domestic corporation, and the agent where the cause of action arose may be served. *Gross v. Nichols*, 72 Iowa 239, 33 N. W. 653.

By coming into the state to do business a foreign corporation submits to the same mode of service as is provided for domestic corporations, if there is no special mode provided for foreign ones. *Farrell v. Oregon Gold Min. Co.*, 31 Ore. 463, 50 Pac. 186, 49 Pac. 876; *Aldrich v. Anchor Coal Co.*, 24 Ore. 32, 41 Am. St. Rep. 831, 32 Pac. 756.

Prior to Act of 1903 (Laws 1903, p. 111) providing for a registered agent, a foreign corporation was served through the same persons and in like manner as a domestic one. *Cunningham v. Klamath Lake R. Co.*, 54 Ore. 13, 101 Pac. 213, rehearing denied 101 Pac. 1090.

corporation was not already there in the persons of other agents.¹⁷ Some of the statutes provide that in justice's and other inferior courts the same persons are to be served and the same modes of service followed as in superior courts;¹⁸ others apply to actions of a specified class,¹⁹ others prescribe the persons to be served on such process, and by reason of the limited territory to which such process runs the persons competent are also limited. Any limitation on such courts affects their jurisdiction acquired or acquirable.²⁰ The legislature may provide that any person may be served, whose relations and duties to the corporation are such that it may be supposed reasonably that notice and the papers will be transmitted to the proper corporate officers for the making of its defense;²¹ and the operating company's officers and agents have been held to be such persons for the purpose of serving the owner or lessor corporation.²² A person prescribed for service in a special statutory proceeding is not intended by the statute for all proceedings and actions,²³ but a person made competent for "any legal process in any action or proceeding" is competent to

¹⁷ Service on the vice president in the state, though resident elsewhere, is good if the corporation is doing business there notwithstanding he was casually there. Only when the corporation is not doing business in the state is a casually present officer disabled to receive service. *Venner v. Denver Union Water Co.*, 40 Colo. 212, 122 Am. St. Rep. 1036, 90 Pac. 623. When the company does no business in the state such service is bad. *Rust v. United Waterworks Co., Ltd.*, 70 Fed. 129.

See a full treatment in the chapter on Foreign Corporations, *infra*.

¹⁸ In justice's court the same persons may be served as in actions generally. *Katzenstein v. Raleigh & G. R. Co.*, 78 N. C. 286.

¹⁹ A station agent may be served in an action for work and labor against a railroad company under a statute providing that "in all actions for damages against any railroad company" service may be on such an agent. *Ruthe v. Green Bay & M. R. Co.*, 37 Wis. 344.

²⁰ Jurisdiction of inferior courts as

dependent on their ability to get service under the law, see § 2968, *supra*.

²¹ *Swann v. Mutual Reserve Fund Life Ass'n*, 100 Fed. 922; *State v. Myers*, 126 Mo. App. 544, 104 S. W. 1146, with dictum that a section man at a "shanty" is not such a person.

²² A statute providing for service on the officers or agents of the operating or controlling line, where the corporate owner cannot be served with summons under existing laws, and further providing that any appearance to object to summons so served shall be a general appearance, is constitutional. *Maysville & B. S. R. Co. v. Ball*, 108 Ky. 241, 21 Ky. L. Rep. 1693, 56 S. W. 188; *Maysville & B. S. R. Co. v. Shofstall*, 15 Ky. L. Rep. 632, 24 S. W. 1068.

²³ Laws 1912, c. 424, § 5, providing for appointment of officer or attorney for service, relates only to proceedings under that act to regulate fares, and does not apply to general proceedings. Hence in them an attorney is not the person to be served. *Washington & R. R. Co. of Montgomery County v. Johnson*, 127 Md. 218, 96 Atl. 445.

be served with an extraordinary writ, such as mandamus.²⁴ A statute enacting how service "may" be made will be treated as permissive and in addition to other modes²⁵ and this has been applied to a statute providing that the statutory registered agent "may" be served,²⁶ and to a provision that in a penal action a certain person "may" be served.²⁷

§ 2992. — Directors or director. A director or trustee, not being the head or chief officer, cannot in the absence of an enabling statute be served; but numerous statutes of that kind have been enacted.²⁸ If they are not servable as "directors" they cannot be regarded as agents, and served as such, unless in fact they are agents,²⁹ but if they are agents of the class who may be served, it will suffice to serve them in that capacity.³⁰ In this sense "director" means one of the members of the body which governs the whole corporation, and not a managing director of some one of its branches or departments.³¹ A director is not a head or chief officer,³² or a managing agent.³³

§ 2993. — President, chief officer and other officers. It has already been said that at common law the president or correspond-

²⁴ Laws 1907, c. 345, § 19; *State v. Brotherhood of American Yeomen*, 111 Minn. 39, 126 N. W. 404.

²⁵ See also § 2988, *supra*.

²⁶ Not exclusive of service on other officers and agents. *Martin v. Atlas Estate Co.*, 72 N. J. Eq. 416. 65 Atl. 881. See also *State v. Brotherhood of American Yeomen*, 111 Minn. 39, 126 N. W. 404.

The provision for service on the chief officer "of such agency" when an insurance corporation is sued in a county where it has an agency (Comp. L. 1909, § 5609) is cumulative with and not repealed by the act (section 3738, Laws 1909, c. 21) providing for service of foreign companies on the insurance commissioner. *Continental Ins. Co. v. Hull*, 38 Okla. 307, 132 Pac. 657.

²⁷ Provision in penal statute that service "may" be made on any director held cumulative to other modes. *State v. Hannibal & St. J. R. Co.*, 51 Mo. 532.

²⁸ May serve trustee where there is

no other officer. *Tom v. First Soc. of M. E. Church of Biga*, 19 Wend. (N. Y.) 25.

By statute (Feb. 19, 1849) a railroad may be served by service on a director as well as on the president, and this was not repealed by Act of March 17, 1856. Hence if the president was ill served and a director well served, jurisdiction is obtained. *Com. v. Wilmington & R. R. Co.*, 2 Pearson (Pa.) 408.

²⁹ Trustees being none of the officers named in the statute (Act March 21, 1874, § 1) cannot be served as such and can be served as agents only if it appears they are such. *Waco Lodge No. 70, I. O. O. F. v. Wheeler*, 59 Tex. 554.

³⁰ See § 2994 *et seq.*, *infra*, as to what agents are competent.

³¹ Managing directors of branch banks held not "directors." *Webb v. Bank of Cape Fear*, 50 N. C. 288.

³² See § 2993, *infra*.

³³ *Alabama & T. Rivers R. Co. v. Burns, McKibbin & Co.*, 43 Ala. 169. See also § 2994, *infra*.

ing chief officer is to be served.³⁴ This is also the rule under most of the statutes, but many of them additionally provide that if he be absent or not found, officers of lesser rank or agents may be served instead, and some allow either or any of them to be served without precedence or preference; but whenever the statute bears such a construction the officers of secondary rank or the agents are competent only when the precedent condition of the president's absence or the like exists³⁵ and the return shows it.³⁶ Some statutes make the

³⁴ See § 2991, *supra*.

³⁵ President may be served. *Branham v. Ft. Wayne & S. R. Co.*, 7 Ind. 524; *Clark v. Porcelain Mfg. Co.*, 8 S. C. (8 Rich.) 22.

Under the statute providing for service on express companies, the president need not be served unless his personal residence, not his office, is in the state. Hence posting a notice in each office with the name of the president and the principal office was unavailing to require service on a nonresident president. *Southern Exp. Co. v. Skipper*, 85 Ga. 565, 11 S. E. 871.

Must be on president if he resides in the county. *Illinois & M. Tel. Co. v. Kennedy*, 24 Ill. 319.

An agent may be served if the president is not found (statute construed). *Golden Paper Co. v. Clark*, 3 Colo. 321.

Service on clerk held good under practical construction given to the statutes, where to hold that only the president might be sued would enable service to be evaded. *Hinckley v. Bluehill Granite Co.*, 16 Me. 370.

Under the statute (Rev. St. 1899, § 995) either the president or chief officer or the person in charge of its office must be served. It is the same when in default of such officer or office summons is sent to another county. Service in neither case can be on the secretary and treasurer as such. *Eminence Land & Mining Co. v. Current River Land & Cattle Co.*, 187 Mo. 420, 86 S. W. 145.

By Code Civ. Proc. § 66, it was made necessary to serve the chief officer or if he "is not found in the county," then other officers, or if none of them be found, then by copy left at the usual place of business with the person in charge. This is a substitute for the former statute. *Fee v. Big Sand Iron Co.*, 13 Ohio St. 563.

A summons in error served on the secretary when the president was in the county and might have been served will be quashed. *Cunningham Commission Co. v. Rorer Mill & Elevator Co.*, 25 Okla. 133, 105 Pac. 676.

In the case of a railroad, or any corporation other than a city or town or bank of circulation, service may be "on any agent thereof or any person declared by the laws * * * to be an agent of such corporation." The provisions preferring service on superior officers do not apply to railroads. *Norfolk & W. R. Co. v. Cottrell*, 83 Va. 512, 3 S. E. 123.

"Any agent" of a foreign corporation includes the president and vice president. *Venner v. Denver Union Water Co.*, 40 Colo. 212, 90 Pac. 623.

As to when other officers and agents may be served, who may be regarded as such, and where and how they are to be served, see this and succeeding sections, *infra*.

Degree of diligence required to find superior before serving inferior class, see § 3009, *infra*.

³⁶ Showing as to absence or inability to serve as warrant to serve inferior, see § 3012, *infra*.

superior officer or officers the primary persons to be served only if they can be served in the county or other territorial limits, and permit service on agents when the superiors cannot be found or are absent.³⁷ In the federal courts such a statute is followed so far as to treat the federal district as a county, requiring service to be made therein upon officers, if possible, before recourse to service on agents.³⁸ A statute providing that a lesser officer may be served as representative is not to be taken as repealing a general statute authorizing service on the president.³⁹ When the statute makes it a condition for serving any officer that he shall be "in charge of" its office, or its principal office, not only must he be in charge, but the office must be of that grade which is specified.⁴⁰ In Georgia it is held that "personal" service can only be made on the president.⁴¹ A statute providing for service on the president of the "leasing" company of a notice by mail, where the agent of the lessee is served to bring the lessor into court, means that the lessor's president is to be notified.⁴²

In accordance with the rule that a de facto or acting officer is competent,⁴³ the acting president,⁴⁴ or acting secretary,⁴⁵ or other acting officer is competent. In the absence of the president the chief or head officer is the vice president,⁴⁶ secretary,⁴⁷ or treasurer

³⁷ See § 2996, *infra*.

³⁸ *Miller's Adm'r v. Norfolk & W. R. Co.*, 41 Fed. 431; *Lung Chung v. Northern Pac. Ry. Co.*, 19 Fed. 254.

³⁹ The Ohio statute (Gen. Code, § 11290) authorizing service on the managing agent of a foreign corporation does not exclude service on the president according to the general statute (§ 11288) applicable alike to domestic and foreign corporations. *Lively v. Picton*, 218 Fed. 401.

⁴⁰ *Taussig v. St. Louis & K. R. Co.*, 186 Mo. 269, 85 S. W. 378; *Thomasson v. Mercantile Town Mut. Ins. Co.* (Mo. App.), 81 S. W. 911. And see generally §§ 2996, 3007, *infra*.

⁴¹ Garnishment which must be served personally can only be served on the president or corresponding officer, being unlike summons which may be served on any agent. *Clark v. Chapman*, 45 Ga. 486.

Temporary absence of the president

does not warrant service of garnishment on lesser officers. *Steiner, Smith Bros. & Knecht v. Central R. R.*, 60 Ga. 552.

⁴² Code, § 3369a. *Atlanta & C. Air-Line Ry. Co. v. Harrison*, 76 Ga. 757.

⁴³ See § 2991, *supra*.

⁴⁴ *Chamberlain v. Mammoth Min. Co.*, 20 Mo. 96.

⁴⁵ *McCall v. Byram Mfg. Co.*, 6 Conn. 428; *Perry District Fair Society v. Zenor*, 95 Iowa 515, 64 N. W. 598.

⁴⁶ *Pond v. National Mortgage & Debenture Co.*, 6 Kan. App. 718, 50 Pac. 973; *Youree v. Home Town Mut. Ins. Co.*, 180 Mo. 153, 79 S. W. 175.

Vice president of foreign corporation who negotiated business for it in Maryland may be served under Maryland laws. *Noel Const. Co. of Baltimore City v. Geo. W. Smith & Co.*, 193 Fed. 492.

⁴⁷ That secretary may be chief officer where president is plaintiff and

er.⁴⁸ Clearly the vice president is one of the chief officers.⁴⁹ The name which an officer is called is not decisive; it is the nature and duties of the office which control.⁵⁰ If the name does not of itself come under the statute the return or the record should show such facts.⁵¹ A director cannot be considered to be the head officer⁵² or the clerk or secretary.⁵³ A manager, however supreme, is not a head officer if his authority is derived through a contract, e. g., a mortgage under which possession has been taken,⁵⁴ and so a receiver cannot be a head officer as such,⁵⁵ though a contrary decision exists, which is believed to be either silent on an essential fact or else unsound in law.⁵⁶

there is no vice president, see *Schaeffer v. Phoenix Brewing Co.*, 4 Mo. App. 115.

⁴⁸ Treasurer may be served where president and secretary were absent. *McMurtry v. Tuttle*, 13 Neb. 232, 13 N. W. 213.

⁴⁹ On collateral attack vice president was held one of the "chief" officers within Kansas statute, especially where the trial court so held and the judgment was affirmed on appeal. *Ball v. Warrington*, 87 Fed. 695.

⁵⁰ The "president or other principal officer" means the chief executive officer by whatever name called. (Act June 13, 1836, § 41; P. L. 579.) *Dale v. Blue Mountain Mfg. Co.*, 35 Wkly. Notes Cas. 509, 15 Pa. Co. Ct. 513, 3 Pa. Dist. 763, aff'd 167 Pa. St. 402, 31 Atl. 633.

Superintendent's chief clerk is not a chief officer. *Pittsburgh, C., C. & St. L. Ry. v. Copenhagen*, 31 Ohio Cir. Ct. 515.

"Grand foreman" of a fraternity, whose duties are like a vice president's, is an officer. *Balmford v. Grand Lodge of Ancient Order of United Workmen*, 16 N. Y. Misc. 4, 37 N. Y. Supp. 645.

⁵¹ See §§ 3012, 3119, *infra*.

⁵² A director is not a "head" of the corporation. *Alabama & T. Rivers R. Co. v. Burns, McKibbin & Co.*, 43 Ala. 169.

Managing "director" of a branch bank is not a "president or other head, cashier, treasurer or director of" the corporation. *Webb v. Bank of Cape Fear*, 50 N. C. 288.

⁵³ A director acting as sales agent and superintendent is not the "secretary or clerk of the company," on whom notice of a levy of attachment on shares can be served. *McCall v. Byram Mfg. Co.*, 6 Conn. 428.

⁵⁴ The agent of a foreign trust company operating and managing a mortgaged railroad, and being the highest agent of the trust company in the state is not a "principal officer" of it. *Farmers' Loan & Trust Co. v. Warring*, 20 Wis. 290.

⁵⁵ *Youree v. Home Town Mut. Ins. Co.*, 180 Mo. 153, 79 S. W. 175.

⁵⁶ Receivers operating a railroad are "other head of the corporation" (Code, § 217) and may be served through their local agents, and the service will bind the corporation. *Grady v. Richmond & D. R. Co.*, 116 N. C. 952, 21 S. E. 304. In the foregoing case it does not appear that the receivers were appointed by a federal court. Had they been a service on them through the same agents by whom the corporation might have been served might have been sustained because they were bound by law to operate the railroad according to the laws of the state (*Central*

"Officers" will include any who are the organic executives of the corporation, as distinguished from its administrative employees, whether the offices be created by the charter or by the corporate authority pursuant to its corporate powers;⁵⁷ hence the attorney of the corporation is not one of its officers,⁵⁸ unless perhaps where the charter of the governing power of the corporation has made him such. One who is denominated an "assistant" officer may be himself an officer, and as such may be competent,⁵⁹ but otherwise will not be unless he is in fact one of the agents or alternates pointed out for service.⁶⁰ The secretary or clerk of the corporation means the principal clerk, and not subordinates such as bookkeepers.⁶¹

Trust Co. of New York v. St. Louis, A. & T. Ry. Co., 40 Fed. 426). In the absence of a statute authorizing such service or a federal receivership, it is doubtful if this would be followed as a precedent in other jurisdictions even so far as to hold the receivers well served. So far as the corporation is concerned it is tantamount to a holding that it may be served on the president "or other head" by delivering a copy to the "local agent" of the "other head."

In *Ganebin v. Phelan*, 5 Colo. 83, it was held good service on foreign receivers of a foreign railroad corporation to serve the local agent, such being the mode of serving such a corporation and the receivers being regarded as having "displaced" its ordinary officers. This was based on a statute. As to the receivers the same result was reached in *Farris v. Receivers of Richmond & D. R. Co.*, 115 N. C. 600, 20 S. E. 187 (in which the corporation seems to have been no party). The court says: "It is not an action against [the receivers] individually. It is in fact, an action against the corporation." Hence it is reasoned that under Code, § 217 service may be had on a local agent. The North Carolina court cites as substantiating this decision, *Eddy v. Lafayette*, 49 Fed. 807, and *Central Trust Co. of New York v. St. Louis,*

A. & T. Ry. Co., 40 Fed. 426, but both cases were based on act of congress subjecting federal receivers to suit without leave and to the duty of operating and managing railroads according to state laws. If the fact be that the receivers, defendant in the North Carolina cases, were federal receivers, then the decisions harmonize with the federal cases cited as authority so far as service on the receivers is concerned, but no sanction is lent to the reasoning by which the decision is reached or to the decision that the corporation was bound.

⁵⁷ As to who are in general sense "officers" of the corporation, see § 1743 et seq.

⁵⁸ *Washington & R. R. Co. of Montgomery County v. Johnson*, 127 Md. 218, 96 Atl. 445; *Northern Cent. R. Co. v. Rider*, 45 Md. 24.

⁵⁹ Assistant secretary, who is an officer by virtue of the by-laws may be served. *Colorado Debenture Corporation v. Lombard Inv. Co.*, 66 Kan. 251, 97 Am. St. Rep. 373, 71 Pac. 584.

"Assistant secretary" may be served in absence of secretary who is among the officers named by statute. *Leavenworth, T. & S. W. Ry. Co. v. Stone*, 60 Kan. 57, 55 Pac. 346.

⁶⁰ See § 2999, infra, and §§ 2994, 2996, infra.

⁶¹ *Chambers Bros. & Co. v. King*

§ 2994. — **Managing agent, superintendent, etc., other than executive officers.** Next to the statutes which provide that the president and other officers may be served, perhaps the largest class of statutes is that which declares that service may be had on a "managing agent" or the "agent in charge of" an office or place of business of the corporation. These designations are far from synonymous, and therefore are treated separately herein, though obviously a managing agent may also be an agent in charge of the office under his management.⁶² The object of these statutes was to alleviate the difficulty of serving officers and to facilitate the acquisition of jurisdiction over the corporation,⁶³ and a statute allowing service on such officer in the first instance without endeavor to serve higher officers is not to be regarded as having been repealed by one which also allows service on the managing agent if such an endeavor is unavailing.⁶⁴ If, however, the statute prefers another for service, such as an officer,⁶⁵ or the statutory registered agent,⁶⁶ the managing agent can be served only when such preferred service is not feasible; and he can only be served in such places as are allowed by the statute.⁶⁷ The return must show all such essential conditions.⁶⁸ The term "managing agent" might well be regarded as self-defining, and few of

Wrought-Iron Bridge Manufactory, 16 Kan. 270.

⁶² As to "agents in charge," see § 2996, *infra*.

⁶³ The addition in 1876 of "managing agent" to the enumeration of officers capable of service, was designed to facilitate the commencement of action in the county where the cause arose by enabling service to be made there. *Holgate v. Oregon Pac. R. Co.*, 16 Ore. 123, 17 Pac. 859.

⁶⁴ *Comp. St.* 1887, § 75, providing for service on named officers, or if they could not be found, on others (including a managing agent) did not repeal section 72, enacted earlier in the same session, which permitted service on certain officers (including a managing agent) in the first instance. *Congdon v. Butte Consol. Ry. Co.*, 17 Mont. 481, 43 Pac. 629.

⁶⁵ Service on general manager is not good if vice president was present at office to receive service (*Act No.* 261

of 1908, p. 380). *Welch v. New Orleans Great Northern R. Co.*, 128 La. 738, 55 So. 338.

See §§ 2991, 2993, *supra*.

⁶⁶ If foreign corporation has designated no agent, its managing agent can be served. *Thomas v. Placerville Gold Quartz Min. Co.*, 65 Cal. 600, 4 Pac. 641.

See also § 2998, *infra*.

⁶⁷ A federal corporation if to be regarded as domestic, cannot be served as such through its general manager where the facts do not meet the requirement of the statute that the general office be within the state and that the general manager reside and be within the county of suit. *Kernan v. Northern Pac. R. Co.*, 103 Wis. 356, 79 N. W. 403.

As to place for service, see also § 3007, *infra*.

⁶⁸ Showing necessary in return to warrant serving managing agent, see § 3012, *infra*.

the many decisions applying it have attempted any formal definition,⁶⁹ but it has been defined in the state of its most frequent consideration as "one who has general power involving the exercise of judgment and discretion."⁷⁰ It is not necessary that he should have sole control of affairs.⁷¹

The nature of the reposed authority is the real test, and the term has been held to include a general superintendent,⁷² local or division superintendents, especially when at a point away from the main office,⁷³ foremen under like circumstances,⁷⁴ local railroad and insur-

⁶⁹ See cases hereinafter cited.

⁷⁰ Reddington v. Mariposa Land & Mining Co., 19 Hun (N. Y.) 405.

One "who is engaged in the management of its affairs, as distinguished from one to whom is intrusted only a particular branch of its business." Schryver v. Metropolitan Life Ins. Co., 29 N. Y. Supp. 1092.

⁷¹ Taylor v. Granite State Provident Ass'n, 65 Hun (N. Y.) 620, 20 N. Y. Supp. 135.

⁷² General superintendent is a "managing agent" where he has charge of operations with superintendents of divisions under him (Code Civ. Proc. § 431). Barrett v. American Telephone & Telegraph Co., 138 N. Y. 491, 34 N. E. 289, aff'g 56 Hun (N. Y.) 430, 10 N. Y. Supp. 138, 18 Civ. Proc. 363, 10 N. Y. Supp. 138.

One in sole control of affairs of a bank in liquidation though not an officer. Carr v. Commercial Bank, 19 Wis. 272.

A superintendent and actual manager of all its local business will be regarded as "managing agent" of a domestic corporation if its officers and nominal manager live outside the state and keep its books there in violation of R. S. § 2637, subd. 10. Wickham v. South Shore Lumber Co., 89 Wis. 23, 61 N. W. 287.

⁷³ An insurance company's district superintendent controlling a region with numerous subordinates is a managing agent. Ives v. Metropolitan Life Ins. Co., 78 Hun (N. Y.) 32, 28

N. Y. Supp. 1030. So is a local superintendent of such company, who has general supervision of the business of his district. Mullins v. Metropolitan Life Ins. Co., 78 Hun (N. Y.) 297, 28 N. Y. Supp. 959, followed in Stubing v. Metropolitan Life Ins. Co., 78 Hun (N. Y.) 610, 28 N. Y. Supp. 960, where it appears that his duties were to oversee solicitors, receive collections and accounts and turn over same to the main office.

Division superintendent of railroad. Rochester, H. & L. R. Co. v. New York, L. E. & W. R. Co., 48 Hun (N. Y.) 190.

Railroad division superintendent remote from the general offices. Brayton v. New York, L. E. & W. R. Co., 72 Hun (N. Y.) 602, 25 N. Y. Supp. 264.

Evidence held sufficient to show that superintendent was "managing agent" especially where introduced by a director as a person in charge and so recognized and assuming so to act. Behan v. Phelps, 27 N. Y. Misc. 718, 59 N. Y. Supp. 713.

⁷⁴ A "foreman" in charge of a dairy corporation's milk station or factory, where he has general supervision of it and the business done there. Wesley v. Beakes Dairy Co., 72 N. Y. Misc. 260, 131 N. Y. Supp. 212.

Foreman transacting business and drawing checks for defendant. Brun v. Northwestern Realty Co., 52 N. Y. Misc. 528, 102 N. Y. Supp. 473.

ance agents remote from the main office,⁷⁵ buying and selling agents with discretionary powers and not under direct control,⁷⁶ a bookkeeper,⁷⁷ and an agent in charge of property of large magnitude.⁷⁸ The following have been held not to be managing agents: directors,⁷⁹ an assistant secretary,⁸⁰ an assistant treasurer,⁸¹ an assistant cashier,⁸² superintendents,⁸³ especially where in subordinate authority,⁸⁴ a "business manager,"⁸⁵ a bookkeeper,⁸⁶ a foreman under local con-

⁷⁵ Local freight and passenger agent of foreign railroad corporation is a managing agent (Rev. Codes, 1899, § 5252, subd. 5). *Brown v. Chicago, M. & St. P. R. Co.*, 12 N. D. 61, 102 Am. St. Rep. 564, 95 N. W. 153.

Agent to effect insurance at a place away from main office of company is a managing agent. *Bain & Brinckerhoff v. Globe Ins. Co.*, 9 How. Pr. (N. Y.) 448.

⁷⁶ A produce buyer required to exercise judgment. *Brophy v. Fairmont Creamery Co.*, 98 Neb. 307, 152 N. W. 557.

One corporator of a foreign land-selling corporation who lived in the state and acted as sales agent. *Coast Land Co. v. Oregon Pacific Colonization Co.*, 44 Ore. 483, 75 Pac. 884.

⁷⁷ Bookkeeper held on evidence a "managing agent" within garnishment statute. *First Nat. Bank of Blue Hill v. Turner*, 30 Neb. 80, 46 N. W. 290, but see contra, *Rogers v. New Central Storage Co.* (N. Y. Misc.), 131 N. Y. Supp. 591.

⁷⁸ Agent in charge of property worth \$3,000,000 held to be a managing agent. *Russell v. Pittsburgh Life Insurance & Trust Co.*, 62 N. Y. Misc. 403, 115 N. Y. Supp. 950.

⁷⁹ *Alabama & T. Rivers R. Co. v. Burns, McKibbin & Co.*, 43 Ala. 169.

⁸⁰ Assistant secretary of a foreign corporation. *Sterett v. Denver & R. G. Ry. Co.*, 17 Hun (N. Y.) 316.

⁸¹ *Winslow v. Staten Island Rapid Transit R. Co.*, 51 Hun (N. Y.) 298, 4 N. Y. Supp. 169.

⁸² Assistant cashier of a branch bank who signs drafts and letters but has no managerial control over the corporation is not a managing agent even where all other higher officers are absent from the branch. *Karns v. State Bank & Trust Co.*, 31 Nev. 170, 101 Pac. 564.

⁸³ Summons out of small cause court must be served on president, treasurer, cashier or clerk, or if they be not found, on a director or manager. Held that service on a superintendent was bad. *State v. Bennett*, 47 N. J. L. 275.

A street railroad superintendent employed also by defendant, a steam road, to superintend operation of horse cars on its unfinished tracks is not a managing agent of the defendant. *Emerson v. Auburn & O. L. R. Co.*, 13 Hun (N. Y.) 150.

⁸⁴ "Assistant superintendent" where supervised manufacturing plant is under direction of a general superintendent. *Kramer v. Buffalo Union Furnace Co.*, 132 N. Y. App. Div. 415, 116 N. Y. Supp. 1101.

Superintendent of soliciting agents employed by a higher authority. *Schryver v. Metropolitan Life Ins. Co.*, 29 N. Y. Supp. 1092.

⁸⁵ *Scorpion Silver Min. Co. v. Marsano*, 10 Nev. 370.

⁸⁶ A bookkeeper who was not an officer, who disavowed knowledge of the whereabouts of the officers but stated that he was "in charge of" the office and any business might be transacted with him, is not "manag-

trol and supervision,⁸⁷ or other person in charge of business under immediate supervision,⁸⁸ a stock transfer agent,⁸⁹ an attorney in fact with discretionary powers,⁹⁰ solicitors and salesmen,⁹¹ collectors,⁹² a telegraph operator,⁹³ a baggage master.⁹⁴

The term "local superintendent," used in one statute, has been held to include a section foreman.⁹⁵

§ 2995. — **General agent.** The term "general agent," used in some of the statutes, is sufficiently similar in meaning to that of "managing agent" to call for examination of the cases last cited⁹⁶ for the analogies there afforded, but it has a less precise meaning apparently. If the general agent is an officer,⁹⁷ or is any of the other persons competent by statute to be served, of course he may be served in such capacity.⁹⁸ Whether the right to serve a general agent coexists with the right to serve other officers or agents prescribed by the statutes as competent for service, depends on the construction of the statutes; and a preferred person for service must be sought, if one is preferred, otherwise not.⁹⁹ A local freight agent of a rail-

ing agent." *Rogers v. New York Cent. Storage Co.*, 131 N. Y. Supp. 591, but see also this section, *supra*.

⁸⁷ *Simmons v. Defiance Box Co.*, 148 N. C. 344, 62 S. E. 435.

⁸⁸ A person in charge of publication and mailing of defendant's periodical at its home office and under the eyes of its officers. *Ruland v. Canfield Pub. Co.*, 18 N. Y. Civ. Proc. 282, 10 N. Y. Supp. 913.

⁸⁹ Stock transfer agent of foreign corporation. *Reddington v. Mariposa Land & Mining Co.*, 19 Hun (N. Y.) 405.

⁹⁰ Attorney in fact to locate mining claims. *Mars v. Oro Fino Min. Co.*, 7 S. D. 605, 65 N. W. 19.

⁹¹ *Gleich v. Ontario Button Co.*, 129 N. Y. Supp. 407; *Bucket Pump Co. v. Eagle Iron & Steel Co.*, 21 Ohio Cir. Ct. 229, 11 Ohio Cir. Dec. 418.

Sales agent paid only by commissions is not a managing agent. N. Y. Code Civ. Proc. § 431, applied though the case being in equity in federal court was not within U. S. Rev. St. § 914 (Conformity Act). *Atlas Glass*

Co. v. Ball Bros. Glass Mfg. Co., 87 Fed. 418, appeal dismissed for want of jurisdiction, 93 Fed. 987 (mem. dec.).

⁹² Collector held not a managing agent of a foreign corporation. *M. Rumely Co. v. Bledsoe*, — Okla. —, 155 Pac. 872.

⁹³ Telegraph operator is not a managing agent of telegraph company. *Jepson v. Postal Tel. Cable Co.*, 22 N. Y. Civ. Proc. 434, 20 N. Y. Supp. 300.

⁹⁴ *Flynn v. Hudson River R. Co.*, 6 How. Pr. (N. Y.) 308.

⁹⁵ *St. Louis & S. F. R. Co. v. De Ford*, 38 Kan. 299, 16 Pac. 442.

⁹⁶ See § 2994, *supra*.

⁹⁷ See § 2993, *supra* and see also § 1746, *supra*.

⁹⁸ As to managing agents, see § 2994, *supra*, and as to local agents and agents in charge or employees in general, see §§ 2996, 3000, *infra*.

⁹⁹ Under the statutes service might be made on a general agent (Code, § 2612) though the action grew out of a local agency so that the local agent might also have been served (Code,

road company has been held to be a general agent,¹ while the term has been held to exclude an assistant manager of agencies of a foreign corporation present in another capacity,² a "recording agent" of an insurance company,³ and a mine foreman under another general agent's control.⁴

§ 2996. — Local agent or person in charge, or other special agents. In a great many states it is enacted that "an agent in charge of" the corporation's business or its office, or its "local agent," or its "freight or passenger agent," or some other particularly described or qualified sort of agent may be served. The phraseology of the statutes is quite varied, and in addition there are further conditions on which the agent's competency depends, such as the absence of or inability to serve a superior, and the residence of the agent within the county where the service is required, and his agency in the transaction whence the cause of action arose, and perhaps others. In connection with the cases cited in this section, therefore, it is highly essential to consider carefully the statutes of the state under investigation and also those of the state whence the precedent came at the time of the decision. Only subject to them can anything of a general nature be laid down as a rule of law. As in the case of officers it is not the name "agent" but the functional character of the agent that makes him such;⁵ and the statute may limit the competency of the

§ 2613) and the fact that the venue was in that county (Code, § 2585) does not fix the local agent as the one to be served. *Centennial Mut. Life Ass'n v. Walker*, 50 Iowa 75.

See also § 2991, 2993, *supra*.

¹ *Toledo, W. & W. Ry. Co. v. Owen*, 43 Ind. 405.

² One who was "assistant manager of agencies" in the home office in another state and who when served was appearing as attorney at law in an action in Iowa where he was not an agent for any other purpose was not competent to be served. *Philp v. Covenant Mut. Ben. Ass'n*, 62 Iowa 633, 17 N. W. 903.

³ A "recording agent" of the company who merely wrote out policies and attended to such as he issued and looked out for the company's interests in respect to such policies is

not an "agent employed in the general management of the business of the company" (Code, § 2612). *State Ins. Co. v. Waterhouse*, 78 Iowa 674, 43 N. W. 611.

⁴ A mine foreman of a domestic corporation under direction of the general agent (Code Civ. Proc. § 40). *Great West. Min. Co. v. Woodmas of Alston Min. Co.*, 12 Colo. 46, 13 Am. St. Rep. 204, 20 Pac. 771.

⁵ A "chief clerk" may be served as an agent though a superior who bore the titular name "agent" was also in the same office. *Louisville & N. R. Co. v. Mitchell*, 6 Ga. App. 390, 64 S. E. 1134.

Local or branch secretary who receives assessments and delivers receipts is an agent within the state. *Southwestern Mut. Ben. Ass'n v. Swenson*, 49 Kan. 449, 30 Pac. 405.

agency to service in actions based on intrastate property or transactions,⁶ or on a specified subject-matter within the scope of the agency.⁷ Unless the statute bears such an interpretation it is not requisite that the object of the agency shall have been accomplished, but only that authority shall have existed of the described kind in the person served.⁸ The agent must bear that relation to the corporation which is the intended defendant, rather than to a receiver,⁹ or some wholly independent principal.¹⁰ The existence of a designated agent does not necessarily exclude service on other agents¹¹ and even if

"Scalpers" or ticket brokers furnished tickets by the railroad to be marketed would not be "acting ticket agents." Dictum in *Hillary v. Great Northern Ry. Co.*, 64 Minn. 361, 32 L. R. A. 448, 67 N. W. 80.

Secretary of local lodge who collects and remits money to grand lodge is an agent. *Hildebrand v. United Artisans*, 46 Ore. 134, 114 Am. St. Rep. 852, 79 Pac. 347.

Evidence held sufficient to show agency. *People v. Tilden*, 121 N. Y. App. Div. 352, 106 N. Y. Supp. 247.

Purser and wharfinger of foreign navigation company at a wharf in a county where its boats touched and took passengers and cargo, are both agents. *Sievers v. Dallas, P. & A. Nav. Co.*, 24 Wash. 302, 64 Pac. 539. See also § 2993, *supra*, as to officers.

⁶ *Olson v. Buffalo Hump Min. Co.*, 130 Fed. 1017, explaining the Washington statute which qualifies an agent of a foreign corporation for service "in any action" pertaining to property or transactions "within the state." But see *Smith v. Empire State-Idaho Mining & Development Co.*, 127 Fed. 462, which further explained that an officer's authority was not so restricted since by another statute he could be served "in a civil action against a foreign corporation doing business in the state."

⁷ *Toledo, W. & W. R. Co. v. Owen*, 43 Ind. 405, holding that the killing of an animal was not ascribable to

the "business of" a local railroad agent. See also this section, *infra*.

⁸ *Commercial Mut. Acc. Co. v. Davis*, 213 U. S. 245, 53 L. Ed. 782.

⁹ A statute (Act Feb. 26, 1887) providing for service on any depot agent or person in charge of any depot in any suit against the person or corporation using or operating such road, "whenever any railroad corporation * * * shall permit its railroad to be used or operated by any other person or corporation" does not apply to receivership. *Ex parte Charles*, 106 Ala. 203, 18 So. 73.

¹⁰ See § 2991, *supra*.

The agent of one corporation cannot be served to bring in another though the two were contractually related. *International Text-Book Co. v. Heartt*, 136 Fed. 129.

¹¹ Service on an agent in the county where suit is brought suffices though there be also a designated agent for service. *New South Brewing & Ice Co. v. Price*, 21 Ky. L. Rep. 11, 50 S. W. 963.

Under the Manufacturing Corporations Act providing for one designated business office within the state (section 20) and for service on the agent "in charge of any business office" (section 30), no agent in charge except the one in charge of the designated office can be served. *Toledo Ice Co. v. Munger*, 124 Mich. 4, 82 N. W. 663. See also *Goodrich v. Hackley-Phelps-Bonnell Co.*, 141 Mich.

it did, the failure to appoint one leaves it open to serve agents, subject to the absence of superior officers.¹²

The residence¹³ or "situation" or place¹⁴ of the agent with re-

343, 104 N. W. 669, 12 Det. L. N. 458, explained in *Moinet v. Burnham*, *Stoepel & Co.*, 143 Mich. 489, 106 N. W. 1126, 13 Det. L. N. 38.

¹² Service on the agent in charge of the office, the president or chief officer not being found, is good against a foreign insurance company which has not designated the insurance commissioner as provided by statute. *Fraternal Bankers of America v. Wire*, 150 Mo. App. 89, 129 S. W. 765.

¹³ Resident agent in county where action is brought may be served. *Adams Exp. Co. v. Crenshaw*, 78 Ky. 136.

Under Code, c. 52, § 20, a railroad company may be served through a "depot or station agent in the employment of the company residing in the county or township wherein the action is brought. *Douglass v. Kanawha & M. R. Co.*, 44 W. Va. 267, 28 S. E. 705.

Resident freight and passenger agent in county where tort action is brought before justice may be served. (Code, c. 50, § 34), there being no other officer found in the county. *Harrow v. Ohio River R. Co.*, 38 W. Va. 711, 18 S. E. 926.

Shannon's Code, § 4542 providing for service on an agent "in all actions in said county growing out of the business or connected with the principal" means a resident agent. A traveling agent cannot be served and sued where he is found. *Mark Twain Lumber Co. v. Lieberman*, 106 Tenn. 153, 61 S. W. 70. To same effect, see *Chicago & A. R. Co. v. Walker*, 77 Tenn. (9 Lea) 475.

Residence of agent as place for service, see also § 3007, *infra*.

¹⁴ Under a statute providing that where a corporation operates a rail-

road summons may be served on its passenger or freight agent stationed at or nearest to the county seat of the county where the action is instituted, the term "passenger or freight agent" will be construed as referring to one employed by the corporation at a specified place. *Louisville & N. R. Co. v. Chestnut & Co.*, 115 Ky. 43, 24 Ky. L. Rep. 1846, 72 S. W. 351.

A merchant who incidentally quoted freight rates and sold tickets for the railroad corporation is a "passenger and freight agent stationed at or nearest to the county seat" though he was not located at a regular station and the line did not run through his town. *Louisville, H. & St. L. R. Co. v. Com.*, 104 Ky. 35, 20 Ky. L. Rep. 371, 46 S. W. 207.

The defendant's passenger or freight agent "at or nearest to the county seat of the county in which the action is brought" need not be an agent within that county. *Nashville, C. & St. L. R. Co. v. Carrico*, 95 Ky. 489, 26 S. W. 177; *Nashville, C. & St. L. R. Co. v. Carrico*, 14 Ky. L. Rep. (abstract) 431.

Soliciting insurance agent traveling about and appointing and instructing subagents is not an agent "situated" in the county where he resides when at home. *Security Mut. Life Ins. Co. v. Ress*, 76 Neb. 141, 106 N. W. 1037.

In Ohio service of summons on a regular ticket agent of a railroad corporation defendant was held good. That he was not employed on the line of road did not bar the fact of his agency. *Woodcock v. Baltimore & O. R. Co.*, 107 Fed. 767.

A traveling passenger solicitor with nothing fixed in the way of an office except an address is not such an agent

spect to the place of the cause of action¹⁵ must be such as the statute prescribes, and if the absence or inability to serve superiors,¹⁶ or the residence of any superior is a condition, that, too, must be such as is prescribed, else the agent cannot be served.¹⁷ Every other imposed condition must be met,¹⁸ and the return must show the facts.¹⁹ The

as can be served for a domestic or foreign corporation (Code, §§ 2831, 2832). His is not an "office or agency" within the county. *Chicago & A. R. Co. v. Walker*, 77 Tenn. (9 Lea) 475.

¹⁵ Service on a common carrier's chief agent in M county is bad when the action is brought in J county and there has been a designated agent appointed. The chief officer in the state (president) could have been served or the designated agent (Oiv. Code Prac. § 51, construed). *Cincinnati, P. B. S. & P. Packet Co. v. Malone & Co.*, 29 Ky. L. Rep. 44, 92 S. W. 306.

¹⁶ The absence of primary officers from the state is not required to appear, but only their absence from the serving officer's county. *Florida Cent. & P. R. Co. v. Luffman*, 45 Fla. 282, 33 So. 710.

Only when the prescribed superior officers cannot be served (statutes construed), may the agent be served. *St. Louis & S. F. R. Co. v. Reed*, — Okla. —, 158 Pac. 399.

Service at the domiciliary office by leaving a copy with a person of required age working there is good if the secretary designated for service was absent and inquiry disclosed that there were no other officers present (Act No. 261 of 1908, p. 381). *Abney v. Louisiana & N. W. R. Co.*, 127 La. 437, 53 So. 678.

Service of summons was upon the secretary at the corporation's place of business in the county. The secretary was in charge of the office and the president could not be found in the county. The statute provided that

service should be made on the president, or if absent, by leaving a copy at the corporate office with the person in charge. It was held that the court had jurisdiction. *Taussig v. St. Louis & K. R. Co.*, 186 Mo. 269, 85 S. W. 378.

Service on a freight agent out of justice's court is good where the only higher agent was an assistant superintendent who was not a "managing agent" (Code Civ. Proc. § 2880). *Duval v. Boston & M. R. Co.*, 58 N. Y. Misc. 504, 111 N. Y. Supp. 629.

Endeavor and diligence required to serve officers before others can be served, see § 3009, *infra*.

Practice in federal courts of treating "county" as equivalent to district with respect to requirement that superior be served in county if possible before resort to agents, see § 2993, *supra*, § 3000, *infra*.

¹⁷ An express company's local agent may be served if the president does not have his personal residence in the state (Code, § 3412). *Southern Exp. Co. v. Skipper*, 85 Ga. 565, 11 S. E. 871.

¹⁸ Service on an express company's agent is not good under the statute unless the president or chief officer resides in the state and a statutory notice of his name and residence is also posted in each office. *Conner v. Southern Exp. Co.*, 37 Ga. 397.

Station agent may be served, though principal office was not in the county (Code, § 1529). *Alabama & V. Ry. Co. v. Bolding*, 69 Miss. 255, 30 Am. St. Rep. 541, 13 So. 844.

¹⁹ Necessary showing in return, see § 3012, *infra*.

court must be such²⁰ and the action or cause of action must be such that the statute allows service on a local or other particular agent,²¹ and his connection with the cause of action or its origin may be essential.²² A cause growing out of the business of the agency, which some statutes make a condition, cannot include a tortious killing of an animal on the tracks of a railroad.²³ The federal statutes provide specially that an agent conducting the business of an infringer at a regular place of business in a state where it is not an inhabitant may be served in infringement cases. To this extent the state rule as to the persons competent for service is not followed.²⁴

The highest agent in the county or at a place is the "chief agent" there, and several with equal powers may all be chief agents.²⁵

²⁰ Local agent may be served in justice's actions as well as in others. *Katzenstein v. Raleigh & G. R. Co.*, 78 N. C. 286.

²¹ A suit for value of goods furnished is not "for damages to person or property"; hence the company cannot be served "on any agent * * * at any depot house," etc. *St. Louis, I. M. & S. R. Co. v. Barnes*, 35 Ark. 95.

²² A division superintendent having charge of a line where the tort occurred beyond the state is an agent connected with the cause of action under the Georgia statute. *Hills v. Richmond & D. R. Co.*, 37 Fed. 660. But see note following.

²³ *Toledo, W. & W. Ry. Co. v. Owen*, 43 Ind. 405. But see *Hills v. Richmond & D. R. Co.*, 37 Fed. 660, cited in note preceding.

²⁴ In a patent infringement case "the agent or agents engaged in conducting such business in the district in which suit is brought" must be served (Judicial Code, § 48), and hence a designated agent appointed under the state law is incompetent unless it appears that the corporation was conducting business in the state as well as licensed by the state to do so. *United States Gramophone Co. v. Columbia Phonograph Co.*, 106 Fed. 220.

Where the corporation is not an in-

habitant the state mode of serving process does not apply but the mode is fixed by the later clause of the federal statute, to-wit on an agent there "conducting such business" of infringement. *Weller v. Pennsylvania R. Co.*, 113 Fed. 502.

In such cases the regular officers may be served if available and amenable, the word "may" indicating that the statute is permissive in providing for service on an agent in the given contingency. *National Elec. Signaling Co. v. Telefunken Wireless Tel. Co.*, 194 Fed. 893.

²⁵ The chief soliciting agents of an insurance company may be served. *German Ins. Co. of Freeport v. First Nat. Bank*, 58 Kan. 86, 62 Am. St. Rep. 601, 48 Pac. 592.

Local ticket agent, who is the highest officer or agent in the county where suit is brought, may be served (Civ. Code, § 51, subsec. 3). *Chesapeake & O. R. Co. v. Cowherd*, 96 Ky. 113, 27 S. W. 990.

A wharf master of a foreign corporation being its highest agent in the state may be served where he resides and is its agent, in action for a tort committed on a boat on the Ohio river adjacent to Indiana (*R. S.* 1881, § 316, also § 312). *Memphis & C. Packet Co. v. Pikey*, 142 Ind. 304, 40 N. E. 527.

The term "local agent" excludes a casual or general agent²⁷ and also a mere work foreman.²⁸ A "depot" or "ticket" agent has been held not to include a "commercial agent"²⁹ or a conductor stopping at a loading point where there is no agent,³⁰ and it has been doubted whether a superintendent can be such.³¹ A telegraph operator³² or a freight solicitor³³ may be a "person in charge."

§ 2997. — Cashiers, clerks, bookkeepers, etc. These are made competent for service by some statutes. The cashier is the financial agent of the corporation, and not every teller or person who handles money is a cashier.³⁴ In some corporations an officer exists called

Service in D county on the agent of a domestic insurance company having its home office in M county, and no higher officer in D county is good although the action did not arise from business done by such agent. *Globe Acc. Ins. Co. v. Reid*, 19 Ind. App. 203, 49 N. E. 291, 47 N. E. 947, adhering to *Memphis & C. Packet Co. v. Pikey*, 142 Ind. 304, 40 N. E. 527, and explaining statutory changes.

Captain of a towboat was chief officer, or agent, the corporation being foreign with no other officers in state, and the action being for negligence in towing. *L. Dodge Lumber Co. v. Macquithy*, 14 Ky. L. Rep. (abstract) 142.

Any of several agents with like powers may be a chief agent (Civ. Code, § 51, subsec. 3). *Louisville & N. R. Co. v. Com.*, 5 Ky. L. Rep. 317, 330.

²⁷ A "local agent" (R. S. 1895, art. 1222) means one acting for a particular locality and does not include one casually in a locality or a general manager, which is distinctively referred to in the next section (section 1223). *Latham Co. v. J. M. Radford Grocery Co.*, 54 Tex. Civ. App. 510, 117 S. W. 909.

²⁸ A foreman working under a local superintendent is not a "managing or local agent." *Simmons v. Defiance Box Co.*, 148 N. C. 344, 62 S. E. 435.

²⁹ *Detroit v. Wabash, St. L. & P. Ry. Co.*, 63 Mich. 712, 30 N. W. 321.

³⁰ A conductor of a train at the end of a stub which was used only to reach a cattle chute from a station several miles distant, no freights being charged for picking up cars thereon or any passengers carried is not an agent in charge of a "depot or station." *Chicago, R. I. & P. Ry. Co. v. Groves*, 7 Okla. 315, 54 Pac. 484.

³¹ Query, whether a superintendent of the lessee is equivalent to a "depot agent" for service on a lessor of a railroad. *Atlanta & C. Air-Line Ry. Co. v. Harrison*, 76 Ga. 757.

³² An operator in charge of a railroad telegraph station is a person in charge of a place of business. *State v. Myers*, 126 Mo. App. 544, 104 S. W. 1146.

³³ Freight solicitor in charge of office. *Davis v. Jacksonville Southeastern Line*, 126 Mo. 69, 28 S. W. 965.

³⁴ Teller of a bank is not "president or other head of the corporation, secretary, cashier or managing agent." (Garnishment statute held not to enlarge agents who may be served.) *Kennedy v. Hibernia Savings & Loan Society*, 38 Cal. 151.

One who merely receives money in a department is not a cashier. *Eisenhofer v. New Yorker Zeitung Pub. & Prtg. Co.*, 91 N. Y. App. Div. 94, 86 N. Y. Supp. 438.

the clerk, being analogous to the secretary,³⁵ but an agent who is not clerical cannot be regarded as either an officer or a clerk.³⁶ A bookkeeper has been held not a managing agent,³⁷ and not the secretary or clerk of the corporation.³⁸

§ 2998. — Registered agent or designated official to receive service. Especially with respect to foreign corporations,³⁹ nonresident domestic ones⁴⁰ and insurance companies, numerous statutes provide for appointment of an agent to receive service and for the recording or filing of a certificate of such appointment, or for the qualification of a state officer for that purpose by operation of law and license. "Process" within such a statute has been held to include garnishment⁴¹ and mandamus.⁴² By some of these statutes the agent so designated is the exclusive one for service,⁴³ but if not other agents

A bookkeeper who also receives money is not a "cashier," and his admission that he was such does not make the service good. *Van Damm v. New York Cent. Storage Co.*, 132 N. Y. Supp. 394.

A cashier in an office of discount and deposit is not "cashier" of the bank. *Brobst v. Bank of Pennsylvania*, 5 Watts & S. (Pa.) 379.

An employee in the office of a local agent is not the "cashier or treasurer." *Fearing v. Glenn*, 73 Fed. 116.

³⁵ See § 2993, *supra*.

³⁶ Track master is neither an "officer" nor a "clerk" engaged in active management of the ordinary business of the corporation. *Richardson v. Burlington & M. R. Ry. Co.*, 8 Iowa 260.

³⁷ *Rogers v. New York Cent. Storage Co.*, 131 N. Y. Supp. 591. Contra, on the evidence, see *First Nat. Bank of Blue Hill v. Turner*, 30 Neb. 80, 46 N. W. 290.

³⁸ *Chambers Bros. & Co. v. King Wrought-Iron Bridge Manufactory*, 16 Kan. 270.

³⁹ See chapter on Foreign Corporations, *infra*.

⁴⁰ Under the West Virginia statute (Code 1906, § 3805), the auditor is agent for service on a nonresident

domestic corporation without any appointment and wholly by virtue of law. *Wylie Permanent Camping Co. v. Lynch*, 195 Fed. 386, writ of certiorari denied 225 U. S. 707, 56 L. Ed. 1266 (mem. dec.).

⁴¹ Garnishment is included in the word "process" in How. St. § 4368 relating to foreign insurance companies and providing for service on the insurance commissioner. *German American Ins. Co. v. Chippewa Circuit Judge*, 105 Mich. 566, 63 N. W. 531, qualifying *Milwaukee Bridge & Iron Works v. Wayne County Circuit Judge*, 73 Mich. 155, 41 N. W. 215.

⁴² Laws 1907, c. 345, § 19, providing for service on foreign insurance companies through the insurance commissioner of "any legal process in any action or proceeding" includes process of mandamus. *State v. Brotherhood of American Yeomen*, 111 Minn. 39, 126 N. W. 404.

⁴³ The statutory mode of serving foreign insurance companies through the designated agent (Laws 1874, p. 74) repeals former acts and is exclusive. A local agent cannot be served. *Baile v. Equitable Fire Ins. Co.*, 68 Mo. 617.

If a foreign corporation has designated an agent he must be served.

may be served if competent under other statutes.⁴⁴ Where no designation has been made, other agents may be served according to the statutes.⁴⁵ The designation must be made while the corporation is competent to do it⁴⁶ and takes effect from the time of consent, where a public official is pointed out and corporate consent to service on him is exacted.⁴⁷ If two state officials are made competent for such service, a service through either is enough.⁴⁸ A deputy may act for a state officer qualified *ex officio*.⁴⁹

State v. King Bridge Co., 28 Ohio Cir. Ct. 147.

An insurance solicitor cannot be served for a foreign company which has designated an agent. *Liblong v. Kansas Fire Ins. Co.*, 82 Pa. 413; *Conners v. Prudential Ins. Co.*, 6 Kulp (Pa.) 400, 11 Pa. Co. Ct. 50, 1 Pa. Dist. Ct. 115.

⁴⁴ The constitution and statutes do not restrict service on a foreign corporation to the designated agent. By *Mills Ann. Code*, § 38, subd. 9, it may be made on "any agent" found in the county. *Venner v. Denver Union Water Co.*, 40 Colo. 212, 122 Am. St. Rep. 1036, 90 Pac. 623, overruling *Venner v. Denver Union Water Co.*, 15 Colo. App. 495, 63 Pac. 1061, in part.

The general code provisions (*Code Civ. Proc.* § 432) for service on foreign corporations and mentioning a designated agent (subd. 2) co-exists with a law providing for designation of the insurance superintendent by foreign insurance corporations. A foreign insurance company may be served on any of the persons indicated. *Silver v. Western Assur. Co. of Toronto, Canada*, 3 N. Y. App. Div. 572, 38 N. Y. Supp. 335.

The statute providing for a designated agent (1910, 26 Stat. 775) does not repeal the law allowing any agent. *Montgomery v. United States Fidelity & Guaranty Co.*, 90 S. C. 283, 73 S. E. 182, 71 S. E. 1084.

⁴⁵ Section foreman is a "local superintendent" of repairs and may

be served if there has been no designation of an agent and no other person or officer in the county who could be served. *St. Louis & S. F. Ry. Co. v. De Ford*, 38 Kan. 299, 16 Pac. 442.

If there is no registered agent the managing agent can be served. *Thomas v. Placerville Gold Quartz Min. Co.*, 65 Cal. 600, 4 Pac. 641.

⁴⁶ Designation of the office of its attorney as being the corporate agent after insolvency of the corporation is not sufficient. *Nickolson v. Wheeling, L. E. & P. Coal Co.*, 110 Fed. 105.

⁴⁷ Under the statute requiring the filing of a consent to service on the state auditor it is the consent and not the statute which qualifies him. Therefore service on him while a company was not doing business and before such filing is not binding. *Greaves v. Posner*, 111 Iowa 651, 82 N. W. 1022.

⁴⁸ A foreign insurance company doing business in the state may be served through the secretary of the corporation commission (*Act of 1901*, c. 5) whether or not it has property here; and it is not material that it has not complied with the law where-by it might also have been served through the insurance commissioner. Either or both methods apply. *Fisher v. Traders' Mut. Life Ins. Co.*, 136 N. C. 217, 48 S. E. 667.

⁴⁹ *South Pub. Co. v. Fire Ass'n of Philadelphia*, 67 Hun (N. Y.) 41, 21 N. Y. Supp. 675, *aff'd* 137 N. Y. 610, 33 N. E. 744.

§ 2999. — **Assistants and deputies of prescribed persons.** The distinction between a subordinate agency for the corporation and a mere clerk or assistant of a corporate officer or agent must be kept in mind, for the rules of agency apply to a corporation, including that which prevents delegation of authority.⁵⁰ Therefore an assistant or deputy must bear a representative relation to the corporation to be competent.⁵¹ An assistant or deputy cannot be served as a substitute for his superior unless by virtue of the superior's absence he becomes clothed with the same authority,⁵² or unless he be himself an officer⁵³ or one of the agents whom the statute makes competent.⁵⁴ The deputy of a public officer designated *ex officio* for service may perform the necessary acts in the name of his superior.⁵⁵

§ 3000. — **Ordinary agents and employees in general.** The statutes considered in the preceding sections have been such as designated an agent with qualifying words of description so that the agents thus designated were only those at a certain place, or those possessing a certain line of duties or authority, or those standing in some specified relation to a superior or to the cause of action. But some statutes are not thus qualified. They make any agent competent either when the corporation is of a certain kind or for any kind of corporation.⁵⁶ A statute of the latter kind applying to specified corporations is harmonious with one of general application in which the agency is of a qualified or specific nature.⁵⁷ When the statute speaks of

⁵⁰ See §§ 1897, 1951, 1960, *supra*.

⁵¹ See § 2991, *supra*.

⁵² *Karns v. State Bank & Trust Co.*, 31 Nev. 170, 101 Pac. 564.

Assistant treasurer cannot be served in lieu of treasurer though latter is nonresident. *Winslow v. Staten Island Rapid Transit R. Co.*, 51 Hun (N. Y.) 298, 4 N. Y. Supp. 169, *aff'd* 15 N. Y. Civ. Proc. 202, 2 N. Y. Supp. 682.

⁵³ Assistant secretary named in by-laws as a corporate officer is competent to be served for a domestic corporation whose actual chief secretary he was for Kansas, the titular secretary being a nonresident. *Colorado Debenture Corporation v. Lombard Inv. Co.*, 66 Kan. 251, 97 Am. St. Rep. 373, 71 Pac. 584.

⁵⁴ Assistant secretary, treasurer or

cashier as managing agent, see § 2994, *supra*.

⁵⁵ Service on the superintendent of insurance is on him as an official and not as an individual; hence his clerk property deputized may receive and admit service effectually. *South Pub. Co. v. Fire Ass'n of Philadelphia*, 67 Hun (N. Y.) 41, 21 N. Y. Supp. 675, *aff'd* 137 N. Y. 610, 33 N. E. 744.

⁵⁶ See the cases hereinafter cited.

⁵⁷ A manufacturing or mercantile corporation (Pub. Acts 1885, Act No. 232) may be served through any agent, and not only through the "agent in charge of any business office," etc. (Pub. Acts 1903, Act No. 232, § 30, and Pub. Acts 1887, Act No. 242, § 3, held harmonious and cumulative). *Moinet v. Burnham, Stoepel & Co.*, 143 Mich.

"any agent" and "any corporation," it betokens the widest application, and extends to foreign as well as domestic corporations and to agents other than the designated statutory agent or the other agents mentioned in other statutes on the subject,⁵⁸ but when the kind of corporation which may be served through an agent is specified, no other kind of corporation can be thus served.⁵⁹ Usually the statutes permit service on an ordinary agent only when higher officers or agents designated by the statutes are not found or are absent, though some make no preference.⁶⁰ The federal courts, in applying and following such a statute "as near as may be" treat the federal district as the "county" in which service must be had on superior officers or agents by preference to inferior ordinary agents.⁶¹ Under a stat-

489, 106 N. W. 1126, 13 Det. L. N. 38, explaining *Goodrich v. Hackley-Phelps-Bonnell Co.*, 141 Mich. 343, 104 N. W. 669; *Toledo Ice Co. v. Munger*, 124 Mich. 4, 82 N. W. 663.

Service on a railroad company may be upon any agent (3 How. St. § 8137) and not only on station agents and ticket agents (3 How. St. § 8147). The first-named statute did not restrict or repeal, but enlarged the other. *Turner v. St. Clair Tunnel Co.*, 102 Mich. 574, 61 N. W. 72.

⁵⁸ "Any agent" of a foreign corporation found in the county may be served. *Venner v. Denver Union Water Co.*, 40 Colo. 212, 122 Am. St. Rep. 1036, 90 Pac. 623, overruling in part 15 Colo. App. 495, 63 Pac. 1061.

The provision that "any corporation" may be served "by serving any officer or agent of the corporation" applies to foreign as well as domestic corporations. Service on the local agent of a foreign insurance company is good. *City Fire Ins. Co. v. Carrugi*, 41 Ga. 660.

Under the statute "any agent" and not only the one charged with legal business may be served if the president be nonresident in the county. *Chicago & R. I. R. Co. v. Fell*, 22 Ill. 333.

Agent representing foreign corporation or association in the transaction

in suit may be served though not the chief or general agent (*Pamph. L.* 1896, p. 305 construed). *Saunders v. Adams Exp. Co.*, 71 N. J. L. 270, 57 Atl. 899; order affirmed 71 N. J. L. 520, 58 Atl. 1101.

The statute (R. S. § 2637, subd. 9) authorizing a foreign insurance company to be served on its appointed agent or "any agent of such corporation within the definition of section 1977 in the state," enables a soliciting agent to be served for an unlicensed company which can have no appointed statutory agent. *State v. United States Mut. Acc. Ass'n*, 67 Wis. 624, 31 N. W. 229.

⁵⁹ An express company is not a railroad or telegraph company which may be served through an agent. *Southern Exp. Co. v. Craft*, 43 Miss. 508.

⁶⁰ See § 2993, *supra*, and as to foreign corporations, see generally chapter on Foreign Corporations, *infra*.

⁶¹ By conformity an agent cannot be served in Oregon if the superior officers were not residents in the district ["county"] where the cause arose and hence could not be served there (*Oregon Code Civ. Proc.* § 54); and a cause not arising in the district cannot be sued there as a consequence of this. *Lung Chung v. Northern Pac. Ry. Co.*, 19 Fed. 254.

In applying the law of Virginia by

ute of Utah a person having property in charge may be served, if no agent can be served.⁶² The distinction between agents and mere employees or contractors must be observed, and "agent" has been held to include officers of the corporation,⁶³ traveling salesmen and solicitors,⁶⁴ solicitors or others paid by commissions but also representing the corporation;⁶⁵ and not to include a member of an advisory committee of the corporation,⁶⁶ or a mere collector of money due to it.⁶⁷ A member of a membership corporation may serve it in such a way that he is also an agent of it.⁶⁸ An agency must in

which service is restricted to the county in which suit is brought (Virginia Code, § 3225), the federal court treats the whole district as a county; hence an agent can be sued only when the superior officers are not servable within the district. *Miller's Adm'r v. Norfolk & W. R. Co.*, 41 Fed. 431.

⁶² An attorney at law "who has any of its property in charge" (Laws Utah, § 3208, subd. 5) is competent to be served if no agent is found. *Saunders v. Sioux City Nursery*, 6 Utah 431, 24 Pac. 532.

⁶³ Vice president is an "agent" on whom service may be made if the president be not found (Rev. St. 1874, c. 110, § 5). *Cook v. Imperial Bldg. Co.*, 152 Ill. 638, 38 N. E. 914, rev'g 46 Ill. App. 279.

Vice president is "any agent" of the corporation. *Norfolk & W. R. Co. v. Cottrell*, 83 Va. 512, 3 S. E. 123.

⁶⁴ A freight soliciting agent for a railroad's "despatch" line of cars may be served under the statute enumerating certain agents "or other" agents. *Bell Jones Co. v. Erie R. Co.*, 168 Iowa 96, 150 N. W. 7.

Traveling salesman is an "agent." *Moinet v. Burnham, Stoepel & Co.*, 143 Mich. 489, 106 N. W. 1126, 13 Det. L. N. 38.

But it has been held that a traveling solicitor for insurance is not an agent who may be served wherever he is found. *Parke v. Commonwealth Ins. Co.*, 44 Pa. St. 422.

Traveling solicitor of foreign railroad cannot be served. *Wilson v. Northern Pac. R. Co.*, 9 Ohio Dec. 634, 16 Cinc. L. Bul. 6.

⁶⁵ Solicitor of consignments to a factor was an agent though paid by commissions, where he furnished means of identifying shipments and reported details to principal. *Crowley, Cook & Co. v. Sumner*, 97 Ill. App. 301. Compare *Temby v. William Brunt Pottery Co.*, 127 Ill. App. 441, aff'd 229 Ill. 540, 82 N. E. 336, which holds that a salesman on commissions held not an agent.

⁶⁶ A member of an "advisory committee" of a foreign corporation is not prima facie its agent. *Fahrig v. Milwaukee & C. Breweries*, 113 Ill. App. 525.

⁶⁷ A bank through which an insurance company only collected premiums and delivered receipts on insurance negotiated by other agents is not an agent of the insurance company for service. *Bankers' Life Ins. Co. of Lincoln v. Robbins*, 53 Neb. 44, 73 N. W. 269.

⁶⁸ Solicitation of membership by another member of a fraternal accident insurance company according to custom constitutes doing business and the member is an agent in the absence of any designated agent (Comp. St. 1909, c. 16, § 8). *Tomson v. Iowa State Traveling Men's Ass'n*, 88 Neb. 399, 129 N. W. 529.

fact exist or be indisputable⁶⁹ wherein the agent may be regarded as representative of the corporation in respect to the proposed litigation,⁷⁰ or regularly employed by it,⁷¹ or such that it may reasonably be supposed that notice will come through him to the corporation.⁷² It is not essential that the person be always an agent in his relation to the corporation, provided he was such in the transaction leading up to the action.⁷³

§ 3001. — Stockholders and members. The distinction between the corporation and its stockholders must again be mentioned in stating that service on the stockholder is not a service on the corporation,⁷⁴ even though the corporation is inactive and without officers

⁶⁹ Evidence held to show no agency. *Bankers' Life Ins. Co. of Lincoln v. Robbins*, 53 Neb. 44, 73 N. W. 269.

Evidence held sufficient to show agency. *Pacific Mut. Life Ins. Co. of California v. Williams*, 79 Tex. 633, 15 S. W. 478; *Choctaw, O. & G. Ry. Co. v. Locke* (Tex. Civ. App.), 92 S. W. 258.

After its counsel has represented that one is agent and he has been served, the corporation cannot dispute it. *Taylor Provision Co. v. Adams Exp. Co.*, 71 N. J. L. 523; 59 Atl. 10, rev'd on other grounds 72 N. J. L. 220, 65 Atl. 508.

⁷⁰ *Saunders v. Adams Exp. Co.*, 71 N. J. L. 520, 58 Atl. 1101; *Mulhearn v. Press Pub. Co.*, 53 N. J. L. 150, 20 Atl. 760; *Norton v. Berlin Iron Bridge Co.*, 51 N. J. L. 442, 17 Atl. 1079.

See also § 2991, *supra*.

⁷¹ An agent must have been one actually appointed by and representing the corporation in some line of employment authorized by its charter. Agency by implication of law is not enough, and a ticket agent of a connecting line, who sold only connecting line tickets honored on defendant's road, was not an agent. *Barnard v. Springfield & N. E. Traction Co.*, 274 Ill. 148, L. R. A. 1916 F 451, 113 N. E. 59, aff'g 194 Ill. App. 218.

Evidence held to show that person

served was a regular agent of defendant. *Gilchrist Transp. Co. v. Northern Grain Co.*, 204 Ill. 510, 68 N. E. 558.

⁷² In a suit under the Act of 1853 service on a conductor is good, being authorized by the statute. He is such an agent as may be expected reasonably to notify corporate officers of the suit. *New Albany & S. R. Co. v. Tilton*, 12 Ind. 3, 74 Am. Dec. 195; *New Albany & S. R. Co. v. Grooms*, 9 Ind. 243.

Manager who was agent is competent. *Lyon v. Crew Levick Co.*, 63 Ill. App. 329.

Assistant manager is agent. *Tenant-Stribbling Shoe Co. v. Hargardine-McKittrick Dry-Goods Co.*, 58 Ill. App. 368.

⁷³ The agent, through whom the particular transaction was done out of which grew the action, is an "agent" of a foreign corporation for service whatever might be his usual custom of dealing as bearing on the fact of agency. *Berkeley v. Culley*, 42 App. Cas. (D. C.) 140.

⁷⁴ As to this distinction, see chapter 1, *supra*. See also *Lillard v. Porter*, 2 Head (Tenn.) 177; *Bache v. Nashville Horticultural Society*, 10 Lea (Tenn.) 436.

Service upon "one of the proprietors of" the corporation is bad. *O'Brien v. Shaw's Flat & Tuolumne*

in service of it, or is dissolved.⁷⁵ In such a case the last incumbent officers should be served.⁷⁶ Under the common law and some statutes a dissolution leaves the stockholders as the reversioners or successors of the corporation, who may sue or be sued for such rights as remain and consequently who should be served if they are defendants. In such a suit, however, they represent themselves, and perhaps the creditors, rather than the corporation.⁷⁷ If the members or stockholders in addition to being such sustain towards the corporation the relation of officers or agents, they may be served as such, but their membership is an immaterial factor in any such capacity for service.⁷⁸

§ 3002. — Vacant offices, resignations, removals and expiration of office or authority. It has already been stated that a de facto or acting officer is competent to represent the corporation,⁷⁹ and a corollary to this is that no vacancy de jure but only a vacancy in fact in the incumbency of an office prevents service through it according to the statutory method. Since the person served must have borne a representative relation to the corporation or a duty that presupposes notice to the corporation through service on him,⁸⁰ service upon a corporate officer who has resigned or ceased to be such prior to

Canal Co., 10 Cal. 343; *Rand v. Proprietors of Upper Locks & Canals on Connecticut River*, 3 Day (Conn.) 441.

⁷⁵ Even if corporation was dissolved such service will not bind other stockholders. *DeWolf v. Mallett's Adm'r*, 33 Ky. (3 Dana) 214.

Principal stockholders cannot be served even if the corporation is inactive and has elected no officers. The last elected ones should be served. *Bache v. Nashville Horticultural Society*, 10 Lea (Tenn.) 436.

As against other stockholders, service on a stockholder made after the corporation has ceased to do business is inoperative, though he was a director while the corporation was going. *Stanton v. Gilpin*, 38 Wash. 191, 80 Pac. 290.

⁷⁶ See § 3002, *infra*.

⁷⁷ See § 2955, *supra*, also chapter on Forfeiture, Dissolution and Winding Up, *infra*.

⁷⁸ See § 2991 et seq., *supra*, and especially § 3000, *supra*.

⁷⁹ See § 2991, *supra*, and also the following:

De facto officers, *Berrian v. Methodist Society*, 13 N. Y. Super. Ct. 682, 4 Abb. Pr. 424.

A subsequent collateral decision that he was not de jure an officer is immaterial. *Stillman v. Associated Lace Makers' Co.*, 14 N. Y. Misc. 503, 35 N. Y. Supp. 1071.

Acting cashier or treasurer. *Russell v. Pittsburgh Life Insurance & Trust Co.*, 62 N. Y. Misc. 403, 115 N. Y. Supp. 950.

One who tacitly acts as director without a formal acceptance of election is competent. *Danville & W. R. Co. v. Brown*, 90 Va. 340, 18 S. E. 278.

⁸⁰ See § 2991, *supra*.

the time of service is not sufficient to bring a corporation into court, although the vacancy has not been filled.⁸¹ The representative relation must have ceased, and mere absence, inactivity, and the devolution of duties on a substitute do not amount to that.⁸² Expiration of his elective or appointive term is not equivalent to a cessation of representative capacity, if by the general law or the by-laws his office is regarded as continuing until the election or appointment and induction of his successor.⁸³ Neither does a resignation ipso facto determine his representation; for there must be an acceptance or its equivalent before there is a vacancy,⁸⁴ and it has even been held that

⁸¹ *Continental Wall-Paper Co. v. Lewis Voight & Sons Co.*, 106 Fed. 550; *Yorkville Bank v. Henry Zeltner Brewing Co.*, 80 N. Y. App. Div. 578, 80 N. Y. Supp. 839; *Silverstein v. Emblem Realty Co.*, 128 N. Y. Supp. 655; *Grossman Bros. & Rosenbaum v. Atlas Const. Co.*, 119 N. Y. Supp. 164; *Klopsch v. Atlas Const. Co.*, 117 N. Y. Supp. 805; *Phillips v. Albert*, 81 N. Y. Misc. 131, 142 N. Y. Supp. 325; *Persons v. Buffalo City Mills*, 29 N. Y. App. Div. 45, 51 N. Y. Supp. 645; *Lushington v. Seattle Auto & Driving Club*, 60 Wash. 546, 111 Pac. 785; *Stanton v. Gilpin*, 38 Wash. 191, 80 Pac. 290.

See also cases cited in notes following:

⁸² Service on the elected president was good, though he had left the county, was inactive in the corporation, and a president pro tem. had been chosen and was acting. *Eel River Nav. Co. v. Struver*, 41 Cal. 616.

⁸³ That the officer continues indefinitely on an election "for the ensuing year," see *McCall v. Byram Mfg. Co.*, 6 Conn. 428.

The last incumbent president may be served until a successor is chosen. *Colorado Debenture Corporation v. Lombard Inv. Co.*, 66 Kan. 251, 97 Am. St. Rep. 373, 71 Pac. 584; *Ft. Scott v. Schulenberg*, 22 Kan. 648.

Failure to elect successor does not terminate office. *Yoree v. Home*

Town Mut. Ins. Co., 180 Mo. 153, 79 S. W. 175.

Failure of re-election without election of successor leaves officer qualified. *Fridenberg v. Lee Const. Co.*, 27 N. Y. Misc. 651, 58 N. Y. Supp. 391.

⁸⁴ An unaccepted resignation by one (a vice president) who was served while continuing to act is not a disabling fact. *Venner v. Denver Union Water Co.*, 40 Colo. 212, 122 Am. St. Rep. 1036, 90 Pac. 623. Especially where articles provide that directors shall serve until successors are elected. *Id.*

Acceptance formally of director's resignation is not necessary to make it effective, especially where notice was given. *Wilson v. Brentwood Hotel Co.*, 16 N. Y. Misc. 48, 37 N. Y. Supp. 655.

Resignation to take effect at once held to disqualify president without formal acceptance. *Yorkville Bank v. Henry Zeltner Brewing Co.*, 80 N. Y. App. Div. 578, 80 N. Y. Supp. 839, 33 N. Y. Civ. Proc. 348, 80 N. Y. Supp. 839.

Evidence that "formal resignation" was signed is not enough. *Straus v. Schisgall & Kienzie Co.*, 144 N. Y. Supp. 316.

An unaccepted resignation within term does not end the officer's capacity to be served. *Ross v. Western Land & Irrigation Co.*, 223 Fed. 680.

in addition there must be a successor elected before competency for service is ended,⁸⁵ and that with all this it may be unavailing against third persons to their prejudice.⁸⁶ It is the fact of a cessation of representative capacity which makes the person incompetent for service thereafter, and not any knowledge or notice thereof brought home to the plaintiff or plaintiff's belief on the subject.⁸⁷ However, it may be presumed that the incumbency has continued, and the belief of the officer or his conclusion will not prevail against such presumption.⁸⁸

In the case of an agent the rule is similar, and if the agency has ceased, service on the agent thereafter is not good.⁸⁹ This is the case where one formerly an agent has become an independent contractor with the corporation.⁹⁰ It is not necessary that there shall have been any notice of the cessation of the agency to make it effective for this purpose.⁹¹ In the agent's case also the existence, continuance

The fact that by statute directors may fill a vacancy in the board does not imply that a resignation of a director cannot be effective until his successor is chosen. *Fearing v. Glenn*, 73 Fed. 116.

⁸⁵ It is within the power of the corporation to elect a successor and thereby terminate all relationship to it of the officer who has so resigned, and if it fails so to do it will not be permitted, as against creditors, to take advantage of its neglect. *Colorado Debenture Corporation v. Lombard Inv. Co.*, 66 Kan. 251, 97 Am. St. Rep. 373, 71 Pac. 584; *Yorkville Bank v. Henry Zeltner Brewing Co.*, 80 N. Y. App. Div. 578, 80 N. Y. Supp. 839; *Carnaghan v. Exporters' & Producers' Oil Co.*, 57 Hun (N. Y.) 588, 11 N. Y. Supp. 172; *Noble v. Euler*, 20 N. Y. App. Div. 548, 47 N. Y. Supp. 302; *Sturgis v. Crescent Jute Mfg. Co.*, 57 Hun (N. Y.) 587, 10 N. Y. Supp. 470; *Timolat v. S. J. Held Co.*, 17 N. Y. Misc. 556, 40 N. Y. Supp. 692; *Wilson v. Brentwood Hotel Co.*, 16 N. Y. Misc. 48, 37 N. Y. Supp. 655.

⁸⁶ As where all resigned. *Evarts v. Killingworth Mfg. Co.*, 20 Conn. 447.

⁸⁷ The fact that plaintiff's attorney disbelieved in the bona fides and reality of the resignation does not qualify the officer for service. *Buchanan v. Prospect Park Hotel Co.*, 14 N. Y. Misc. 435, 35 N. Y. Supp. 712. But see *Colorado Debenture Corporation v. Lombard Inv. Co.*, 66 Kan. 251, 97 Am. St. Rep. 373, 71 Pac. 584.

⁸⁸ An officer is presumed to continue as such until termination of his incumbency is shown. His bare conclusion that it had is not proof. *Quitman Oil Co. v. Peacock*, 14 Ga. App. 550, 81 S. E. 908.

⁸⁹ Expiration of the contract term of agency which still continued in fact is immaterial. *Gross v. Nichols*, 72 Iowa 239, 33 N. W. 653.

⁹⁰ *Combs v. Hamlin Wizard Oil Co.*, 58 Ill. App. 123.

⁹¹ *Equitable Produce & Stock Exchange v. Keyes*, 67 Ill. App. 460.

Changing an employee to an independent contractor renders him incompetent without regard to notice of such change, there being no agency thereafter held out. *Combs v. Hamlin Wizard Oil Co.*, 58 Ill. App. 123.

or termination of the agency is a question of fact⁹² not determinable by the agent's declarations.⁹³

In the case of officers or agents holding a dual relation to the corporation in either of which relations he was competent for service, termination of one relation does not affect his competency to be served in the remaining capacity.⁹⁴

A designated resident agent's capacity to receive service is not lost by failure to renew the appointment at the end of his year.⁹⁵ It has been held of a statute requiring the filing of a list of the officers, that noncompliance did not authorize service on former officers who had ceased to be such.⁹⁶ A statutory agent's power to receive service cannot be revoked, it has been held in the case of a foreign corporation, to the prejudice of residents holding rights prior in time,⁹⁷ or while there are outstanding policies or contracts made or existing under it.⁹⁸ Subject to this it is revoked by cessation or withdrawal from business in the state,⁹⁹ or by the act of the official him-

⁹² Service on an agent who had been competent for service and had often previously been served is good. *Hill v. Morgan*, 9 Idaho 718, 76 Pac. 323.

⁹³ Mere declarations by the former agent that he was yet agent are not binding. *Boynton v. Keeseville Elec. Light & Power Co.*, 5 N. Y. Misc. 118, 25 N. Y. Supp. 741.

⁹⁴ If one served as vice president and managing agent retains the latter office, it suffices. *Coast Land Co. v. Oregon Pacific Colonization Co.*, 44 Ore. 483, 75 Pac. 884.

⁹⁵ *Hamilton v. Wilder*, 31 Vt. 695.

⁹⁶ Failure to file a list of officers with the county auditor (Rem. & Bal. Code, §§ 3691, 3692), does not justify service on one who has ceased to be an officer. *Lushington v. Seattle Auto & Driving Club*, 60 Wash. 546, 111 Pac. 785.

⁹⁷ Revocation of insurance commissioner's designation held ineffectual as to a citizen who had become assignee of a foreign claim before revocation made. *Hunter v. Mutual Reserve Life Ins. Co.*, 118 N. Y. App. Div. 94, 103 N. Y. Supp. 70. So as to a

resident who took a policy before revocation. *Woodward v. Mutual Reserve Life Ins. Co.*, 178 N. Y. 485, 102 Am. St. Rep. 519, 71 N. E. 10. But the revocation is effective against a resident who took a foreign claim afterwards. *Hunter v. Mutual Reserve Life Ins. Co.*, 184 N. Y. 136, 30 L. R. A. (N. S.) 677, 6 Ann. Cas. 291, 76 N. E. 1072. (The foregoing decisions were made on consideration of the faith and credit to be given a foreign judgment made on such service.)

See generally chapter on Foreign Corporations, *infra*.

⁹⁸ A consent to be served through the insurance commissioner cannot be revoked as long as there are outstanding policies in the state. *Com. v. Provident Sav. Life Assur. Society*, 155 Ky. 197, 159 S. W. 698; opinion modified in another respect on rehearing 155 Ky. 771, 160 S. W. 476.

Withdrawal does not prevent service on the auditor on a cause of action arisen within the state from business done therein. *S. M. Smith Ins. Agency v. Hamilton Fire Ins. Co.*, 69 W. Va. 129, 71 S. E. 194.

⁹⁹ A statute for service on foreign

self in revoking the license of the corporation to which his authority is an incident.¹ A domiciliary dissolution of the corporation also necessarily revokes such a designation to most intents and purposes, though possibly not as to similar residents and rights.² Until a case is presented of an attempted revocation by a domestic corporation of the designation of such an agent, and service on him thereafter, the question should be treated as one pertaining to foreign corporations,³ or of the constitutional faith and credit guaranteed to foreign judgments, which was the real point in some of the cases just cited.

§ 3003. — Dissolution, suspension or dormancy of corporation. In cases of dissolution or suspension of the corporation further questions obtrude. First, if before the action is commenced, what was its effect, to extinguish the corporation, or to leave it in existence for winding up purposes, or to make a receiver or liquidator the person to sue or defend in its stead?⁴ Second, if *pendente lite* but so that additional service may be required, did the action wholly abate or was it continued by force of statute?⁵ Third, assuming its continuance in some form, on whom does the representation of the corporation devolve for that purpose?⁶ The answers to these questions, found at the places referred to, will lead back to the question whether the required representative capacity has terminated or been extinguished, and that is met by the ordinary rules stated in this section. Dissolution or suspension goes not to cessation of the representative authority to be served as it does to cessation of the principal's existence or its functions for the time being. An apparent contrariety

(insurance) companies through a public officer if no agent has been designated, ceases to authorize such service when the company ceases to do business in the state. *People v Commercial Alliance Life Ins. Co.*, 7 N. Y. App. Div. 297, 40 N. Y. Supp. 269.

See chapter on Foreign Corporations, *infra*.

¹ The revocation by the insurance commissioner of leave to do business in the state extinguishes a consent that he should represent the corporation for service therein. *Swann v. Mutual Reserve Fund Life Ass'n*, 100 Fed. 922.

² After dissolution in the domicile the superintendent of insurance cannot

receive service for a foreign company merely because he has custody of its assets. *Martyne v. American Union Fire Ins. Co. of Philadelphia*, 168 N. Y. App. Div. 380, 153 N. Y. Supp. 433, order affirmed 216 N. Y. 183, 110 N. E. 502.

³ See chapter on Foreign Corporations, *infra*, as to the making and revocation of such designations and their effect.

⁴ See generally chapters on Forfeiture, Dissolution and Winding Up; Receivers; Insolvency; Bankruptcy, *infra*.

⁵ See §§ 2954, 2955, *supra*.

⁶ See references in two preceding footnotes.

of opinion exists as to the competency of a station agent or other operating agent to receive service on his corporation where it has gone into the hands of receivers who are operating the property. The majority hold such an agent incompetent basing the conclusion expressly or impliedly, or without any other perceptible reason, on the fact that the agency for the corporation has ceased and another agency for the receivers has taken its place.⁷ The same reasoning leads to a like result where an operating company or a corporate successor has become a new principal.⁸ This rule is not altered by the fact that the successor takes under a proviso that all rights of creditors shall be preserved.⁹ Some authorities, however, have reached the conclusion that the agency for the corporation continues notwithstanding such receivership or other change, and if this is true in fact there is no reason in law against such dual agency, outside of possibly some inhibiting statute.¹⁰ When reduced to reasons the

⁷ Receivers' agent, though formerly agent of the railroad corporation is not competent. *Webster v. International & G. N. Ry. Co.*, — Tex. Civ. App. —, 184 S. W. 295.

See the cases cited § 2991, *supra*, to the proposition that the agent of a receiver is not the representative of the corporation and therefore cannot be served.

⁸ Extinction of agency by sale of defendant's property and franchise to another into whose sole service the agent enters disqualifies him. *Pennington & Evans v. Douglas, A. & G. R. Co.*, 6 Ga. App. 854, 65 S. E. 1084.

Lessor cannot be served by serving agent, who has ceased to be such agent for lessor and has become lessee's agent. *Perry v. Brunswick & W. R. Co.*, 119 Ga. 819, 47 S. E. 172; *Chicago, B. & Q. R. Co. v. Weber*, 219 Ill. 372, 4 L. R. A. (N. S.) 272, 76 N. E. 489, *rev'g* 121 Ill. App. 455 (evidence to show which was real principal considered).

In suit against a corporation selling its entire property, service on a party who had been ticket agent of the selling corporation and retained the same position with the purchasing corporation is not sufficient. *Thomson v.*

McMorran Milling Co., 132 Mich. 591, 94 N. W. 188.

⁹ A former corporation cannot be served through one who has ceased to be its agent and has become agent for a successor. *Thomson v. McMorran Milling Co.*, 132 Mich. 591, 94 N. W. 188, 10 Det. L. N. 48.

¹⁰ A station agent does not lose his relationship to the railroad company and become incompetent for service by appointment of receivers and notice from them to him of their control. *Ennest v. Pere Marquette R. Co.*, 176 Mich. 398, 47 L. R. A. (N. S.) 179, Ann. Cas. 1915 B 594, 142 N. W. 567.

Receivership does not of itself terminate a division superintendent's managing agency for a railroad company, though he continues serving the receivers. *Faltiska v. New York, L. E. & W. R. Co.*, 12 N. Y. Misc. 478, 33 N. Y. Supp. 679, but see dissenting opinion.

The mere fact that the railroad has gone into receivers' hands since the agent's appointment does not terminate the agent's authority. *Simpson v. East Tennessee, V. & G. Ry. Co.*, 89 Tenn. (5 Pickle) 304, 15 S. W. 735.

apparent conflict is largely dispelled. In the case of an officer appointed as receiver his official capacity remains and he can be served as an officer to bring the corporation into court.¹¹

Total dormancy of the corporation¹² or the reduction of the number of officers below the legal requirement¹³ will not destroy the competency of the last officers for service, and resignations of officers concerted to prevent service are of no avail.¹⁴ Either because of their presumably continued incumbency or because of statutes so enacting, it is sufficient to serve the late officer or officers,¹⁵ or lawful substitutes if they be not found,¹⁶ and a statute authorizing publication in such a case¹⁷ is not exclusive of service on them if their competency is continued, despite the dissolution for the purpose of winding up the corporation.¹⁸

¹¹ *Venner v. Denver Union Water Co.*, 40 Colo. 212, 122 Am. St. Rep. 1036, 90 Pac. 623.

¹² Total liquidation, distribution and a resolution of final dissolution with a surrender of all stock leaves all directors subject to service. *Carnaghan v. Exporters' & Producers' Oil Co.*, 57 Hun (N. Y.) 588, 11 N. Y. Supp. 172.

¹³ Resignations reducing the number of directors below the legal number, but still leaving the president and some directors, will not be considered ineffectual. *Wilson v. Brentwood Hotel Co.*, 16 N. Y. Misc. 48, 37 N. Y. Supp. 655.

¹⁴ The formal resignations and records thereof will be disregarded. *Evarts v. Killingworth Mfg. Co.*, 20 Conn. 447.

¹⁵ Last president may be sued in case of cessation of business and attempt abortively to dissolve. *Simms v. Bialy Hardware & Supply Co.*, 187 Mich. 375, 153 N. W. 821.

Last vice president of an insolvent and inactive corporation held chief officer, president being absent. *Youree v. Home Town Mut. Ins. Co.*, 180 Mo. 153, 79 S. W. 175.

By statute late president, cashier or director may be served. *Blake v. Hinkle*, 18 Tenn. 218.

Holdover officers may be served in a winding up suit. *Parker v. Bethel Hotel Co.*, 96 Tenn. 252, 31 L. R. A. 706, 34 S. W. 209.

The late officer can be sued where the corporation is defunct under the statute making it suable "as before" (Code, § 1103). *Richmond Union Passenger Ry. Co. v. New York & S. B. Ry. Co.*, 95 Va. 386, 28 S. E. 573.

Late officers can be served in chancery and, though their answers disclaim the right to answer officially, if they recognize the service the court has jurisdiction. *Lewis' Adm'r v. Glenn*, 84 Va. 947, 6 S. E. 866.

Under laws of Wyoming (Rev. St. § 560) trustees hold over and may be served though the corporation has suspended. *Swan Land & Cattle Co., Ltd. v. Frank*, 39 Fed. 456.

¹⁶ In Michigan a corporation continued after expiration is subject to the same substituted service as going corporations where none of the named officers are found. *Merrill v. Montgomery*, 25 Mich. 73.

¹⁷ In case of want of officers the statute authorizes publication. *United New Jersey Railroad & Canal Co. v. Hoppock*, 28 N. J. Eq. 261.

¹⁸ The late president of a defunct corporation, continued by statute for suing or being sued, may be served

§ 3004. — Adverse interest of agent or officer as disqualification.

It is an undisputed principle of law that if the officer or agent who might otherwise be served is adverse in interest to the corporation in the matter of litigation,¹⁹ as where he is the plaintiff or one of them,²⁰ he cannot be served to bind the corporation, and if served that the judgment will be voidable at its instance.²¹ If two are served and only one is disqualified by interest, the service is good.²² One who is contingently interested in the recovery cannot be served,²³ and the fact that the officer served was assignor of the plaintiff affects the officer with an interest consisting in the possibility of recourse to him.²⁴ Attorneyship in law,²⁵ or in fact²⁶ for plaintiff, is a disqualifying interest. Mere consanguinity to the corporation's surety on the note in suit does not render the officer incompetent because

as a necessary incident of being amenable to suit "as before." The added clause of the statute (Code, § 1103) for service by publication is cumulative. *Richmond Union Passenger Ry. Co. v. New York & S. B. Ry. Co.*, 95 Va. 386, 28 S. E. 573.

¹⁹ *White House Mountain Gold Min. Co. v. Powell*, 30 Colo. 397, 70 Pac. 679.

²⁰ *St. Louis & S. Coal & Mining Co. v. Sandoval Coal & Mining Co.*, 111 Ill. 32; *St. Louis & S. Coal & Mining Co. v. Edwards*, 103 Ill. 472. And see *Whittlesey v. Delaney*, 73 N.Y. 571, where after service the papers were turned over to plaintiff trustee's attorney for attention.

If the person has an antagonistic personal interest he cannot be served (school district and claimant to office served with process by his own hand). *People v. Feicke*, 252 Ill. 414, 96 N. E. 1052.

Service on president as a member is invalid where he is plaintiff in the action notwithstanding there was not found the "clerk, secretary, agent, or other officer having charge" (Rev. St. c. 90, § 43). *Buck v. Ashuelot Mfg. Co.*, 4 Allen (Mass.) 357.

²¹ As to avoidance of judgment, see § 3118, *infra*.

²² Service on the president and secretary in a suit by the president against the corporation. *Schaeffer v. Phoenix Brewery Co.*, 4 Mo. App. 115.

²³ One to whom loss under a policy may become payable on his interest appearing is disqualified thereby as agent for service. *North British & Mercantile Ins. Co. v. Storms*, 6 Tex. Civ. App. 659, 24 S. W. 1122.

²⁴ *Swift v. Globe Varnish Co.*, 1 N. Y. City Ct. 43.

Because of his contingent warranty that a chose in action exists against defendant. *Atwood v. Sault Ste. Marie Light, Heat & Power Co.*, 148 Mich. 224, 118 Am. St. Rep. 576, 111 N. W. 747, 14 Det. L. N. 71.

²⁵ Service on defendant's president who is also attorney for plaintiff is voidable on proper objection thereto, but not void. It may be waived. *United States Blowpipe Co. v. Spencer*, 46 W. Va. 590, 33 S. E. 342.

²⁶ Officer who held power of attorney in fact for a stranger to sue the corporation cannot be served as its agent. *George v. American Ginning Co.*, 46 S. C. 1, 32 L. R. A. 764, 57 Am. St. Rep. 671, 24 S. E. 41.

the surety will wish that the principal, the corporation, be made to satisfy the amount.²⁷

§ 3005. Substituted or constructive service—In general. Substituted service is that wherein by statute an agent, actual or assumed, is served instead of the person himself, differing from constructive service in that there is an actual service on a person. It is a statutory or chancery term of somewhat difficult, if not doubtful, application to a corporation; for the corporate entity is incapable of service other than through persons representative of it. Hence it is true in a sense, that all service on corporations is strictly either substituted or constructive, as was said in a Florida case; but no such strict meaning can be accepted in the face of the great number of cases which tacitly recognize the possibility of a "personal" or actual service as distinguished from constructive service.²⁸ The term is sometimes used in the broad sense of a statement that the corporate entity can only be served upon some person who represents it.²⁹ By way of distinction from the regular mode of actual service on officers or agents designated by the law as competent, the term substituted service has been applied to that made according to stat-

²⁷ President of a bank held not disqualified because his father was surety on note sued on and took counsel for his own protection. *Thompson v. Pfeiffer*, 60 Kan. 409, 56 Pac. 763.

²⁸ *Cyc. Law Dictionary*, "Service"; *Rawle's Bouvier's Law Dictionary*, "Service." See N. Y. Code Civ. Proc. § 435 et seq., which provides for substituted service and applies only to residents who cannot be served in the regular manner.

That substituted service cannot be had, because of incapacity of a corporation to conceal itself, see *Hahn v. Anchor Steamship Co.*, 2 N. Y. City Ct. 25.

"Strictly speaking there can be no personal service on a corporation, but only such constructive or substituted service as the law may provide * * * Generally, service is made on the principal officer of a corporation who may be found; this is constructive service strictly speaking;

yet upon such service personal judgments are daily rendered." *Clearwater Mercantile Co. v. Roberts, Johnson, Rand Shoe Co.*, 51 Fla. 176, 4 L. R. A. (N. S.) 117, 120 Am. St. Rep. 153, 40 So. 436.

That all service on corporations is either personal or constructive, see *John McMenamy Investment & Real Estate Co. v. Stillwell Catering Co.*, 267 Mo. 340, 184 S. W. 467, rev'g 175 Mo. App. 668, 158 S. W. 427; *Regent Realty Co. v. Armour Packing Co.*, 112 Mo. App. 271, 86 S. W. 880 (foreign corporation); *Brassfield v. Quincy, O. & K. C. R. Co.*, 109 Mo. App. 710, 83 S. W. 1032; all of which were under the Missouri statutes which admit of no constructive service on domestic corporations, but admit of it on foreign ones.

²⁹ "From the nature of the case the service must be a substituted one." *Lung Chung v. Northern Pac. Ry. Co.*, 19 Fed. 254.

ute on a public officer, owing no actual agency to the corporation but designated for service, in the absence of any competent officer or agent.³⁰ Constructive service of a corporation is that which operates on some res within the state brought under the jurisdiction by levy, seizure, immovable location, or otherwise, accompanied by posting, mailing, publication, or actual notice delivered beyond the state where the process of the court cannot run. It is personal and not constructive where the service is by process of the court served within the state on some one of the officers or agents competent for that purpose.³¹ The great majority of cases dealing with constructive service on corporations are those in which the corporation was foreign, and the bearings of the question will be further considered in the chapter on Foreign Corporations.

The laws authorizing constructive or substituted service on "persons" will also apply to corporations when their terms admit and there is no specific statute on the subject,³² and a statutory power to courts

³⁰ Service on the county auditor where there is no officer or agent found, is substituted service (Rev. Codes, § 4144); and while it has the same effect as personal service it is not a "personal" service. *Brooks v. Orchard Land Co.*, 21 Idaho 212, 121 Pac. 101.

³¹ Cyc. Law Dictionary, "Service"; Rawle's Bouvier's Law Dictionary, "Service." See N. Y. Code Civ. Proc. §§ 438-440 for a statute illustrative of these distinctions.

The personal service beyond the state provided for in Rev. St. 1909, § 1778 has reference only to constructive service under section 1770, and is equivalent in effect only to published service. *John McMenamy Investment & Real Estate Co. v. Stillwell Catering Co.*, 267 Mo. 340, 184 S. W. 467, rev'g 175 Mo. App. 668, 158 S. W. 427.

Service of a railroad corporation on its agent in charge in the chief officer's absence is personal and not constructive. *Brassfield v. Quincy, O. & K. C. R. Co.*, 109 Mo. App. 710, 83 S. W. 1032.

That service on a resident agent of a foreign corporation is constructive service, see *Regent Realty Co. v. Armour Packing Co.*, 112 Mo. App. 271, 86 S. W. 880.

³² *McKendrick v. Western Zinc Min. Co.*, 165 Cal. 25, 130 Pac. 865.

In California the statute (Code Civ. Proc. § 412) names five distinct grounds for published service: (a) resides out of the state, (b) departed from the state, (c) cannot after due diligence be found within the state, (d) conceals himself to avoid service, (e) is a corporation having no managing agent * * * or other officer on whom summons may be served and who cannot [sic] be found, etc.

A statute expressly permitting service beyond the state does not impliedly deny that it could be done before. *Straub v. Lyman Land & Investment Co.*, 30 S. D. 310, 46 L. R. A. (N. S.) 941, 138 N. W. 957.

A foreign corporation trustee under a mortgage which is assailed as void may be brought in by constructive service, the res being the mortgaged land. *McCarter v. Pitman*, Glassboro

to frame writs for proper exercise of their jurisdiction would, it seems, authorize them to adapt the personal mode or other suitable one if the statute made no provision.³³ The statutes in some states make specific provision for such service on corporations,³⁴ but a statute applying to persons and foreign corporations will not authorize constructive service on a domestic corporation to which its mode of execution cannot apply,³⁵ and if a class or classes of corporations amenable to such service is pointed out, it must appear that defendant is of the class.³⁶ Only under statutes which are applicable to him can a justice of the peace or other inferior court acquire jurisdiction by constructive service.³⁷

As previously stated, the better rule is that constructive service on a domestic corporation will not give jurisdiction in personam and does not constitute due process of law for obtaining it,³⁸ though there are some authorities to the contrary;³⁹ but there can no longer be

& Clayton Gas Co., 74 N. J. Eq. 255, 69 Atl. 211, in which no statute is mentioned as warrant for the service.

The statute (Code 1873, c. 166, § 15) providing for personal service beyond the state with like effect as publication does not apply to corporations. (The opinion refers to this as "substituted" service.) *Dillard v. Central Virginia Iron Co.*, 82 Va. 734, 1 S. E. 124.

³³ It has been suggested that in the absence of a provision for constructive service against a domestic corporation the courts having authority to frame suitable writ and a reasonable mode of service (Cal. Code Civ. Proc. § 187) might adopt and frame a mode. *McKendrick v. Western Zinc Min. Co.*, 165 Cal. 24, 130 Pac. 865.

³⁴ Constructive service against domestic corporations is authorized by N. Y. Code Civ. Proc. § 438, subd. 6, which section also authorizes it in certain cases by reason of the subject-matter or nature of the demand.

A special act for service of a given company by posting on a certain post and mailing a copy is not abrogated by a later constitution requiring all laws to have a general operation, nor

is a subsequent amendment merely changing the location of the post invalid. *Nashville & C. R. Co. v. McMahon*, 70 Ga. 585.

That constructive service by order to appear and publication after return of summons not served was binding, see *Stansbury v. Patent-Cloth Mfg. Co.*, 5 N. J. L. 433, rev'd on ground not stated 5 N. J. L. 861.

³⁵ Under statute domestic corporation is not subject to constructive service though it has no officer, agent or place of business within the state. The statute (Rev. St. 1909, §§ 1770, 1778) can apply only to "nonresidents of the state or * * * a corporation of another state, kingdom or country." *John McMenamy Investment & Real Estate Co. v. Stillwell Catering Co.*, 267 Mo. 340, 184 S. W. 487, rev'g 175 Mo. App. 668, 158 S. W. 427.

³⁶ *Webster v. Iowa State Traveling Men's Ass'n*, 165 Fed. 367.

³⁷ Statutes regulating service in courts which have a clerk do not apply to justices of the peace. *Nashville & C. R. Co. v. McMahon*, 70 Ga. 585.

³⁸ See § 2977, *supra*.

³⁹ Jurisdiction in personam of a

any doubt that constructive service is due process of law, when correctly executed, to obtain jurisdiction in rem,⁴⁰ provided that it can be said to have a reasonable tendency to bring notice to the defendant corporation.⁴¹

The grounds and occasions for such service are such as the statute establishes and no other.⁴² It has been held a sufficient ground for such service, having regard to the phraseology of the particular statutes, that the officers and agents have all departed from the state,⁴³ or that they evade service,⁴⁴ or are not or cannot be found in the

corporation operating a railroad within the state can be gained by service made by posting notice according to statute and mailing a copy to the president. (The court points out that persons may be served by leaving a copy at their abodes.) *Nashville & C. R. Co. v. McMahon*, 70 Ga. 585.

Where a domestic corporation has failed to provide officers or agents upon whom any other form of service may be made, service upon it by publication, as provided by statute, will be deemed due process of law. A corporation derives its existence from the state and must necessarily be subject to such restrictions and limitations as the state may see fit to impose with respect to service of process, where the restrictions or limitations are not prohibited by the organic law of the state or by federal authority. "The fundamental object of all laws relating to service of process," said the court, "is to give that notice which will in the nature of things most likely bring the attention of the corporation to commencement of the proceedings against it, and when legislation carries out this clear design, it should not be stricken down by the courts." *Clearwater Mercantile Co. v. Roberts, Johnson, Rand Shoe Co.*, 51 Fla. 176, 4 L. R. A. (N. S.) 117, 120 Am. St. Rep. 153, 40 So. 436. In the case last cited it was argued in the opinion that all service on corporations is technically "substituted or constructive"; and because jurisdic-

tion in personam concededly results from some service on corporations, therefore it follows that constructive service is efficacious for that purpose. The fallacy of this opinion lies in confusing the subjection of the domestic corporation to the enacted processes for obtaining the jurisdiction with the sufficiency of such processes to obtain a given kind or degree of jurisdiction.

⁴⁰ *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; and compare *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222. And see also § 2977, *supra*.

⁴¹ A method of serving a foreign corporation must afford due process of law; hence a law for serving the secretary of state without actual designation by the corporation, and without any publication merely by delivery of a copy is invalid under the 14th Amendment. *King Tonopah Min. Co. v. Lynch*, 232 Fed. 485.

⁴² See generally cases cited in this and the following section.

⁴³ A domestic corporation may be served constructively under Code Civ. Proc. § 412, as a "person" which has departed from the state, all of its officers and agents for service having departed from the state, though its technical legal residence remains. *McKendrick v. Western Zinc Min. Co.*, 165 Cal. 24, 130 Pac. 865.

⁴⁴ Substituted service is proper where corporation's place of business is at president's residence in the county and he evades service. *Bentz v.*

state,⁴⁵ or in the proper county,⁴⁶ and if two more grounds may exist one is enough to show.⁴⁷

§ 3006. — Application and procedure. The procedure for such service is wholly statutory and is strict.⁴⁸ Nothing short of a digest of the statutes of the several states would afford a full and sufficient commentary on the procedure requisite. The local statute must be carefully consulted and followed, and it is here appropriate to say that the decisions involving constructive service on natural persons may afford many valuable precedents, depending on the similarity of the statutes governing it to those governing such service on corporations. A treatment of it as applied to foreign corporations will also be found in a subsequent chapter of this work.⁴⁹ Each kind of corporation must be proceeded against, according to the mode appro-

Crotona Park Realty Co., 81 N. Y. Misc. 364, 142 N. Y. Supp. 193.

For a case in which service by leaving a writ of mandamus at the residence of the absent president was held good, there being circumstances of evasion, see *Bay State Gas Co. v. State*, 4 Pennw. (Del.) 238, 56 Atl. 1114.

⁴⁵ Where an "assistant secretary" lived in the state, it cannot be said that no officer could be found for service. *Leavenworth, T. & S. W. Ry. Co. v. Stone*, 60 Kan. 57, 55 Pac. 346.

Publication against a domestic corporation can be made under Practice Act, par. 5, if the proper person for service cannot be found although the principal office of the corporation is known to be within the state. *Nelson v. Chicago, B. & Q. R. Co.*, 225 Ill. 197, 8 L. R. A. (N. S.) 1186, 116 Am. St. Rep. 133, 80 N. E. 109.

In the federal courts in "lien" cases, provision is made by Judicial Code, § 57, for substituted or constructive service personally outside the state or by publication if that is not practicable. See § 3006, *infra*.

⁴⁶ The corporation can be sued on constructive service only when its located office is, and when the officers ordinarily to be served are not found

there (construing Comp. Laws, § 4835). *People v. Saginaw Circuit Judge*, 23 Mich. 491.

A suit on an insurance policy may be brought where the property lies, and the fact that there is no agent in such county makes publication proper, although defendant is also a bank and if sued as such another venue might have been necessary. *Wytheville Ins. Co. v. Stultz*, 87 Va. 629, 13 S. E. 77.

⁴⁷ Prior to 1882, a domestic corporation could not be served by publication except in the instances of concealment or fraud named in Code, § 218 (2) (4), but in that year an amendment authorized such service if "no officer or agent" to serve "can be found" by due diligence. Intent to defraud or to evade service is not necessary. *Bernhardt v. Brown*, 118 N. C. 700, 36 L. R. A. 402, 24 S. E. 527, 715.

⁴⁸ *John McMenamy Investment & Real Estate Co. v. Stillwell Catering Co.*, 267 Mo. 340, 184 S. W. 467, *rev'g* on dissenting opinion below, 175 Mo. App. 668, 158 S. W. 427.

⁴⁹ See the local statutes and standard treatises on practice. See also chapter on Foreign Corporations, *infra*.

prate to it.⁵⁰ It must be at a county where the action may lawfully be brought.⁵¹ Application for an order for such service must be seasonably made⁵² and accompanied by a sufficient showing by affidavit or otherwise of all necessary or prerequisite facts, including inability to make ordinary personal service.⁵³ The order must with-

⁵⁰ In the case of expired corporations continued by the statute for three years, the service in default of any of the officers named should be substituted in the same manner as going corporations. *Merrill v. Montgomery*, 25 Mich. 73.

Substituted service on the insurance superintendent can only be made under a complaint and a writ showing defendant to be of the class of corporations subject thereto. *Webster v. Iowa State Traveling Men's Ass'n*, 165 Fed. 367.

⁵¹ Where its located office is situate. *People v. Saginaw Circuit Judge*, 23 Mich. 491. See also § 2978 et seq., supra.

Under Practice Act, c. 110, §§ 4 and 2, the corporation can be served by publication only where it has a residence. The principal place of business is such a residence and there may be others where other business is carried on. *Mt. Olive Coal Co. v. Hughes*, 45 Ill. App. 566.

⁵² Long delay (five terms of court) after a return non est inventus will bar an application for published service, especially where it would substantially evade the bar of limitations. *Branch v. Mechanics' Bank*, 50 Ga. 413.

⁵³ Where the affidavit makes out a distinct and independent ground for publication, the insufficiency of a showing as to due diligence to find them is not material. *McKendrick v. Western Zinc Min. Co.*, 165 Cal. 24, 130 Pac. 865.

The Practice Act, par. 5, enables service by publication to be made if the proper persons for service cannot

be found in the county, notwithstanding the principal office of the corporation is known to be within the state. *Nelson v. Chicago, B. & Q. R. Co.*, 225 Ill. 197, 8 L. R. A. (N. S.) 1186, 116 Am. St. Rep. 133, 80 N. E. 109. Accordingly, where the statute provided for publication as in chancery cases (Chancery Act, §§ 12, 13), which requires affidavit that defendant could not be found, or resides out of or has gone out of the state, this is to be construed with the other statute; and in the case of a corporation the inconsistent averments should be omitted. Id.

Personal service beyond the state by unofficial persons without any service within the state will not give jurisdiction of a forfeiture suit, although no officer for service has been found within the state. There must be a sheriff's return to support it. *Eel River R. Co. v. State*, 143 Ind. 231, 42 N. E. 617.

Affidavit must state according to statute that officers "cannot be found." That plaintiff is unable to find them is not the same. *Leavenworth, T. & S. W. Ry. Co. v. Stone*, 60 Kan. 57, 55 Pac. 346.

A statement that none resides in the county is bad (so held where corporation was continued after expiration by statute). *Merrill v. Montgomery*, 25 Mich. 73.

Substituted service is allowable only when a return clearly shows that ordinary service on an agent cannot be made (foreign corporation). *Buckingham & Hecht v. North German Fire Ins. Co. of New York*, 149 Fed. 622.

out material misnomer describe the defendant⁵⁴ and run against those which are to be so served,⁵⁵ directing the manner of service, if that is left to the court.⁵⁶ In the case of service on a public officer in default of corporate officers or agents, or under the statute as a substitute for them, all necessary acts, such as the mailing by him of the required notice, must be done before the service is complete.⁵⁷ Mailing not required as part of the process may, it is held, be presumed.⁵⁸

§ 3007. Place for service—In general. The ordinary place for service of natural persons will apply to corporations as a corollary to the rule that they are to be sued as are natural persons, and accordingly the limitary restrictions on the power of courts to send their process to another county or of the officer or server to make service in another county than the one whence process comes must be considered as an unwritten part of the subject-matter of this section. The statutes must be examined not only to see how and where process against corporations may or must be served, but also to see how and where ordinary process for commencing a suit may or must be served. Only those cases which exhibit some peculiar law of corporations are here considered. Service in personam must be within the state and within the county or counties thereof to which the process of the court can lawfully run, this being especially true of

⁵⁴ Publication against the "Farmers' Loan & Trust Co.," a name commonly used and correct except for omission of the words, "of Kansas," is good. *King v. Wilson*, 86 Kan. 227, Ann. Cas. 1913 B 1246, 120 Pac. 342.

⁵⁵ Where a sufficient affidavit was made but the order for publication ran against other defendants only and not against the corporation, it was not good as to it. *Styles v. Laurel Fork Oil & Coal Co.*, 45 W. Va. 374, 32 S. E. 227.

⁵⁶ In a lien case under Act of March 3, 1875, § 8 (Judicial Code, § 57), service must and can be made on an absent domestic corporation only in the prescribed way. Mere service in a foreign state on the president by order of the judge is bad. *Kent v. Hon-singer*, 167 Fed. 619. But under that statute the order for service should

be for actual service if practicable and for publication only when impracticability of actual service appears. *Hicks v. Crawford Coal & Iron Co.*, 190 Fed. 334.

Service in Illinois on an officer of an Iowa corporation on process out of a federal court of Florida, held bad. *Hillsworth Trust Co. v. Parramore*, 108 Fed. 906.

⁵⁷ Where the insurance commissioner failed to forward the copy of summons by mail to the company, the service is incomplete. *Chicago Life Ins. Co. v. Robertson*, 147 Ky. 61, 143 S. W. 740.

Mailing copies to persons not shown by affidavit or on the record to have had any connection with defendant does not satisfy statute. *Scorpion Silver Min. Co. v. Marsano*, 10 Nev. 370.

⁵⁸ Mailing of copy by insurance com-

inferior tribunals,⁵⁹ and within that county or counties, or lesser divisions to which the serving officer's authority may be limited. Personal service beyond the state, as already stated, is inefficient to give jurisdiction in personam but may be due process in rem.⁶⁰ In addition to these limitations, which are common to all process, there are many statutes requiring that the service must be made at a particular county or may be made in any county, or in any where there is a place of business, or an agency,⁶¹ or along the line of defendant's railroad.⁶² Thus it is enacted in numerous states that the officer or agent must be served in the county where he resides, or where the agency or place of business is, or where the cause arose; such a limitation forbids service on the same agent or officer at another place. On the other hand, if it is permissive, then he may be served there or at some other lawful place.⁶³

missioner need not affirmatively appear where it is no part of the process but merely an imposed duty of his after service is made. *State v. Brotherhood of American Yeomen*, 111 Minn. 39, 126 N. W. 404.

⁵⁹ Justice's garnishee process cannot be served outside his county on insurance commissioner to find foreign insurance company. *Hansard v. German Ins. Co. of Freeport*, 62 Mo. App. 146.

The statute (Rev. § 1447) prohibiting a justice from sending process to another county unless one or more bona fide defendants reside within and one or more without the county, does not apply where defendant is a foreign corporation, it being governed by section 1448 which permits it to be sent to the county where defendant's process agent resides. *Allen-Fleming Co. v. Southern R. Co.*, 145 N. C. 37, 58 S. E. 793.

Where a justice has jurisdiction, the statute adopting the practice of county courts, "which are in their nature applicable," enables service to be had outside of the justice's county. *Western Paving Co. v. Binion*, — Okla. —, 150 Pac. 898.

Summons from county court may be

served in another county when jurisdiction is based on defendant's residence, i. e., its road being in the county. Code Civ. Proc. § 347. *Johnson v. Manhattan & Queens Traction Corporation*, 162 N. Y. App. Div. 753, 147 N. Y. Supp. 965.

It has already been stated that extraterritorial service is effectual only for jurisdiction in rem such as publication would give. There are, however, a few decisions to the effect that service beyond the state on a domestic corporation is good service in personam. See §§ 2977, 3005, *supra*.

⁶⁰ See §§ 2977, 3005, *supra*.

⁶¹ For statutes construing the words "place of business," "agency," and the like as contained in statutes fixing the venue or place for trial, see §§ 2979, 2981, *supra*.

⁶² A conductor on an interurban electric railway line may be served "along the line of or at the end of the railroad" though that be in a city (Pub. Acts 1901, Act No. 208), and the proviso that the statute shall not apply to electric railways operating within cities means wholly within their limits. *Halladay v. Detroit United Ry.*, 155 Mich. 436, 119 N. W. 445, 15 Det. L. N. 1050.

⁶³ Georgia. Service upon the gen-

Unless by the terms of the statute a differentiation is made as to

eral manager by leaving a copy of the writ "at his most notorious place of abode" held insufficient. *Stuart Lumber Co. v. Perry*, 117 Ga. 888, 45 S. E. 251. Under statute service by leaving copy at "the most notorious place of abode of" the president is good. *Water Lot Co. v. Bank of Brunswick*, 30 Ga. 685.

Illinois. A director casually in a county on his own business and where the corporation does no business cannot be served. *Silsbee v. Quincy Hotel Co.*, 30 Ill. App. 204.

Indiana. A foreign corporation may be served on its agent in the county where he is and where he transacted the business in suit. *Edwards v. Van Cleave*, 47 Ind. App. 347, 94 N. E. 596. Must be served where agent resides. *Memphis & C. Packet Co. v. Pikey*, 142 Ind. 304, 40 N. E. 527.

Kentucky. Under statute, summons from the county of performance can be sent out for service to the county of residence of defendant's president for service. *Winn v. Carter Dry-Goods Co.*, 102 Ky. 370, 19 Ky. L. Rep. 1418, 43 S. W. 436; *Glasscock v. Louisville Tobacco Warehouse Co.*, 31 Ky. L. Rep. 702, 103 S. W. 319; *Covington v. Limerick*, 19 Ky. L. Rep. 330, 40 S. W. 254. Either on the chief officer or agent in any county where found or on the chief officer or agent in the county of suit. *Louisville & N. R. Co. v. Coleman*, 7 Ky. L. Rep. (abstract) 229.

Louisiana. Where the charter designates the president and he is served but not in the office of the corporation, it having no office in the county, the service is good under the charter and Act No. 267 of 1914, § 25, notwithstanding Act No. 261 of 1908, which points out mode of service, to-wit, by leaving copy at office of corporation.

German-American Nat. Bank v. Front Lawn Co., 138 La. 938, 70 So. 918.

Michigan. Under Laws 1887, Act No. 242, § 3, service on proper officers of the corporation may be made in the county of plaintiff's residence as well as at the defendant's place of business. *Potter v. John Hutchinson Mfg. Co.*, 79 Mich. 207, 44 N. W. 595. Under the Manufacturing Corporations Act of February 5, 1853, the officers named must either be served in the county where defendant's office is or else posting must be resorted to at the business office in that county. Service on officers in another county where suit is brought is invalid. *Dewey v. Central Car & Manufacturing Co.*, 42 Mich. 399, 4 N. W. 179.

Missouri. Under Wagn. St. 294, § 26, the copy may be left at "any business office" with the person in charge if the president is not found. It need not be the president's or the chief office. *Hoen v. Atlantic & P. R. Co.*, 64 Mo. 561. In any county where there is a place of business though it be not the office of the president or chief officer. *Dixon v. Hannibal & St. J. R. Co.*, 31 Mo. 409. An operator's hut where train movements were directed by telegraph at a junction with no business carried on with the public is a "business office," and service may be made there on the operator in charge. *State v. Myers*, 126 Mo. App. 544, 104 S. W. 1146. Where a statute provides that a corporation shall be brought into court by service upon an officer specified made at the office of the corporation, service upon such officer not at the corporate office is not sufficient to bring the corporation into court. *Bente v. Remington Typewriter Co.*, 116 Mo. App. 77, 91 S. W. 397. A statute providing that in service on town mutual insurance companies a certified copy of the petition and sum-

them, equity writs are to be served at the same places as those in

mons should be served on the president or secretary or other chief officer in charge of the "principal office" of such company is not satisfied by service made on the secretary in charge of the "usual business office" of the corporation. *Thomasson v. Mercantile Town Mut. Ins. Co.* (Mo. App.), 81 S. W. 911. Foreign insurance company being suable in any county in the state on service had on the insurance commissioner (Rev. St. 1909, § 7042), it was no objection that summons was issued to and was served in the county of the commissioner's official residence from the county of suit. *Curfman v. Fidelity & Deposit Co. of Maryland*, 167 Mo. App. 507, 152 S. W. 126. Foreign insurance company may be served through its state agent in another county by process issued to the sheriff thereof. *Stone v. Travelers' Ins. Co.*, 78 Mo. 655.

Nebraska. Service on the chief officer or, if he be not found, on the inferior officers, must under Code Civ. Proc. § 73, be made in "the county" where the office of usual place of business is. *Western Travelers' Acc. Ass'n v. Taylor*, 62 Neb. 783, 87 N. W. 950. The casual presence of a secretary in a county to adjust a claim does not give the corporation "an agency" there to warrant service there under Code Civ. Proc. § 74. *Western Travelers' Acc. Ass'n v. Taylor*, 62 Neb. 783, 87 N. W. 950.

New Jersey. Need not be served on registered agent at registered office (P. L. 1896, p. 291, § 43). *Philadelphia & C. Ferry Co. v. Intercity Link R. Co.*, 73 N. J. L. 86, 62 Atl. 184, aff'd 65 Atl. 1118.

North Carolina. Service on a corporate officer "being at the time of such service in the county where he usually resides" (Rev. St. c. 26, § 3) may be at his usual personal residence or

his usual official residence or office. *Governor v. Raleigh & G. R. Co.*, 38 N. C. 471.

Ohio. May be made on ticket agent in county where defendant operates a line under lease. *Cleveland, C., C. & I. Ry. Co. v. McLean*, 1 Ohio Cir. Ct. 112, 1 Ohio Cir. Dec. 67.

Oregon. Under L. O. L. § 55, the president or other officer may be served either in or out of the county. The other methods of service (on any clerk or agent * * * who may reside or be found in the county, or if no such officer be found then by leaving a copy, etc.) are substituted service which must be made in the county. *Davies v. Oregon Placer & Power Co.*, 61 Ore. 594, 123 Pac. 906 (overruling in part *Holgate v. Oregon Pac. R. Co.*, 16 Ore. 123, 17 Pac. 859). See also *Bailey v. Malheur & H. L. Irrigation Co.*, 36 Ore. 54, 57 Pac. 910; *Farrell v. Oregon Gold-Min. Co.*, 31 Ore. 463, 50 Pac. 186, 49 Pac. 876; *Weaver v. Southern Oregon Co.*, 30 Ore. 348, 48 Pac. 171. The action for wrongful death occurring in Montana cannot be regarded as having arisen in Oregon by reason of the appointment thereof of an administrator who sues. *Lung Chung v. Northern Pac. Ry. Co.*, 19 Fed. 254.

Pennsylvania. In assumpsit at principal place of business. *Brobst v. Bank of Pennsylvania*, 5 Watts & S. 379.

Texas. General agent cannot be served in a county where there is no local agent (Rev. St. art. 1228). *Hamburg-Bremen Fire Ins. Co. v. Moses*, 2 Posey Unrep. Cas. 438. The Act of March 21, 1874, and Act of April 17, 1874, both providing for service on agents in the county of venue, are cumulative to and do not repeal the statute for service at the principal office. *Houston & T. C. R. Co. v. Wil-*

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law actions,⁶⁴ and foreign corporations like domestic ones.⁶⁵ The federal courts in following a law requiring service in a "county" will treat the district as a county.⁶⁶ The return should show the place of service and any facts justifying a particular place which the law requires.⁶⁷

§ 3008. — Substituted place; sending process to another county. The legislature may enact⁶⁸ and numerous statutes have been en-

lie, 53 Tex. 318, 37 Am. Rep. 756. Service by leaving a copy at an office other than the principal one is bad. It is necessary either to make service at the principal office or personally on the agent representing the defendant in the county where suit is brought (Rev. St. art. 1223). *Galveston, H. & S. A. R. Co. v. Gage*, 63 Tex. 568.

West Virginia. Acts 1903, c. 9, amending Code 1906, §§ 1985, 1989, repealed, pro tanto at least, the provision that service must be made where the agent or officer resides, and permits it to be made "in the county in which the property, land or other thing in controversy may be, or in any county where the cause of action arises." *Stout v. Baltimore & O. R. Co.*, 64 W. Va. 502, 131 Am. St. Rep. 940, 63 S. E. 317. This also applies to certain railroad corporations, which as to business carried on in the state are treated as domestic corporations, though in fact foreign (Code 1906, § 2322); and the provision of section 1986 (old section 35) as to foreign corporations generally does not apply to them. *Stout v. Baltimore & O. R. Co.*, 64 W. Va. 502, 131 Am. St. Rep. 940, 63 S. E. 317. See also *Joseph Speidel Grocery Co. v. Warder*, 56 W. Va. 602, 49 S. E. 534, where same was stated as rule in justice's action against domestic corporation. Under the former statute it must be where person resides. *Frazier v. Kanawha & M. Ry. Co.*, 40 W. Va. 224, 21 S. E. 723. Service on president must be in county where he resides on process

from justice of the peace (statutes construed). *Taylor v. Ohio River R. Co.*, 35 W. Va. 328, 13 S. E. 1009.

Wyoming. The phrase, "or if its chief officer be not found in the county upon its cashier * * * or managing agent," uses the word county with reference to that where the principal office is (Rev. St. 1899, § 3516 and Laws 1903, c. 53, p. 62, construed); hence service on president (chief officer) or subordinate officer must be made in that county. Service on him elsewhere is bad. *Harrison v. Carbon Timber Co.*, 14 Wyo. 246, 83 Pac. 215.

⁶⁴ The same mode applies in equity as in law. *Bailey v. Malheur & H. L. Irrigation Co.*, 36 Ore. 54, 57 Pac. 910. See also *Winnesheik Ins. Co. v. Holzgrafe*, 46 Ill. 422.

⁶⁵ A foreign corporation was servable only in the domicile at common law; but by the modern doctrine when it is doing business in another state it consents to be served there as other corporations are. *Aldrich v. Anchor Coal & Development Co.*, 24 Ore. 32, 41 Am. St. Rep. 831, 32 Pac. 756.

As to service on foreign corporations, see generally chapter on Foreign Corporations, *infra*.

⁶⁶ "County" as limiting place for service will be taken to mean "district" in federal practice in the state. *Lung Chung v. Northern Pac. Ry. Co.*, 19 Fed. 254.

⁶⁷ Showing in return, see § 3012, *infra*.

⁶⁸ The statute, enabling the State Bank or the Real Estate Bank to sue

acted providing that the process may be sent out for service in another county,⁶⁹ there to be served by the sheriff of that county, or the sheriff of the original county, or such other person as the statute makes proper.⁷⁰ In the federal courts provision is made for sending the process to the marshal of another district within the state if the action is local in nature, or for personal service wherever found in "lien" cases.⁷¹ The grounds and conditions on which it can be sent out are fixed by the statutes, the general purpose of which is obviously to facilitate or perfect service which could not be had in the venue where suit is laid; and accordingly it has been done under the statutes where the first service was invalid,⁷² where the corporate domicile or main office was in another county,⁷³ or one co-defendant was in

in any county in which the bank or a branch may be and to issue process to other counties, is constitutional and service in another county is good. *Hay v. Bank of State*, 5 Ark. 250; *Tucker v. Real Estate Bank*, 4 Ark. 431.

⁶⁹ Process may be sent out to another county and served there as in case of natural persons (statutes construed). *Western U. Tel. Co. v. Claymore*, 2 Colo. 32.

Where plaintiff brings action in his own county the process must run from there and, if the president cannot be served there, an agent may be; but process cannot be sent into another county for service on the president there residing. *Stephenson Ins. Co. v. Dunn*, 45 Ill. 211.

The same rule applies to chancery suits. *Winnesheik Ins. Co. v. Holzgrafe*, 46 Ill. 422; *Pipkin v. National Loan & Investment Ass'n*, 80 Mo. App. 1.

⁷⁰ The court must have jurisdiction of the cause to issue its process to another county; and it must also follow the statute in directing it to its own officers for service in the other county and not to the officers of such other county, if the statute so requires (Code, § 3220). *Guarantee Co. of North America v. First Nat. Bank*, 95 Va. 480, 28 S. E. 909.

When service cannot be made in the

county where suit is brought, it must be issued to the sheriff where the principal office is situated. *Harrison v. Carbon Timber Co.*, 14 Wyo. 246, 83 Pac. 215.

What persons shall make service, see § 3011, *infra*.

⁷¹ "In suits of a local nature, where the defendant resides in a different district in the same state from that in which suit is brought, plaintiff may have original and final process against him, directed to the marshal of the district in which he resides." Judicial Code, § 54.

Section 57 regulates service upon absent defendants and procedure on their failure to appear "in any suit * * * to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought," etc.

⁷² If the person served as agent was not such, a second original served in another county as directed on the president suffices (Code, § 3369 et seq.), the court having the right to assert its jurisdiction by causing service on the proper officer. *Mitchell v. Southwestern R. R.*, 75 Ga. 398.

⁷³ Summons may be sent to the home county of the corporation for service. *Owensboro Shovel & Tool*

another county,⁷⁴ or request was made to send it out.⁷⁵ A common requirement is that process to the county of suit shall have been returned "not found" or the like.⁷⁶ Only in the cases provided can it be sent to another county or jurisdiction.⁷⁷ The record need not show such facts as are committed to the clerk to ascertain as a condition precedent to sending out the process to another county,⁷⁸ but where

Co. v. Moore, 154 Ky. 431, 157 S. W. 1121.

Citation is properly sent to the county where an agency, presumably the corporate domicile, is situated. *Hunt v. Atchison, T. & S. F. Ry. Co.* (Tex. Civ. App.), 28 S. W. 460.

⁷⁴ The action being begun in a venue proper for one defendant corporation, enables service to be made on the other at its principal office in another county. *George R. Barse Live-Stock Commission Co. v. Turner*, 56 Kan. 778, 44 Pac. 987.

⁷⁵ An injury to property on the road or line of a railroad may be sued in any county where it passes (Civil Code, § 50) and summons may go out to any other county at request (Civil Code, § 60). Hence personal service on the president, or by leaving a copy with his wife at his residence in that county is good. *Newberry v. Arkansas, K. & C. Ry. Co.*, 52 Kan. 613, 35 Pac. 210.

⁷⁶ Under Burns' Stat. 1894, § 318, an agent in D county to receive service was properly served, summons to counties where the road ran having been returned "Not found." *Eel River R. Co. v. State*, 155 Ind. 433, 57 N. E. 388.

When suit against an insurance company is brought where it has a local agent, he must be served there and the writ should not be sent to the home county to be served on the secretary. *Henderson v. Maryland Home Fire Ins. Co.*, 90 Md. 47, 44 Atl. 1020.

By the statute (section 5045) the service on the president is not restricted to the county of suit. If he

be not served there summons may be sent to another county to be served on him, but this need not be done, and the officers secondarily amenable may be served. *Campbell v. Woodsdale Island Park Co.*, 4 Ohio S. & C. Pl. Dec. 152, 3 Ohio N. P. 159.

Necessity of endeavor to serve officer in county before applying to send process to another county, see *Hoen v. Atlantic & P. R. Co.*, 64 Mo. 561.

Showing to support service in another state, see § 3006, supra.

⁷⁷ The statutes for service on corporations must be construed with those fixing the place where suit shall be brought (Code 1873, c. 165) and those which direct what officer may execute the process (chapter 166); and no process can be sent out except in the cases there provided. *Dillard v. Central Virginia Iron Co.*, 82 Va. 734, 1 S. E. 124. Accordingly where the corporation was a resident of the county it could not be sent out; and if it was a domestic corporation of another county sued where the cause of action arose it could not be sent out; and if it was a foreign corporation with jurisdiction in rem only because of property in the county it could not be sent to another state for service with any other effect than a mere notice in rem. *Dillard v. Central Virginia Iron Co.*, 82 Va. 734, 1 S. E. 124, construing the statutes.

⁷⁸ It is presumed that the clerk would not send process to another county for service unless the statutory condition of no person found in the county of suit was ascertained. Hence the record need not show such fact in

the right to have process sent out to another county is dependent on allegations of fact in the complaint, it must show them well pleaded.⁷⁹

§ 3009. Mode and time of service—In general. The necessity of service in conformity to the statutory mode has been stated in a previous section.⁸⁰ In a celebrated case the United States Supreme Court uttered a dictum that the state creating them could provide a mode for serving corporations, which in view of the context and subject of the opinion no doubt means that any legislation would needs be agreeable to due process of law and other constitutional limitations.⁸¹ There may be more than one mode of service, either of which is good,⁸² and a statute providing that service “may” be made in a given way is to be regarded as cumulative.⁸³ A general statute for civil practice with a section for service on corporations will repeal an act applicable to corporations alone,⁸⁴ but an act relating to corporation service generally does not impliedly repeal one relating only to railroad corporations.⁸⁵ If the name of the defendant imports incorporation, the service should accordingly be made as on a corporation.⁸⁶ The mode appropriate to the particular kind of corporation must be followed.⁸⁷ The mode of communicating the notice or

support of process so sent out and served. *Rochester, R. & St. L. Ry. Co. v. Jewell*, 107 Ind. 332, 8 N. E. 215.

⁷⁹ Process can be sent out of the county only on like averments as would be required in the case of natural persons. *Holbrook v. Peoria Bridge Co.*, 3 Ill. 32.

⁸⁰ See § 2989, *supra*.

⁸¹ *Penney v. Neff*, 95 U. S. 714, 24 L. Ed. 565.

⁸² If service on an agent is made and also the alternative mode of leaving a copy is adopted, either will suffice regardless of the other. *El Paso & S. W. Ry. Co. v. Kelly* (Tex. Civ. App.), 83 S. W. 855, rev'd 99 Tex. 87, 87 S. W. 660.

⁸³ Held to indicate an additional mode of service to those elsewhere in the statutes pointed out. *State v. Hannibal & St. J. R. Co.*, 51 Mo. 532.

⁸⁴ Act of March 14, 1877, “to provide for formation of corporations,”

was repealed as to section 30 fixing method of service by the Act of March 17, 1877, “to provide a system of procedure in civil actions,” section 37 providing a mode of service on corporations. *Little Bobtail Gold-Min. Co. v. Lightbourne*, 10 Colo. 429, 15 Pac. 785.

⁸⁵ Act of February 18, 1855, providing for service out of justice courts on the “president, cashier, secretary, or other principal officer,” does not repeal the law permitting service on conductors of railroads. *Fowler v. Detroit & M. Ry. Co.*, 7 Mich. 79.

⁸⁶ Under the statute, garnishee service is the same as in original attachment. Hence service according thereto was held good. *United States Exp. Co. v. Bedbury*, 34 Ill. 459.

⁸⁷ Though Gen. Corp. Act, § 48, prescribes manner of service on corporations “created under this act,” yet as section 3 makes all corporations

command of the writ to the person served, whether by reading, copy or mailing, must be according to the statutory requirement;⁸⁸ and due endeavor to serve the superior officers preferred by the statute for service must be made before recourse to the next class is warranted.⁸⁹ It must be served during such hours of the day as the statute prescribes,⁹⁰ and must also be served a sufficient time before the return day or answer day,⁹¹ and if served for a past day is a nulli-

subject to the act, it applies to pre-existing corporations including those formed under a previous constitution. *Bay State Gas Co. v. State*, 4 Pennw. (Del.) 238, 56 Atl. 1114.

As to railroad companies sued before the justice, the Act of March 21, 1850, is exclusive and the Act of March 14, 1853, applies to other corporations. *North v. Cleveland & M. R. Co.*, 10 Ohio St. 548.

⁸⁸ A statute providing for service on any agent in the county where suit is brought and adding a requirement that the clerk shall mail copy of process to the home office, is imperative as to such mailing without which there is no jurisdiction. *Eminent Household of Columbian Woodmen v. Lundy*, 110 Miss. 881, 71 So. 16.

By New Equity Rule 13 all subpoenas shall be served "by delivering a copy thereof to the defendant personally, or by leaving a copy thereof at the dwelling house or usual place of abode of each defendant with some adult person who is a member of or resident in the family." Former Equity Rule 13 was substantially the same.

Reading or delivering of copy, see § 3010, *infra*.

Mailing and publication according to statute as essential in constructive process, see also §§ 3005, 3006, *supra*.

⁸⁹ See §§ 2993, 2996, 3000, *supra*.

Under a statute (*Wagn. St.* 294, § 26) authorizing service on the president or chief officer, "or in his absence" by leaving a copy at any business office, and also providing for

process to another county if there be no office, or any person in charge of it, or if the chief officer "cannot be found in such county," the officer must endeavor to find and serve the president unless he knows him to be absent from the county as well as from the office. *Hoen v. Atlantic & P. R. Co.*, 64 Mo. 561.

If the superior officer cannot be found on the day service is made, it suffices to warrant service on the next class without waiting to find them, if possible on another day. *Cornwall v. Star Bottling Co.*, 128 Mo. App. 163, 106 S. W. 591.

⁹⁰ "Business" hours means "office hours," and service during business hours is good. *El Paso & S. W. Ry. Co. v. Kelly* (Tex. Civ. App.), 83 S. W. 855, *rev'd* 99 Tex. 87, 87 S. W. 660.

⁹¹ A statute requiring six days was held to exclude the return day of a rule for issuance of an alternative writ of mandamus (*Gen. Corp. Act*, § 48). *Bay State Gas Co. v. State*, 4 Pennw. (Del.) 238, 56 Atl. 1114; *State v. Bay State Gas Co.*, 4 Pennw. (Del.) 214, 57 Atl. 291.

The Act of 1863 cut down the time from fifteen to ten days repealing Act of 1861, which related to corporations having their offices out of the state. *Toledo, L. & B. Ry. Co. v. Shively*, 26 Ind. 181.

The Act of 1853 required service thirty days before return term if the principal office of defendant railroad was not within the state. *Ohio & M. Ry. Co. v. Boyd*, 16 Ind. 438.

Ten days' service before trial of

ty.⁹² The mode of service must ordinarily be shown by the return.⁹³

§ 3010. — Delivery of copy, reading, etc. The statutes generally require that copy be left with the person served,⁹⁴ and it must be such a copy as the requirement contemplates,⁹⁵ including a copy of the complaint.⁹⁶ A copy for each service is necessary though two or more services are made on one person.⁹⁷ Reading and explanation in addition to delivery of copy may be requisite according to the terms

stock killing case before justice is legal if corporation does not appear to have its office outside the state. *New Albany & S. R. Co. v. McNamara*, 11 Ind. 543.

On justice summons against a railroad corporation in actions for stock killed, if the principal office is outside the state, at least thirty days must be given before trial (statutes construed). *Ohio & M. Ry. Co. v. Boyd*, 16 Ind. 438; *Michigan Southern & N. I. R. Co. v. Shannon*, 13 Ind. 171.

Under St. 1785, c. 75, § 8, process against all corporations aggregate must be served thirty days before return day. *Bullard v. Nantucket Bank*, 5 Mass. 99.

Service on July 8th pursuant to direction to serve on or before the 15th gives more than thirty days before a return day on August 9th. *State v. Brotherhood of American Yeomen*, 111 Minn. 39, 126 N. W. 404.

Must be served by attested copy of writ served twenty-eight days before return day (Gen. St. c. 204, §§ 1, 12, 14). *Sleeper v. Free Bapt. Ass'n*, 58 N. H. 27.

Where service is on the president in the county of suit, service need not be ten days before return, as when it is on an agent in another county (Code, §§ 3225, 3227). *Jones & Co. v. C. W. Hancock & Sons*, 117 Va. 511, 85 S. E. 460.

By federal New Equity Rule 12, the answer is due twenty days after service, and a memorandum made on the bottom of the subpoena shall state

that answer or other defense is required "on or before the twentieth day after service, excluding the day thereof."

⁹² *Iron Clad Mfg. Co. v. Benjamin E. Smith & Sons*, 28 N. Y. Misc. 172, 59 N. Y. Supp. 332.

A return showing that it was not timely served is insufficient to sustain jurisdiction. *Staunton Perpetual Building & Loan Co. v. Haden*, 92 Va. 201, 23 S. E. 285.

⁹³ Showing in return, see § 3012, *infra*.

⁹⁴ Copy must be left. Code, § 217. *Aaron v. Pioneer Lumber Co.*, 112 N. C. 189, 16 S. E. 1010.

Leaving a process with a clerk of the person served making return of service on that day and taking the latter's verbal assurance next day that the service would not be disputed is a practice highly censurable, but it constitutes only a technical defect in service regularly returned. *Union Pac. Ry. Co. v. Novak*, 61 Fed. 573.

⁹⁵ Must leave "a true and attested copy." Return of "a copy" left is void. *Com. v. Wilmington & R. R. Co.*, 2 Pearson (Pa.) 408.

⁹⁶ No copy of the petition need be delivered with the citation if it is served on an agent in the county where the suit is brought. *Rev. St. art. 1219. Houston & T. C. R. Co. v. Burke*, 55 Tex. 323, 40 Am. Rep. 808.

⁹⁷ Where a bill pending against the president individually is amended and the corporation is made a party, service of an additional copy on him is

of the particular statute,⁹⁸ but one is not equivalent to the other or a substitute for it.⁹⁹

§ 3011. Persons qualified to make service; disqualification by interest. The service is to be made by the sheriff or other executive officer of the court, and by statute in some states a disinterested private person acquainted with the defendant is allowed to make the service and prove the same by his affidavit performing the office of a return.¹ This is the rule applicable to a suit against a natural person, and there is no different one for a corporation unless there is a statute establishing one. The authority of a public officer, sheriff or constable, to make service on a corporation is not affected by the fact that the defendant is a corporation, unless he is a person disqualified by interest or other personal cause.² A de facto officer³ and a deputy constable⁴ have been held competent. Membership or the holding of stock does not disqualify the person to serve process.⁵

a necessary service. *McRae v. Guion*, 58 N. C. 129.

⁹⁸ The notice subjoined to a declaration in ejectment must be read or explained as well as a copy delivered. *Den v. Fen*, 10 N. J. L. (5 Halst.) 237.

The statute (Practice Act of 1861) does not require that the original be read to the officer served; it merely requires delivery of a copy. The Act of 1862 applying to "companies" was additional but not exclusive. *Gillig, Mott & Co. v. Independent Gold & Silver Min. Co.*, 1 Nev. 247.

⁹⁹ Reading the summons to the person served is bad. Practice Act of July 1, 1872, requires "leaving a copy," etc. *Cairo & V. R. Co. v. Joiner*, 72 Ill. 520; *Grand Tower Min., Mfg. & Transp. Co. v. Schirmer*, 64 Ill. 106 (garnishee summons from justice of the peace).

¹ See statutes of the various states.

In Wisconsin a service by one other than the sheriff requires that he know the corporate defendant and make affidavit thereof in proof of service. *Kernan v. Northern Pac. R. Co.*, 103 Wis. 356, 79 N. W. 403.

An officer or agent of a corpora-

tion cannot commence an action against a corporation, either as plaintiff or as attorney, by serving himself with the process necessary to commence the action, for when he undertakes to bring the action, he abandons, for the time and occasion, at least, his position as its officer or agent. *George v. American Ginning Co.*, 46 S. C. 1, 57 Am. St. Rep. 671. And see *Buck v. Ashuelot Mfg. Co.*, 4 Allen (Mass.) 357; *Rehm v. German Insurance & Savings Institution of Quincy*, 125 Ind. 135.

² See generally treatises on Sheriffs and Constables; Process.

³ *Alabama & V. Ry. Co. v. Bolding*, 69 Miss. 255, 30 Am. St. Rep. 541, 13 So. 844.

⁴ Constable's deputy, a private citizen. *New Albany & S. R. Co. v. Grooms*, 9 Ind. 243.

⁵ *Merchants' Bank v. Cook*, 4 Pick. (Mass.) 405; *Searsburgh Turapike Co. v. Cutler*, 6 Vt. 315. But see contra, *Dunmore Mfg. Co. v. Rockwell*, *Brayton* (Vt.) 18. And see *Washington Ins. Co. v. Price*, 1 Hopk. Ch. (N. Y.) 1.

A clerk of court who is a stock-

§ 3012. Return or proof of service—In general. The return is “a short account in writing made by the sheriff or other ministerial officer of the manner in which he has executed a writ.”⁶ Pursuant to the general law on the subject, it is the duty of the officer or server to make return of the execution of the process, or an affidavit of the facts under some of the statutes, and this should be done on the return day or the day appointed by law or named in the writ.⁷ As such it enters into the record and there forms the evidence of the mode by which the jurisdiction of the court over the person of the corporation was acquired. It therefore must show truly and accurately all of the facts made necessary by the statutes to authorize the service and sustain it as made,⁸ according to the statute applicable to the

holder may sign a writ for the corporation plaintiff. *Vermont Mut. Fire Ins. Co. v. Cummings*, 11 Vt. 503.

⁶ *Stephen on Pleading* (Tyler's Ed.), p. 55; *Cyc. Law Dict.*, “Return.”

⁷ See *Stephen on Pleading* (Tyler's Ed.), p. 55. See also the local statutes as to when return should be made.

⁸ **Delaware.** Return of service of a rule and also a writ on the president held sufficient. *State v. Bay State Gas Co.*, 4 Pennw. 214, 57 Atl. 291.

Louisiana. Must show service at office of corporation, that designated officer if not president was served, and that inquiry was made to ascertain what officer was present amenable to service. *Prince v. Tremont & G. R. Co.*, 128 La. 834, 55 So. 474; *Welch v. New Orleans Great Northern R. Co.*, 128 La. 738, 55 So. 338. Should state that name of person was known to officer or was learned by inquiry, and should state day, month and year of service. Return held bad under Code Prac. arts. 201-203. *O'Hara v. Independence Lumber & Improvement Co.*, 42 La. Ann. 226, 7 So. 533. In action against a religious corporation, return must show that person served was rector (president) or that he was agent and that service was at its office. *Municipality No. 1 v. Christ Church*, 3 La. Ann. 453.

Michigan. Held sufficient on face to serve president. *Wilson v. California Wine Co.*, 95 Mich. 117, 54 N. W. 643.

Mississippi. Return of summons as follows: “I have this day executed the within writ personally upon the within-named defendant, the Iowa Packing & Provision Company, by handing to E. N. Nagle, the agent of said Company, a true copy of this writ,” was valid on its face. *Lamb v. Russell*, 81 Miss. 382, 32 So. 916.

Missouri. Sufficiency in general. *Hudson v. St. Louis, K. C. & N. Ry. Co.*, 53 Mo. 525; *Holtzschneider v. Chicago, R. I. & P. R. Co.*, 107 Mo. App. 381, 81 S. W. 489. Garnishment service. *Antonelli v. Basile*, 93 Mo. App. 138. Return held insufficient to show service in accordance with Rev. St. 1899, § 995, on town mutual insurance company. *Thomaason v. Mercantile Town Mut. Ins. Co.* (Mo. App.), 81 S. W. 911.

Ohio. *Harrow v. Ohio River R. Co.*, 38 W. Va. 711, 18 S. E. 926.

West Virginia. Return held sufficient to show service on “depot or station agent” under Code, c. 52, § 20. *Douglass v. Kanawha & M. R. Co.*, 44 W. Va. 267, 28 S. E. 705.

See also cases cited hereafter in this section. See also local statutes as to what the return must contain.

particular corporation or class of corporations of which defendant is a member.⁹ The return is of itself sufficient evidence of the acquisition of jurisdiction over the corporation, when it is substantially full and complete; so that no additional evidence need be taken as to the agency of the person served.¹⁰ It is also the only evidence or paper that can be considered for that purpose, supporting affidavits being inadmissible to aid it when not assailed by motion to quash,¹¹ and when an amendment is made it must supply all deficiencies.¹² It will be seen in the next section, however, that the return when questioned by motion to quash or otherwise may or may not be conclusive on the recited facts¹³ and other questions arise where the judgment contains express or implied findings that the court had jurisdiction. Does such a finding supply the want of explicitness in the return, and will it overcome an implication against the jurisdiction arising from a deficient or wholly insufficient return? This is a question of the law of judgments, and standard treatises on that subject should be consulted.¹⁴ It is also to be remembered that an appearance may

⁹ Should "show every fact to bring it within statute." Hence return of service on "agent" of express company is bad, it being not a railroad or telegraph company, and being servable only as ordinary corporations (Statutes of 1860 and 1863 construed). *Southern Exp. Co. v. Craft*, 43 Miss. 508.

See also this section, *infra*, as to showing where there are several modes of service not requiring the same facts to sustain them.

¹⁰ Constable's return to justice of the peace is enough to give jurisdiction without independent proof of jurisdictional facts. *New York & E. R. Co. v. Purdy & Adams*, 18 Barb. (N. Y.) 574.

In taking default no further proof than the return that the person served was the defendant's secretary is needed. *San Antonio & A. P. Ry. Co. v. Wells*, 8 Tex. Civ. App. 307, 23 S. W. 31.

Return that person served is agent of defendant is not proof thereof where he was not so designated in the petition and return did not aver serv-

ice on him at the corporate office. *Municipality No. 1 v. Christ Church*, 3 La. Ann. 453.

¹¹ If the return is deficient it cannot be aided by affidavits showing the requisite facts of service and agency. *Brown v. Gaston & Simpson Gold & Silver Min. Co.*, 1 Mont. 57.

¹² *Youngstown Bridge Co. v. White's Adm'r*, 105 Ky. 273, 20 Ky. L. Rep. 1175, 49 S. W. 36.

¹³ See § 3013, *infra*.

¹⁴ In a Texas case where the petition did not describe the agent and name him it was held it must show legal service even though judgment also recites it. It is not sufficient to return that defendant was served; the name of the officer and his office or agency must be given. *Miller v. First State Bank & Trust Co.*, — Tex. Civ. App. —, 184 S. W. 614.

But it has been held that the return need not show all statutory facts if they appear from the record, e. g., in the findings. *El Paso & S. W. Ry. Co. v. Kelly* (Tex. Civ. App.), 83 S. W. 855, rev'd 99 Tex. 87, 87 S. W. 660. The question is not one proper for ex-

cure or waive any deficiency in service or return¹⁵ and the return may be aided by reference to the complaint, especially where, as in Texas, the practice is to describe the agent by name in the petition, i. e., the complaint.¹⁶ In lieu of a return there may be an acceptance or acknowledgment by the proper officer that service was made or was waived.¹⁷

The return must therefore include a statement that the defendant corporation was served, or an implication equivalent thereto,¹⁸ also the name of the officer or agent through whom it was served,¹⁹ and his relation to the corporation, so that it may appear that he was legally competent.²⁰ Furthermore, it should show that the officer

tensive discussion in such a work as this, as no principal of corporation law is controlling or decisive of it. Moreover it is one on which authorities are not in full accord.

See generally standard treatises on Judgments; Collateral Attack, and see §§ 3119, 3124, *infra*.

¹⁵ See § 3019, *infra*.

¹⁶ As to allegations aiding description in summons, see § 2986, *supra*.

¹⁷ See § 3017, *infra*.

¹⁸ *California*. Affidavit that it was "served" describing the person served as managing agent of the corporation, etc., suffices without averment that it was served on the corporation sole defendant. *Keener v. Eagle Lake Land & Irrigation Co.*, 110 Cal. 627, 43 Pac. 14.

Georgia. Return that he "served the defendant, G, general manager of" the corporation, is bad. *Stuart Lumber Co. v. Perry*, 117 Ga. 888, 45 S. E. 251. Return "I have this day served the defendant's agt. [named] with a copy of the within writ, by handing copy to said agt.," is good. *Phillips v. Bond*, 132 Ga. 413, 64 S. E. 456.

Michigan. "Who" in return to replevin held to refer grammatically to the corporation and not the officer served. *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104, 43 N. W. 1006.

Montana. Return of service on C,

"a trustee, being the defendant named in said summons," etc., is bad because it shows that he and not the corporation was defendant, and in any event does not show of what he was trustee. *Mathias v. White Sulphur Springs Ass'n*, 17 Mont. 542, 43 Pac. 921.

¹⁹ Return of service on "— agent of" defendant is bad because it does not name the person served or state that no higher officer was found. (Condemnation suit but service was to be as in ordinary actions.) *Southern Indiana Ry. Co. v. Indianapolis & L. Ry. Co.*, 168 Ind. 360, 13 L. R. A. (N. S.) 197, 81 N. E. 65.

Return of service on "— Schindler, a conductor on train No. 39, a regular passenger train running on said company's railroad" satisfies R. S. 1881, § 4027, which authorizes service "on any conductor on any train on said road passing into or through said county." *Cincinnati, H. & I. R. Co. v. McDougall*, 108 Ind. 179, 8 N. E. 571. The Christian name need not be stated. *Id.*

²⁰ *United States*. Must show relation to defendant corporation, not to some other. *International Text-Book Co. v. Heartt*, 136 Fed. 129.

Arkansas. *Cairo & F. R. R. Co. v. Rea*, 32 Ark. 29; *Cairo & F. R. R. Co. v. Trout*, 32 Ark. 17.

Georgia. In return as to three, one

or agent so served is of the class and rank which is designated,²¹

was designated as "Gen. Son. Agt."; another was described as "Trav. Frt. Agt."; the third was described as "Commercial Agt." These persons were further described as "in charge of office." The court held the service bad, saying: "As will have been observed, there is in this entry no recital that the individuals therein named were agents of this particular railroad company; or that they were in charge of its office; or, indeed, that it had any office in this state. The statement, 'they being in charge of office,' was entirely too general and indefinite to meet the requirements of the statute." *Holbrook v. Evansville & T. H. R. Co.*, 114 Ga. 4, 39 S. E. 938.

Idaho. Proof of service on "manager" is prima facie proof that it was on managing agent. *Densel v. Atlanta Mercantile Co.*, 17-Idaho 432, 106 Pac. 2.

Illinois. Sufficient if it recites service on an "agent" with nothing in the record to contradict his agency. *O'Donoghue v. St. Louis Southwestern Ry. Co.*, 181 Ill. App. 286. Return of service on "vice president" shows service on agent. *Cook v. Imperial Bldg. Co.*, 152 Ill. 638, 38 N. E. 914, rev'g 46 Ill. App. 279. General solicitor is not prima facie an agent. The return must state that he is agent. *Illinois Cent. R. Co. v. Pairpoint Mfg. Co.*, 55 Ill. App. 231.

Maryland. *Northern Cent. R. Co. v. Rider*, 45 Md. 24.

Michigan. *Price v. Delano*, 187 Mich. 49, 153 N. W. 7; *Hoben v. Citizens' Tel. Co.*, 176 Mich. 596, 142 N. W. 1070.

Mississippi. Supreme Ruling of Fraternal Mystic Circle v. Sommers, 108 Miss. 54, 66 So. 322.

Missouri. Description of person served as "state agent of" the de-

fendant foreign insurance company suffices. *Stone v. Travelers' Ins. Co.*, 78 Mo. 655.

Oregon. A statute provided for service on the "president or other head of the corporation, secretary, cashier, or managing agent." The return held insufficient showed service on the "vice president and managing agent." The person served had ceased to be vice president but was at the time of service still managing agent. *Coast Land Co. v. Oregon Pacific Colonization Co.*, 44 Ora. 483, 75 Pac. 884.

West Virginia. Description of person as "attorney in fact and of record for" defendant is bad because it does not show for what purpose he was attorney. *Adkins v. Globe Fire Ins. Co.*, 45 W. Va. 384, 32 S. E. 194.

²¹ **United States.** In a patent infringement case with service on agent it must show that person was an agent at a "regular and established place of business." *Scheuerle v. One Piece Bifocal Lens Co.*, 241 Fed. 270.

Kansas. Character of the agent served must appear. *Dickerson v. Burlington & M. River R. Co.*, 43 Kan. 702, 23 Pac. 936; *Union Pac. Ry. Co. v. Pillsbury*, 29 Kan. 652.

Kentucky. Return of service on agent does not show that the agent was one of those named in Civ. Code, § 732, subsec. 33. *Studebaker Corp. of America v. Miller*, 169 Ky. 90, 183 S. W. 256.

Minnesota. Affidavit of service must show that person was one of those named by the statute. *Schlesinger v. Modern Samaritans*, 121 Minn. 145, 140 N. W. 1027.

Missouri. "Agent" is not equivalent to station agent. *Heath v. Missouri, K. & T. R. Co.*, 83 Mo. 617. Garnishment notice must specify that the agent is the "nearest station or

but not necessarily his formal title.²³ To the foregoing rules an exception in the case of Tennessee must be noted, it there being held that the return need not show who was served or his relation to the corporation.²³ The person must be shown to have been an agent or officer such as the particular court could cause to be served, especially in an inferior court whose jurisdiction is favored by no intendments.²⁴ Under those statutes which provide for service on an officer or class of officers primarily with the right to serve others as a secondary mode, if the person served was of the secondary class the return must sufficiently show the facts which warrant service on him,²⁵ such

freight agent." *Haley v. Hannibal & St. J. R. Co.*, 80 Mo. 112; *Werries v. Missouri Pac. R. Co.*, 19 Mo. App. 398; *Farmer v. Medcap*, 19 Mo. App. 250.

New York. Should state that the person served is the officer denominated by the statute or words tantamount to it. *Behan v. Phelps*, 27 Misc. 718, 59 N. Y. Supp. 713.

Ohio. Superintendent must be shown to be managing agent of foreign corporation. *State v. King Bridge Co.*, 28 Ohio Cir. Ct. 147. "Ticket and general agent" does not import "regular ticket or freight agent" under Rev. St. Ohio, § 5044. *Tallman v. Baltimore & O. R. Co.*, 45 Fed. 156.

Oregon. *Willamette Falls Canal, Milling & Transportation Co. v. Williams*, 1 Ore. 112.

South Dakota. *Mars v. Oro Fino Min. Co.*, 7 S. D. 605, 65 N. W. 19.

²³ Return of service on one described as "its agent in B county," where business was done and the cause arose is good without regard to his official title, he being the agent in charge. *Central Georgia Power Co. v. Parnell*, 11 Ga. App. 779, 76 S. E. 157.

Need not specify what office person held. Further affidavits in proof of service may be called for if needed. *Crawford v. Bank of Wilmington*, 61 N. C. 136.

²³ *Town of Wartrace v. Wartrace & B. G. Turnpike Co.*, 42 Tenn. 515.

²⁴ Justice's court. *Delaware, L. & R. Co. v. Ditton*, 36 N. J. L. 361. Hence it must show that the agent of a railroad corporation was a ticket or freight agent at a station within the county where the justice had court. *Jones v. Toledo & O. Cent. Ry. Co.*, 20 Ohio Cir. Ct. 63, 10 Ohio Cir. Dec. 789.

²⁵ *Arkansas Const. Co. v. Mullins*, 69 Ark. 429, 64 S. W. 225; *Caro Bros. v. Oregon & C. R. Co.*, 10 Ore. 510.

Return must show why superior was not served. *Ozark Marble Co. v. Still*, 24 Okla. 559, 103 Pac. 586; *Ravia Granite Ballast Co. v. Wilson*, 22 Okla. 689, 98 Pac. 949.

It should show that service could not be made on superior officers and that there was no designated agent. *St. Louis & S. F. R. Co. v. Reed*, — Okla. —, 158 Pac. 399.

Must show the lack of any designated agent before an ordinary agent ("freight agent") can be served under the Oklahoma statute. *St. Louis & S. F. R. Co. v. Loughmiller*, 193 Fed. 689.

Under the law of Tennessee, a return of service on a superintendent as the highest officer "to be found" in the county is sufficient, the presumption favoring the discharge of official duty to try to serve superiors. *Kansas City, Ft. S. & M. R. Co. v.*

as that the superiors were not or could not be found within the state or county or at the proper place for service,²⁶ or were all absent from

Daughtry, 138 U. S. 298, 34 L. Ed. 963, aff'g 88 Tenn. 721, 13 S. W. 698.

26 Arkansas. Return of service on a clerk or agent must show that president or chief officer was not found in the county. *Arkansas Const. Co. v. Mullins*, 69 Ark. 429, 64 S. W. 225; *Arkansas Coal, Gas, Fire-Clay & Manufacturing Co. v. Haley*, 62 Ark. 144, 34 S. W. 545; *St. Louis, I. M. & S. R. Co. v. Barnes*, 35 Ark. 95; *Cairo & F. R. R. Co. v. Trout*, 32 Ark. 17.

Illinois. A secondary class cannot be served if there are any of the primary class, and the return must show this. *Cairo & V. R. Co. v. Joiner*, 72 Ill. 520; *St. Louis, V. & T. H. R. Co. v. Dawson*, 3 Ill. App. 118. To same effect, see *Grand Tower Min., Mfg. & Transp. Co. v. Schirmer*, 64 Ill. 106; *Crowley, Cook & Co. v. Sumner*, 97 Ill. App. 301; *Collins v. American Spirit Mfg. Co.*, 96 Fed. 133. See also *Chicago Planing-Mill Co. v. Merchants' Nat. Bank*, 86 Ill. 587. Return on director held sufficient but open to traverse for not serving the president. *Chicago Sectional Elec. Underground Co. v. Congdon Brake Shoe Mfg. Co.*, 111 Ill. 309. In the Chicago municipal court return that the president was not found "in the city of Chicago," will support service on other officers or agents. *Burr v. Co-operative Const. Co.*, 162 Ill. App. 512; *Chicago Copy Co. v. Original Mfg. Co.*, 162 Ill. App. 500.

Indiana. *Jester v. Barret*, 181 Ind. 374, 102 N. E. 29; *Southern Indiana Ry. Co. v. Indianapolis & L. Ry. Co.*, 169 Ind. 360, 13 L. R. A. (N. S.) 197, 81 N. E. 65. Service on agent with recital of president and secretary not found in bailiwick is good. *Cincinnati, L. & C. R. Co. v. Knowlton*, 11 Ind. 339; *New Albany & S. R. Co. v.*

Haskell, 11 Ind. 301. Return that the person served is the highest officer found shows that no higher officer could be found. *Baltimore & O. S. W. R. Co. v. Miles*, 184 Ind. 719, 112 N. E. 524. Return of service on one named as agent of defendant, "there being no higher officer found," shows that no officer was found of those named in the statute, and hence that service was rightly made on the agent. *Western U. Tel. Co. v. Lindley*, 62 Ind. 371.

Kansas. Should show that superior officers could not be found in county. *Palmetto Town Co. v. Rucker*, 1 Kan. (Dass. Ed.) 561. "President and chief officers * * * not being found" shows enough to serve an assistant secretary. *Colorado Debenture Corporation v. Lombard Inv. Co.*, 66 Kan. 251, 97 Am. St. Rep. 373, 71 Pac. 584.

Mississippi. *Southern Exp. Co. v. Hunt*, 54 Miss. 664.

Missouri. Must show that president or chief officer was absent or could not be found. *Powell v. St. Louis, I. M. & S. Ry. Co. (Mo. App.)*, 178 S. W. 212; *Rixke v. Western U. Tel. Co.*, 96 Mo. App. 406, 70 S. W. 265. A return of service in another county than that in which suit was instituted which did not state that the president or other chief officer could not be found in the county in which suit was brought, held not good. *Thomasson v. Mercantile Town Mut. Ins. Co. (Mo. App.)*, 81 S. W. 911. See also cases in note following this.

Ohio. *Fee v. Big Sand Iron Co.*, 13 Ohio St. 563.

Virginia. Must show no superiors servable within federal district (corresponding to county) under laws of Virginia. *Miller's Adm'r v. Norfolk & W. R. Co.*, 41 Fed. 431.

the state or county of place for service.⁸⁷ The statutory mode of service must appear to have been followed such as the leaving of such a copy, if any, as the statute requires,⁸⁸ with the proper person

87 Florida. *Drew Lumber Co. v. Walter*, 45 Fla. 252, 34 So. 244.

Georgia. Where the return does not show that the president was a non-resident, and shows improper service on a lesser officer, no judgment can be entered. *Steiner, Smith Bros. & Knecht v. Central R. R.*, 60 Ga. 552.

Illinois. Must show that president did not reside in county or was absent. *St. Louis, A. & T. H. R. Co. v. Dorsey*, 47 Ill. 288. "The president not found in my county, he being a nonresident," held sufficient to import that the county of the serving officer was meant, and that the president was nonresident thereof. *Beed v. Tyler*, 56 Ill. 288.

Missouri. Must appear that he was absent from the county or could not be found. *Hoen v. Atlantic & P. R. Co.*, 64 Mo. 561; *Horn v. Mississippi River & B. T. R. Co.*, 88 Mo. App. 469. Recital that service was at business office and that president could not be found imports that he was absent from the said office. *Story v. American Cent. Ins. Co.*, 61 Mo. App. 534. Where a statute provides that where service is attempted to be made on a corporation it shall be made by leaving a copy of the summons upon the president or chief officer or in his absence upon the person in charge, failure in the return to state that the president or chief officer was absent where the summons was left with the person in charge renders judgment on such return of service coram non judice. *Rixke v. Western U. Tel. Co.*, 96 Mo. App. 406, 70 S. W. 265. See also note preceding.

Oklahoma. Recital of execution "in my county" by service on cashier named, "president not in the county on" date named, held by reference

to supply all necessary facts. *First Nat. Bank of Tishomingo v. Latham*, 37 Okla. 286, 132 Pac. 891; *First Nat. Bank of Tishomingo v. Ingle*, 37 Okla. 276, 132 Pac. 895.

⁸⁸ The return must specify the mode of service, under the statute. "Served each of the defendants personally with a copy," etc., is insufficient, one of them being a corporation. *Hayden & Healy v. Atlanta Sav. Bank*, 66 Ga. 150.

Must show copy left. Reading is not enough. *Cairo & V. R. Co. v. Joiner*, 72 Ill. 520; *Grand Tower Min., Mfg. & Transp. Co. v. Schirmer*, 64 Ill. 106.

Adding to the return that it was served "by reading" as well as by leaving a copy with the president is not a vice. *Rock Valley Paper Co. v. Nixon*, 84 Ill. 11.

Reading of process must appear. *Den v. Fen*, 10 N. J. L. (5 Halst.) 237.

Should state manner of service. *Behan v. Phelps*, 27 N. Y. Misc. 718, 59 N. Y. Supp. 713.

Should state that copies were left with person served. Return that they were "delivered" to T, "a freight agent," is bad. *Duval v. Boston & M. R. Co.*, 58 N. Y. Misc. 504, 111 N. Y. Supp. 629.

Must show that a "true and attested copy" was left. *Com. v. Wilmington & R. R. Co.*, 2 Pearson (Pa.) 408.

Must show how it was served, whether by reading or leaving copy (garnishment summons, which by statute is to be returned like other summons). *Sun Mt. Ins. Co. v. Seeligson*, 59 Tex. 3.

Return of "serving" on G, a local agent, "a true copy," etc., was held

and at the specified place,²⁹ and that the requisite time for answer was afforded³⁰ and (in substituted service on a state official) that the copy was mailed as required.³¹ It must also show the place of the service where the statute marks out a particular place,³² such as defendant's office in charge of the agent served,³³ or the county where

bad as not showing delivery of copy to agent, that being the required mode of service. Recital of execution "by delivering" to defendant did not aid above return. *Continental Ins. Co. v. Milliken*, 64 Tex. 46.

Recital that writ was executed by delivery of copy, etc., "at the following times and places, to-wit; * * * by service" on a named local agent shows that the copy was "delivered" to him. *Missouri, K. & T. R. Co. v. Scoggin & Dupree*, 57 Tex. Civ. App. 349, 123 S. W. 229.

When service is by attachment delivery of copy also is essential to jurisdiction, and the return must show that the copy was delivered to that corporation's representative whose property was attached. A recital that a copy was delivered to "defendants" when only one's property was attached is bad. *Johnson & Bennington & N. A. St. R. Co.*, 87 Vt. 519, 90 Atl. 507.

²⁹ Return held not to show a copy left with a person in charge of any business office, as tested by rules of strict construction. *Holtschneider v. Chicago, R. I. & P. Ry. Co.*, 107 Mo. App. 381, 81 S. W. 489.

³⁰ A writ returnable on "the third Monday in August" and served as shown by the return on August 14th cannot have been served ten days before return day, and hence gives no jurisdiction under the statute (Code, §§ 3225, 3227). *Staunton Perpetual Building & Loan Co. v. Haden*, 92 Va. 201, 23 S. E. 285.

³¹ Affidavit of the secretary of state, supplementing the sheriff's return of service on such secretary, that one of

the copies mentioned in the statute was filed in his office and "the other copy was immediately mailed postage prepaid * * * to the" defendant "at St. Paul," imports a mailing of a copy addressed to St. Paul to defendant. *Town of Hinckley v. Kettle River R. Co.*, 70 Minn. 105, 72 N. W. 835.

³² Return of service at "abode" means the same as at residence. *Water Lot Co. v. Bank of Brunswick*, 30 Ga. 685.

Must show that service was in county of person's residence. *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 450, 62 L. R. A. 178, 44 S. E. 300; *Chesapeake & O. Ry. Co. v. Wright*, 50 W. Va. 653, 41 S. E. 147; *Frazier v. Kanawha & M. Ry. Co.*, 40 W. Va. 224, 21 S. E. 723; *Kanawha & O. Ry. Co. v. Ryan*, 31 W. Va. 364, 13 Am. St. Rep. 865, 6 S. E. 924.

Must show that county in which it was served on the president was his residence (statutes construed). *Taylor v. Ohio River R. Co.*, 35 W. Va. 328, 13 S. E. 1009 (service on president).

³³ Georgia. It must show that persons served were agents and that the office was defendant's. Return held too indefinite. *Holbrook v. Evansville & T. H. R. Co.*, 114 Ga. 4, 39 S. E. 938; but see *Holbrook v. Evansville & T. H. R. Co.*, 114 Ga. 1, 39 S. E. 937.

Michigan. *Toledo Ice Co. v. Munger*, 124 Mich. 4, 82 N. W. 663.

Missouri. Must show service at a business office if president or chief officer is not served. *Little Rock Trust Co. v. Southern Missouri & A. R. Co.*,

it operates or its road extends;³⁴ and if served at a substituted place must show why the service was not at the preferred place.³⁵ It must appear to have been served within territorial limits of process and judicial or official authority.³⁶

It is only when one of two modes of service is preferred to another by the statutes that the return need show a primary effort to serve superiors,³⁷ or to make service at the county of suit,³⁸ and it need not show conditions of residence, place of office or authority, which are only applicable when persons of another class are served,³⁹ or the corporation is of a class to which the method does not apply.⁴⁰ Where

195 Mo. 669, 93 S. W. 944; *Eminence Land & Mining Co. v. Current River Land & Cattle Co.*, 187 Mo. 420, 86 S. W. 145; *Gate City Elec. Co. v. Corby*, 61 Mo. App. 630. Recital of service "at and in the only office of" defendant shows service at a business office. *Hill v. St. Louis Ore & Steel Co.*, 90 Mo. 103, 2 S. W. 289. Naming defendant's line of railroad is not enough. *Vickery v. Omaha, K. C. & E. Ry. Co.*, 93 Mo. App. 1.

³⁴ Return of service on ticket agent "at the depot" of defendant, he being in charge and there being no designated agent, is good, without further showing that the road runs into the county or that it transacts business there. *Missouri, K. & T. R. Co. v. Crowe*, 9 Kan. 496.

³⁵ When served in another county on president it should show that he could not be found in the original county. *Story v. American Cent. Ins. Co.*, 61 Mo. App. 534.

Return held not to show that superior officer could not be found in county of suit or that service in other county was at the "principal" place of business. *Thomasson v. Mercantile Town Mut. Ins. Co.* (Mo. App.), 81 S. W. 911.

³⁶ It will be presumed that a recited service was within the officer's territorial limits. *Ohio & M. Ry. Co. v. Quier*, 16 Ind. 440.

A constable's return on summons from a justice need not recite service

within the county, that being presumed where defendant's railroad is judicially known to run through the county. *Baltimore & O. R. Co. v. Brant*, 132 Ind. 37, 31 N. E. 464.

³⁷ Where two statutes exist and by one the person served might have been served in the first instance, while the other enables him to be served only when superior officers are not found, the return need not state that superior officers could not be found, service having been made under the former statute. *Congdon v. Butte Consol. Ry. Co.*, 17 Mont. 481, 43 Pac. 629.

³⁸ Return of service on president in another county need not show that inferiors could not be served in county of origin. *Bailey v. Malheur & H. L. Irrigation Co.*, 36 Ore. 54, 57 Pac. 910.

³⁹ Need not show that president of a foreign corporation, served in the county where the cause arose and it was doing business, was an agent authorized to represent defendant in the state, or that he resided in such county or had an office there. *Farrell v. Oregon Gold-Min. Co.*, 31 Ore. 463, 50 Pac. 186, 49 Pac. 876.

Secretary may be served at principal office without returning that he resided or had an office there. *Weaver v. Southern Oregon Co.*, 30 Ore. 348, 48 Pac. 171.

⁴⁰ It should appear that officers of superior grades were not found if

it is material whether or not the corporation was domestic or foreign as regards service, it must appear which it was either from the return or elsewhere in the record.⁴¹

The facts returned must be of the server's or serving officer's own doings and knowledge and not hearsay,⁴² or else the grounds of a stated belief should also be stated⁴³ and must be positively stated, not inferentially or ambiguously,⁴⁴ and as of the time of serv-

service is on corporations generally; but if under the railroad statute where no distinction of grade is made, it need not show such fact. *Toledo, W. & W. Ry. Co. v. Owen*, 43 Ind. 405.

If the corporation is in the general class and none of the excepted ones, it must show all the general facts. *Southern Exp. Co. v. Craft*, 43 Miss. 508.

⁴¹ The return in connection with the record must show whether the corporation was domestic or foreign, and in either case that "the agent of the within named" was such an agent as could receive it and that the circumstances were such as to admit of service on a mere agent. *Arkansas Const. Co. v. Mullins*, 69 Ark. 429, 64 S. W. 225.

⁴² A return showing that the officer's only knowledge of the agency was the supposed agent's declaration, is bad. *White House Mountain Gold Min. Co. v. Powell*, 30 Colo. 397, 70 Pac. 679.

Recital that person was "said to be one of the directors," is bad. *Den v. Fen*, 10 N. J. E. (5 Halst.) 237.

Return on one "reputed" to be a director is good on appeal where record showed that he was a director. *Alexandria, A. & G. R. Co. v. Brown*, 17 Wall. (U. S.) 445, 21 L. Ed. 675.

⁴³ An affidavit of service by a private person should be based on knowledge of the status of the person served, or, if on belief, the grounds of belief should be stated. *Merrill v. Montgomery*, 25 Mich. 73, holding statement that he was formerly pres-

ident and to deponent's belief the only president, does not show that the last president was served.

⁴⁴ It must not only show inability to find the president but must show that the person served was the officer he is described as being. To serve one "as secretary" is bad. *Chicago Planing-Mill Co. v. Merchants' Nat. Bank*, 86 Ill. 587.

Service on named person "as president" is a bad return. *Illinois & M. Tel. Co. v. Kennedy*, 24 Ill. 319.

If an "advisory committee" member is an agent the sheriff must so decide and so return the fact. *Fahrig v. Milwaukee & C. Breweries*, 113 Ill. App. 525.

Recital of copy delivered "to — Smith who was the chief agent of" defendant, etc., is bad as failing to name with certainty the person served or his relation to defendant, or that there were no higher officers who could have been served, and because the recital that he "was" agent in the past tense to time of service. *Youngstown Bridge Co. v. White's Adm'r*, 105 Ky. 273, 20 Ky. L. Rep. 1175, 49 S. W. 36.

Return of service on "agent of said company, no chief officer being found," fails to show that a managing agent was served or that no chief officer could be found. *Bucket Pump Co. v. Eagle Iron & Steel Co.*, 21 Ohio Cir. Ct. 229, 11 Ohio Cir. Dec. 418.

"No other chief officer being found" suffices where secretary is served. *Cincinnati Hotel Co. v. Cen-*

ice.⁴⁵ Accordingly acquaintance of the server with the "defendant" is not shown by affidavit that he knew the person served as agent.⁴⁶ Unnecessary recitals will not vitiate the return.⁴⁷

A return will be construed rationally to uphold it⁴⁸ and in so

tral Trust & Safe-Deposit Co., 11 Ohio Dec. 255, 25 Cinc. L. Bul. 375.

A return of service on the "vice president and managing agent," when in fact the person served had ceased to be vice president though remaining the managing agent, is bad. *Coast Land Co. v. Oregon Pacific Colonization Co.*, 44 Ore. 483, 75 Pac. 884.

Return of service on "general manager" should either show that he was chief executive officer or that such officer could not be found so that he could have been served as manager under the statute. *Dale v. Blue Mountain Mfg. Co.*, 167 Pa. St. 402, 31 Atl. 633, aff'g 35 Wkly. Notes Cas. 509, 15 Pa. Co. Ct. 513, 3 Pa. Dist. 763.

Return of leaving copy "with secretary of said defendant" is bad because it does not show who he was, whether it was a corporation servable through its secretary or if not whether he was also treasurer so that service would have been good on corporations generally. *American Electrical Works v. Devaney*, 32 R. I. 292, 79 Atl. 678.

A recital of delivering copy to "defendants" does not show that it was delivered to the particular defendant, the other not being served in a manner that required such copy. *Johnson v. Bennington & N. A. St. R. Co.*, 87 Vt. 519, 90 Atl. 507.

A return equivocating between two defendants by reciting attachment of real estate of "defendant" is not helped out by a public act authorizing them to consolidate but with no showing that they had done so. *Johnson v. Bennington & N. A. St. R. Co.*, 87 Vt. 519, 90 Atl. 507.

⁴⁵ Recital that he "was" agent is bad because it may refer to a time

before service. *Youngstown Bridge Co. v. White's Adm'r*, 105 Ky. 273, 20 Ky. L. Rep. 1175, 49 S. W. 38.

⁴⁶ Under a statute (S. & B. Ann. St. § 2642) requiring the affidavit of one other than the sheriff to state that "he knew the person served to be the defendant mentioned in the summons," it is deficient if he merely deposes that he knew the agent served and his relation to defendant. *Kernan v. Northern Pac. R. Co.*, 103 Wis. 356, 79 N. W. 403.

⁴⁷ *Rock Valley Paper Co. v. Nixon*, 84 Ill. 11.

⁴⁸ *Davis v. Jacksonville Southeastern Line*, 126 Mo. 69, 28 S. W. 965.

The word "who" was referred to the corporation rather than to the agent in *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104, 43 N. W. 1006.

A return with two dates construed as meaning that it was made on the latter and that inability to find the president was on the same day the agent was served. *Chicago & P. R. Co. v. Kaehler*, 79 Ill. 354.

Return of service on "F, he being superintendent of the road," held to mean that he was superintendent of the existing corporation's road and not of the former extinct one. *Shamokin Valley & P. R. Co. v. Malone*, 85 Pa. St. 25.

"Manager" cannot be presumed to be either president, secretary, treasurer or local agent. *Latham Co. v. J. M. Radford Grocery Co.*, 54 Tex. Civ. App. 510, 117 S. W. 909.

A return that "a true copy of this writ" was delivered does not admit a presumption that where two corporate defendants were served through the same agent by writs differing

doing improper descriptions of the corporation may be rejected as surplusage.⁴⁹ Abbreviations of names,⁵⁰ either of the defendant or of its officers or others, are not fatal defects, if they fairly and certainly describe the intended corporation or persons.

§ 3013. — **Effect and conclusiveness when questioned.** Although the return if unquestioned is sufficient evidence of jurisdiction over the corporation,⁵¹ it remains to be seen what binding force it has when attacked. The conclusiveness and effect of a return to service on a corporation is not different from that ascribable to service and return on natural persons, and as to this there is such a variety and conflict of opinion that no attempt to set it all forth, much less to resolve it, can be permissible in this connection. Additional confusion is made by using the word "conclusiveness" indiscriminately with respect to the effect before judgment, when the return is still assailable in the ordinary course, and the effect after judgment, when attack must be made on the service by seeking relief from the judgment. By the common-law rule of England and also in many states it is regarded as conclusive on all matters properly belonging to it and on parties and privies within the jurisdiction; but only *prima facie* when the judgment is viewed as a foreign one, or as to unnecessary or improper recitals or those supposedly outside of the server's knowledge. It may, of course, be impeached for fraud or mistake.⁵² The larger number of states seems to favor the more liberal and more modern rule that the return may be impeached by affidavit or otherwise in a direct proceeding, such as motion to dismiss, to quash, or to vacate a default.⁵³ On collateral attack and as against the officer, but not in his favor, when a party opposes him in interest it is conclusive as a general rule; while as against strangers it is only *prima facie*.⁵⁴

only in defendants' names, both copies were of one of such writs. *Central & M. R. Co. v. Morris*, 68 Tex. 49, 3 S. W. 457.

⁴⁹ An unnecessary recital that defendant "the A. P. Co. (now A. & Co., a corporation)" was served, is not conclusive of the succession of corporations and may be regarded as surplusage to uphold the service. *Regent Realty Co. v. Armour Packing Co.*, 112 Mo. App. 271, 86 S. W. 880.

⁵⁰ Description of Odd Fellows Building Association, defendant to the

writ, as "O. F. B. A." held not too indefinite to be valid. *Odd Fellows Bldg. Ass'n v. Hogan*, 28 Ark. 261.

⁵¹ See § 3012, *supra*.

⁵² 32 Cyc. 514, title "Process"; 18 Encyc. Pl. & Pr. 965, title "Returns."

⁵³ 32 Cyc. 516, title "Process"; 18 Encyc. Pl. & Pr. 969, title "Returns." Professor Sunderland pronounces the conflict to be "utterly irreconcilable." 32 Cyc. 514.

⁵⁴ 32 Cyc. 518, title "Process"; 18 Encyc. Pl. & Pr. 967, title "Returns."

Having regard to the general law as just stated the return has been held conclusive in actions against a corporation of the facts recited of the particulars of service and the persons found or served,⁵⁵ and impeaching affidavits or evidence are not receivable in the states noted below;⁵⁶ while others treat it as rebuttable in those particulars, though *prima facie* true,⁵⁷ admitting affidavits or other evidence by way of impeachment⁵⁸ which must be clear and convincing to overcome the

⁵⁵ That the person served was the highest officer found. *Groff v. Warner*, 44 Ind. App. 544, 89 N. E. 609.

The return is conclusive on the parties in the absence of collusion and fraud, that the service was made. *Taussig v. St. Louis & K. R. Co.*, 186 Mo. 269, 85 S. W. 378; *Fraternal Bankers of America v. Wire*, 150 Mo. App. 89, 129 S. W. 765; *Zion Church v. St. Peter's Church*, 5 Watts & S. 215.

See also cases in succeeding footnote.

That person served as president was such. *State v. O'Neill*, 4 Mo. App. 221.

⁵⁶ Return of service on president held conclusive though he as co-defendant testified he was not such and had no stock. *Winecoff v. Weedon*, 142 Ga. 552, 82 S. E. 1057. But in Georgia a mode exists for traversing the return and trying the issue of fact.

Impeaching affidavits that the president and vice president were not absent will not be heard. *Cornwall v. Star Bottling Co.*, 128 Mo. App. 163, 106 S. W. 591.

When good on its face cannot be set aside on extraneous evidence. *Ben Franklin Coal Co. v. Pennsylvania Water Co.*, 25 Pa. Super. Ct. 628.

⁵⁷ *Montana*. *Prima facie* that person bore relation as stated. *Vadnais v. East Butte Extension Copper Min. Co.*, 42 Mont. 543, 113 Pac. 747.

Nebraska. Not conclusive that person had any connection with the corporation. The fact may be shown to impeach judgment for total want of service. *Campbell Printing Press & Manufacturing Co. v. Marder, Luse &*

Co., 50 Neb. 283, 61 Am. St. Rep. 573, 69 N. W. 774.

New York. Not conclusive of the agency recited. *Boynton v. Keeseville Elec. Light & Power Co.*, 5 Misc. 118, 25 N. Y. Supp. 741.

Texas. Not conclusive that person served as agent was such. *Galveston, H. & S. A. R. Co. v. Gage*, 63 Tex. 568.

Wisconsin. Not conclusive that person served as president was such when default resulted. *Carr v. Commercial Bank*, 16 Wis. 50.

See also cases in two succeeding footnotes.

⁵⁸ *United States*. Affidavits held to have been properly used. *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 54 L. Ed. 272.

Iowa. The officer may testify in contradiction of his return that he served the original affidavit of injury and not a copy as returned. *Liston v. Central Iowa Ry. Co.*, 70 Iowa 714, 29 N. W. 445.

Kansas. The recitals of jurisdictional facts, viz., that the person served was the secretary or clerk, may be impeached. *Chambers Bros. & Co. v. King Wrought-Iron Bridge Manufactory*, 16 Kan. 270.

New Jersey. That the person served was a stranger to the corporation. *Jones v. Manganese Iron Ore Co.*, 3 Atl. 517.

Texas. Affidavits of the persons served may be received to disprove such agency as is returned. *Olsen v. California Ins. Co.*, 11 Tex. Civ. App. 371, 32 S. W. 446.

return.⁵⁹ A prompt repudiation of the service is a factor of weight in considering the evidence.⁶⁰ The federal courts do not follow the state doctrine that the return is conclusive, when inquiring of the jurisdiction in a case coming from the state court.⁶¹ Generally under either doctrine, if the return appears to state conclusions and not facts, it is not conclusive as to them,⁶² or as to matters on which it is silent;⁶³ and is not conclusive and not evidence as to improper recitals included in it.⁶⁴ Where substituted service was resorted to evidence aliunde cannot be received to supply a basis for such service which the record did not warrant.⁶⁵ Although a return may not be regarded as conclusive of the recited fact, e. g., agency of the person served, in the trial court, yet it will be held conclusive on a collateral attack against the resulting judgment.⁶⁶

⁵⁹ Evidence held sufficient to impeach return as to person served and relation to corporation. *Majestic Metal Bed Co. v. Mutual Furniture Co.*, 152 N. Y. Supp. 994. See also *Parker v. Van Dorn Iron Works*, 23 Ohio Cir. Ct. 444.

Especially when it showed other superior officers and return made no mention of them. *Beattyville Coal Co. v. Bamberger, Bloom & Co.'s Assignee*, 21 Ky. L. Rep. 830, 53 S. W. 31.

⁶⁰ To be considered on the question of agency of the kind returned. *Kramer v. Buffalo Union Furnace Co.*, 132 N. Y. App. Div. 415, 116 N. Y. Supp. 1101.

⁶¹ Though conclusive in the state court, it is not so regarded in the federal courts in cases coming from such state. *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 54 L. Ed. 272.

⁶² Return that service was made on one "who is the secretary and treasurer and chief officer in charge of the business of" defendant and that the president was absent, states a mere conclusion as to the chief officership and is bad. *Stanley v. Sedalia Transit Co.*, 136 Mo. App. 388, 117 S. W. 685.

Must show service in the statutory manner and may use the words of the

statute; but a recital of execution of the writ "as the law directs" is not conclusive. *Heath v. Missouri, K. & T. R. Co.*, 83 Mo. 617.

⁶³ Not conclusive as to matters not stated, e. g., place of service and character of agent. *Liblong v. Kansas Fire Ins. Co.*, 82 Pa. St. 413.

While the return is regarded as conclusive between the parties, liberality is indulged in going into the facts where it is not full and explicit. *Park Bros. & Co. v. Oil City Boiler Works*, 204 Pa. 453, 54 Atl. 334. A return not showing where service was made may be overcome by showing that it was invalid because made at the wrong place. *Id.*

⁶⁴ Return that the officer served was "the officer in charge of said company's office and business in" the county of suit, is not evidence as to there being an office in the county, that being no proper part of the return. *Kimsey & Dopson v. Macon Lumber Co.*, 136 Ga. 369, 71 S. E. 675.

⁶⁵ *Webster v. Iowa State Traveling Men's Ass'n*, 165 Fed. 367.

⁶⁶ *New York & E. R. Co. v. Purdy & Adams*, 18 Barb. (N. Y.) 574.

On collateral attack a finding of jurisdiction had on due process cures a bad return which did not show the relation of the person served to the cor-

§ 3014. **Defects, objections and amendments.** A defect is merely the lack of some requisite to validity or perfection; therefore the question what constitutes a defect in writ, service or return should find answer in previous sections.⁶⁷ Jurisdiction is not frustrated by the fraud of the person served in failing to apprise the corporation properly of the service; but in the event of a default it will be opened on a showing of such facts.⁶⁸ It is a familiar rule of general law that fraud, accident or mistake in obtaining the jurisdiction constitute grounds for relief against or for a collateral attack on it.⁶⁹

What has been said in the outset of the last preceding section is true also of objections and amendments. The law involved is not peculiar to corporations. The applications of it alone are peculiar to them. The general practice in taking objections and allowing amendments must be followed, and it varies greatly in the different states. At common law objection for any matter of defect in the service or the return but not in the writ would have been by plea in abatement to the person of the defendant with a prayer whether it should answer the declaration; and for any matter of defect in the writ or going to its validity the plea would have been in abatement of the writ itself with a prayer that it be quashed.⁷⁰ Pleas in abatement and to the jurisdiction will be more fully discussed hereafter, and attention is invited thereto.⁷¹ The modern practice with the modern forms of process, and especially under the codes is usually by motion to quash the service or return, which motion is supported by a showing of the facts needed to give to plaintiff "a better writ"; or to move or sue for relief from the resultant default judgment in such manner as the practice admits, making the requisite showing and urging the insufficiency of the service to give jurisdiction;⁷² or by a proper saving of the question and an appeal or writ

poration. *Ford v. Delta & Pine Land Co.*, 43 Fed. 181.

On appeal it was held that a return of service on a local agent with corroborative testimony in the record, that being good service if made, is enough to make a prima facie valid judgment which cannot be impeached by motion after term to vacate the judgment. *National Metal Co. v. Greene Consol. Copper Co.*, 9 Ariz. 192, 80 Pac. 397.

In the Arizona case it appears that the statute declares the return to be prima facie true.

⁶⁷ See §§ 2985-3012, *supra*.

⁶⁸ *Allen v. Dallas & W. R. Co.*, 3 Woods 316, Fed. Cas. No. 221.

⁶⁹ See generally *Freeman on Judgments*; *Black on Judgments*.

⁷⁰ See *Stephen on Pleading* (Tyler's Ed.), p. 85.

⁷¹ See § 3069 et seq., *infra*.

⁷² *Delaware*. Proper practice is a motion to set the return aside where service is on an officer not contemplated by statute, or by petition and affidavit where return is of service on a director and the president resides in the state; but in the latter case the

of error.⁷³ Some of the states retain the plea in abatement as a means of attacking the writ or summons itself, as for a variance from the complaint,⁷⁴ or where the ground of objection lies in proof extrinsic to the writ and the return;⁷⁵ while in Maryland a plea to the jurisdiction goes only to jurisdiction over the subject-matter, and a motion reaches a service at the wrong place or on the wrong person;⁷⁶ and in those states a plea and a motion cannot be used interchangeably,⁷⁷ or the office of a plea accomplished by a mere opposition to

name and residence of the president must be stated like in a plea in abatement. *Arnold v. Sentinel Printing Co.*, 2 Boyce 177, 77 Atl. 966.

Kentucky. Motion to quash is a proper mode of objecting that person served was not an agent. *Chesapeake, O. & S. W. R. Co. v. Heath's Adm'r*, 87 Ky. 651, 9 S. W. 832.

Pennsylvania. Bad service may be set aside by rule as well as by plea in abatement. *Park Bros. & Co. v. Oil City Boiler Works*, 204 Pa. 453, 54 Atl. 334.

West Virginia. Under Code 1906, §§ 3834, 3835, misnomer is pleadable in abatement by defendant and "may" be amended by plaintiff on motion; but the motion may be made after default is set aside. *Varney & Evans v. Hutchinson Lumber & Manufacturing Co.*, 64 W. Va. 417, 63 S. E. 203. Formerly a plea in abatement to correct misnomer in process was requisite, but by statute a motion now suffices (Code 1906, c. 125, § 3834), and this applies also to justice's cases. *Stout v. Baltimore & O. R. Co.*, 64 W. Va. 502, 131 Am. St. Rep. 940, 63 S. E. 317.

Wisconsin. May either move to set service or return aside if none was legally made or may object by motion to vacate default. *Carr v. Commercial Bank*, 16 Wis. 50. Defendant is not relegated solely to action for false return. *Id.*

As to showing requisite on the motion, see this section, *infra*.

⁷³ See § 3125, *infra*.

⁷⁴ Failure to describe defendant as a corporation can only be objected to by plea in abatement because the writ varies from the declaration. *Snyder v. Philadelphia Co.*, 54 W. Va. 149, 63 L. R. A. 896, 102 Am. St. Rep. 941, 1 Ann. Cas. 225, 46 S. E. 366.

⁷⁵ Objection that service was not on the president is properly made by plea in abatement; hence to quash such a plea is error. *Chicago Sectional Elec. Underground Co. v. Congdon Brake Shoe Mfg. Co.*, 111 Ill. 309.

Objection to apparently valid service is by plea in abatement. *Lamb v. Russell*, 81 Miss. 382, 32 So. 916.

⁷⁶ *Henderson v. Maryland Home Fire Ins. Co.*, 90 Md. 47, 44 Atl. 1020.

⁷⁷ It must be specially pleaded if process sent to another county is improperly sent there. *Western U. Tel. Co. v. Claymore*, 2 Colo. 32. Motion suffices only when defect appears on face of papers. *Id.*

A return of service on an assistant treasurer as officer of the corporation is good as against a motion to dismiss since the court as matter of law cannot know the facts. *Harriman v. Reading & L. St. Ry. Co.*, 173 Mass. 28, 53 N. E. 156.

Withdrawal of a foreign corporation from the state after liability accrued but before suit cannot be urged to quash service made on the state auditor if the fact does not appear on the summons or acceptance thereof. Plea is necessary. *S. M. Smith Ins. Agency v. Hamilton Fire Ins. Co.*, 69 W. Va. 129, 71 S. E. 194.

taking a default.⁷⁶ The federal courts will entertain a motion in equity, but on the law side, conforming to the state practice, a plea is required if the state law requires that form of objection.⁷⁹ In an earlier federal case it was said that to raise an issue on extrinsic facts by motion was not a practice to be commended.⁸⁰ A motion will not be heard after the same ground has been ruled on by a plea.⁸¹ A traverse of the return making the sheriff a party is a statutory mode adopted in Georgia; and the sheriff is usually brought in by a rule and service.⁸² In Texas and one or more other states it is enacted that the motion to quash shall constitute an appearance, which is entered to the next term, leaving the question to be tried by an appeal if the motion be overruled.⁸³ No objection can be effectually made in an action for equitable relief, if there was good service and the judgment is just and the return was merely incorrect,⁸⁴ or if an adequate legal remedy existed by motion and the saving of an exception to the overruling of the same for review by error or appeal.⁸⁵

⁷⁶ A service returned according to statute will be only irregular and not void, though the officer may not have been served at the right place. The objection must be pleaded in abatement or waived. It cannot be made in opposition to motion for decree pro confesso. *Governor v. Raleigh & G. R. Co.*, 38 N. C. 471.

⁷⁹ The state practice would have required a plea to deny agency of the person served. *American Cereal Co. v. Eli Pettijohn Cereal Co.*, 70 Fed. 276.

A motion to quash because the return does not show agency of the persons served is not proper federal practice in Texas. It should be pleaded with proof that they were not agents. *Illinois Steel Co. v. San Antonio & G. S. Ry. Co.*, 67 Fed. 561, following *Galveston, H. & S. A. R. Co. v. Gage*, 63 Tex. 568, 573. The same was indicated to be the law in a Washington case by a question made as to whether a return regular on its face could be impeached by motion. *Union Pac. Ry. Co. v. Novak*, 61 Fed. 573. But such a question was entertained on motion in a case at common law in Illinois,

though by the practice of that state a plea is required to raise questions of fact extrinsic to the return. *N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. R. Co.*, 54 Fed. 420, 38 L. R. A. 271.

⁸⁰ A motion to quash or to abate the writ is the proper mode of attack for defects apparent on the face of the record, and a plea in abatement where extrinsic facts are averred. The practice of raising issues of fact by motion, sometimes allowed, is not so good a practice. *United States v. American Bell Tel. Co.*, 29 Fed. 17.

⁸¹ *Grand Lodge Brotherhood of Locomotive Firemen v. Cramer*, 164 Ill. 9, 45 N. E. 165.

⁸² On a traverse of the return plaintiff cannot complain that the serving officer was not properly brought in. The officer might have come waiving a rule and service. *Branan v. Nashville, C. & St. L. R. Co.*, 119 Ga. 738, 46 S. E. 882.

⁸³ See §§ 3018, 3019, 3125, *infra*.

⁸⁴ *Peoria, D. & E. R. Co. v. Duggan*, 32 Ill. App. 351.

⁸⁵ The prosecution of the action will not be enjoined on the ground that

Whatever is the practice it must be pursued in such manner and season that a general appearance is not made which waives all such questions; and therefore it is necessary to take the objection before pleading to the merits or even before a plea in abatement for some cause which presupposes the pleader to be in court.⁸⁶ If this is done and the necessary exception is taken, the objection is not waived by answering after the court overrules it.⁸⁷

The question remains whether the corporation, claiming not to have been served so as to be in court, ought to appear in court to urge that objection. In an earlier day this was thought to nullify the objection. Under the older practice it was a matter of importance that a plea to the jurisdiction of the person be not made by the corporation "in person" (for that was considered impossible) or "by its attorney" (for that brought it into court) and the dilemma was avoided either by the wording of the plea, or by having the president present the plea for the corporation, or by having the officer who was served raise the question as a friend of the court.⁸⁸ Some modern sanction for an appearance by a friend of the court to test the service is found in the Texas decisions.⁸⁹ But under the modern statutory practice the corporation itself in its own name ordinarily makes the objection by the proper motion, pleading or petition,⁹⁰ in which the

service was bad. The remedy at law by motion is adequate, since if it be overruled, an exception properly taken will save the objection for appeal. Answering afterwards does not waive it. *American Electrical Works v. Devaney*, 32 R. I. 292, 79 Atl. 678.

⁸⁶ As to appearance and effect thereof, see §§ 3018, 3019, *infra*.

As to pleas to the jurisdiction and in abatement, see § 3069, *infra*.

⁸⁷ When no lawful service was had and return shows none, objection can be saved by motion to quash and exception to overruling thereof afterwards answering. *St. Louis & S. F. R. Co. v. Reed*, — Okla. —, 158 Pac. 399.

See also §§ 3018, 3019, *infra*, as to effect of appearance; and see § 3069, *infra*, as to effect of answer over after plea to the jurisdiction overruled.

⁸⁸ See § 3069, *infra*, and see also § 3018, *infra*.

⁸⁹ Persons improperly served as

agents, which they are not, can appear by *amicus curia* to show such facts. *Olsen v. California Ins. Co.*, 11 Tex. Civ. App. 371, 32 S. W. 446.

⁹⁰ A petition must be in the name of the corporation and not by the person improperly served. *Arnold v. Sentinel Printing Co.*, 2 Boyce (Del.) 177, 77 Atl. 966. Form of petition and its substance approved as correct. *Id.*

But see as to objection to service, *Buck v. Ashuelot Mfg. Co.*, 4 Allen (Mass.) 357 (plea by stranger); *Foster v. Essex Bank*, 16 Mass. 245, 8 Am. Dec. 135 (suggestion of counsel).

Form of motion to question service and return but not jurisdiction generally, see *N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. R. Co.*, 54 Fed. 420, 38 L. R. A. 271. Approved as proper form in *American Cereal Co. v. Eli Pettijohn Cereal Co.*, 70 Fed. 276.

grounds should be stated⁹¹ with the showing of the facts to impeach the service⁹² stated positively and not on information and belief.⁹³ The showing must exclude all inferences favorable to the writ or the service⁹⁴ and must therefore speak of the time when service was made.⁹⁵ Either presumptions⁹⁶ or binding admissions afford proof

⁹¹ On motion. *Newport News & M. V. R. Co. v. Thomas*, 96 Ky. 613, 29 S. W. 437.

⁹² The agent's affidavit that he was not agent of defendant railroad corporation but was employed by a union depot company in selling tickets, must be clear and unequivocal to show that he was not selling them as defendant's agent. *Union Pac. Ry. Co. v. Novak*, 61 Fed. 573.

Where it was shown that service had been made on one who had theretofore in other actions been served with process of which the corporation had shown its acceptance by its appearance, the service was deemed sufficient, especially in the absence of showing that no one authorized to act for the corporation had given information how better service could be made to the party concerned. *Hill v. Morgan*, 9 Idaho 718, 76 Pac. 323.

On a motion to quash it is necessary to disprove that the person served was not an agent as returned. *Protection Life Ins. Co. v. Palmer*, 81 Ill. 88.

On motion to set aside service made through the insurance commissioner it must be shown that the corporation is not, as alleged, one which could be served in that way. *State v. Brotherhood of American Yeomen*, 111 Minn. 39, 126 N. W. 404.

Evidence held sufficient to overcome affidavit of service and showing in corroboration of it. *Schlesinger v. Modern Samaritans*, 121 Minn. 145, 140 N. W. 1027.

Motion to set aside service should plainly show when official character ceased, especially when person served

was chief officer and is principal stockholder. *Wamsley v. H. L. Horton & Co.*, 68 Hun (N. Y.) 549, 23 N. Y. Supp. 85.

Motion to set aside service of summons in an action against a corporation should be granted where the person served as an officer files affidavit that five days previous to date of service he had resigned as such officer. *Continental Wall-Paper Co. v. Lewis Voight & Sons Co.*, 106 Fed. 550.

⁹³ The fact of the location of an office should be stated positively and not on information and belief. *Zindorf v. Western American Co.*, 26 Wash. 695, 67 Pac. 355.

⁹⁴ *Nye v. Burlington & L. R. Co.*, 60 Vt. 585, 11 Atl. 689.

An affidavit denying that he was an officer or managing agent does not overcome facts showing that he was such though not by name. *Carr v. Commercial Bank*, 19 Wis. 272.

⁹⁵ Affidavit of the person served that he was not defendant's representative "at the time" suffices as against counter-affidavits which do not meet it. *Scott v. Stockholders' Oil Co.*, 120 Fed. 698.

An affidavit by the person served that he "is not the agent" of defendant without any showing that he was not when served is bad. *Breathitt Coal, Iron & Lumber Co. v. Patrick*, 143 Ky. 614, 136 S. W. 1003.

⁹⁶ A corporation may be presumed to have been formed under the general law in order to sustain the manner of service. *Nye v. Burlington & L. R. Co.*, 60 Vt. 585, 11 Atl. 689.

As to the admissible presumptions, see also § 3090, *infra*, and references

of the facts.⁹⁷ Following the reasons which ruled in the case of a plea, the motion or petition ought to give a better writ, that is show where, how and on whom correct service might have been made,⁹⁸ unless such facts appear by the record.⁹⁹ The issues raised on the motion are to be tried by the court or it may frame issues thereon, according to the established or prevailing practice.¹ The objection to service should not be extended to a trial of the question of corporate existence or capacity to defend.²

Abatement, quashal or amendment are the ordinary consequences

there made to other parts of this work.

⁹⁷ It may be made to appear by admission that a railroad corporation's office was out of the state and the service therefore too recent. *Ohio & M. Ry. Co. v. Boyd*, 16 Ind. 438.

Where the general counsel of a corporation states to the attorney of the plaintiff that a certain agent of the corporation is authorized to accept service, the sufficiency of the service cannot thereafter be questioned by the corporation. *Taylor Provision Co. v. Adams Exp. Co.*, 71 N. J. L. 523, 59 Atl. 10.

⁹⁸ Service on a director will not be quashed until the corporation discloses the name of the president or other officer, if any, who can be served. *Arnold v. Sentinel Printing Co.*, 2 Boyce (Del.) 177, 77 Atl. 966.

The corporation objecting to the person served must show who might be served on motion to quash. *Hill v. Morgan*, 9 Idaho 718, 76 Pac. 323.

On motion to quash summons sent to another county it should be shown that a person might have been found in the county of issuance, if that objection is taken. *Rochester, R. & St. L. Ry. Co. v. Jewell*, 107 Ind. 332, 8 N. E. 215.

The affidavit must state the true corporate name when motion is based on misnomer. *Wilhite v. Convent of Good Shepherd*, 117 Ky. 251, 25 Ky. L. Rep. 1375, 78 S. W. 138.

A motion to abate the writ, if

proper, must, like a plea, give a better writ, and exclude all inferences by which the writ can be upheld. *Nye v. Burlington & L. R. Co.*, 60 Vt. 585, 11 Atl. 689.

⁹⁹ The motion need not show who was the chief officer on whom service should be made, if the facts appear otherwise of record and were known to plaintiff. *Youngstown Bridge Co. v. White's Adm'r*, 105 Ky. 273, 20 Ky. L. Rep. 1175, 49 S. W. 36.

¹ On a motion to quash service because the agent, so called, was not such, the court may frame the issue and set it down for trial without delay of formal pleading. *Turner v. St. Clair Tunnel Co.*, 102 Mich. 574, 61 N. W. 72.

² On exception to the citation against the "Banking Department of the Citizens' Bank" made by the president of the Citizens' Bank, in which there is averred to be no such corporation as defendant and that Citizens' Bank is the corporation, that question will be passed over and tried contradictorily with it. Sufficiency of service only will be tried. *State v. Banking Department of Citizens' Bank*, 113 La. 150, 36 So. 921.

Want of capacity to defend cannot be raised by motion to dismiss based only on the summons. It must be raised on the pleadings by appropriate demurrer or answer. *Fisher v. Traders' Mut. Life Ins. Co.*, 136 N. C. 217, 48 S. E. 667.

of a defect. It is a matter of general law not easily reducible to such brevity as is here required, but it may be said with respect to all kinds of actions that the writ or summons may be amended while it yet has life, or purely formal amendments may be made afterwards, or a new summons may be issued. A service merely invalid but with some substance to amend by can be amended, or further service is permissible. If the defect is only in the return and all prior procedure was good, then the return may be amended to show the facts, unless the state is one of those which regards it as conclusive on the parties and the proposed amendment would contradict it.³ The writ of summons or citation, not being as was the original writ at common law, the foundation of the action but a means to jurisdiction, does not when quashed carry down the action with it; and a dismissal is not usually proper,⁴ and it will not be dismissed on quashing service and return⁵ unless plaintiff declines to amend or take further proceedings.⁶ The service may be quashed, leaving the writ standing for further service if it still has life, or leaving the action standing for issuance of another writ,⁷ but it has been held that a continuance to perfect totally void service cannot be had in absence of a statute warranting it.⁸ The return may be quashed with leave to amend by stating the facts which show that good serv-

³ Amendment of writ before service, see 32 Cyc. 444, title "Process"; 20 Encyc. Pl. & Pr. 1182, title "Summons and Process"; 1 Encyc. Pl. & Pr. 658, title "Amendments."

Amendment of formal defects where service is merely voidable, see 32 Cyc. 531, title "Process."

Amendment of returns, see 32 Cyc. 537, title "Process."

⁴ If citation is invalid because addressed to the president, the suit will not be dismissed but will merely be continued for proper service. *State v. Voorhies*, 50 La. Ann. 671, 23 So. 871; *State v. Montegudo*, 48 La. Ann. 1417, 20 So. 911.

Quashal of the writ leaves the case standing without entry of final judgment. 20 Encyc. Pl. & Pr. 1188, title "Summons and Process."

⁵ When the service in another county

has been less than ten days before return day (Code, § 3227), the proper practice is to quash the service and return and not to dismiss. *Norfolk & W. R. Co. v. Carter*, 91 Va. 587, 22 S. E. 517.

⁶ When there is no motion to amend a defective return dismissal is proper. *Hayden & Healy v. Atlanta Sav. Bank*, 66 Ga. 150.

⁷ The president of an express company can be served at the place given in the statutory notice in order to perfect service in a suit begun in another county and ineffectually served on a local agent (statutes construed). *Conner v. Southern Exp. Co.*, 37 Ga. 397, 19 Encyc. Pl. & Pr. 711, title "Service of Process," etc.

⁸ *Johnson v. Bennington & N. A. St. R. Co.*, 87 Vt. 519, 90 Atl. 507.

ice was had.⁹ A jurisdictional defect may be questioned on a collateral attack.¹⁰

The summons itself may be amended in formal particulars, such as to state the correct name of the corporation when actually served as intended,¹¹ or to describe it as a corporation,¹² or unnecessary matter may be stricken out of it.¹³ If the summons did not run to the corporation, its agent cannot consent that it be brought in by substituting its name for his.¹⁴

Matter necessary to be shown by the complaint and the process for a given kind of service cannot be shown by suppletory affidavits.¹⁵

Generally speaking a return is but the proof of the facts of service and therefore it may be amended to state such facts, which when done makes the new matter of the return read by relation as a part of the original return and with like effect.¹⁶ The name of the person

⁹ See cases cited this section, *infra*.

¹⁰ If any element of jurisdiction is wanting the judgment based on the service is collaterally assailable, and it may also be done on extrinsic proof destructive of the jurisdiction. *Freeman on Judgments* (4th Ed.), § 126; *Black on Judgments*, § 223.

¹¹ Misnomer in a writ well served may be corrected by amendment. *Sherman v. Connecticut Bridge*, 11 Mass. 338; *Burnham v. Savings Bank*, 5 N. H. 446; *Lane v. Seaboard & R. R. Co.*, 50 N. C. 25.

Mere mistake in name in summons whereby the name of plaintiff's predecessor partnership was used, may be amended after judgment, the name being correct in other parts of the record. *Thurber-Whyland Co. v. Klittner*, 62 Hun (N. Y.) 620, 16 N. Y. Supp. 828.

Amendment of writ and return to state corporation's name instead of its president's is void, no service on it having been made. *Blodgett v. Schaffer*, 94 Mo. 652, 7 S. W. 436.

¹² *Snyder v. Philadelphia Co.*, 54 W. Va. 149, 63 L. R. A. 896, 102 Am. St. Rep. 941, 1 Ann. Cas. 225, 46 S. E. 366.

Writ may be amended to describe plaintiff, "Stewards of M. E. Church"

as a corporation. *Stewards of M. E. Church v. Town*, 49 Vt. 29.

¹³ Writ commanding the summoning of the "proper officer of the" named defendant was properly amended by striking out the quoted words. *Stone v. Travelers' Ins. Co.*, 78 Mo. 655.

¹⁴ An agent served as defendant cannot consent to an amendment naming his corporation instead as defendant. *Booth v. A. Feldman Const. Co.*, 139 N. Y. Supp. 815.

¹⁵ Evidence aliunde will not be received on the motion to show a state of facts warranting the substituted service which the complaint and the summons did not warrant. *Webster v. Iowa State Traveling Men's Ass'n*, 165 Fed. 367.

¹⁶ See 32 Cyc. 514, 537, and see also *Freeman, Executions* (3rd Ed.), § 360, p. 2044, where the rules as to amendment of returns to execution are stated.

May be amended by leave to conform to fact if jurisdiction was had. *Valley Bank & Savings Institution v. Ladies' Congregational Sewing Society*, 28 Kan. 423.

Amended return relates back. *El Paso & S. W. R. Co. v. Kelly* (Tex. Civ. App.), 83 S. W. 855, rev'd 99 Tex. 87, 87 S. W. 660; *McClure-Mabie*

served and facts showing him competent,¹⁷ the residence of the person served,¹⁸ the place of service,¹⁹ the leaving of a copy,²⁰ may be supplied by amendment conformable to the facts. Unnecessary matter may be stricken out.²¹ Every deficiency must be supplied by the return to be effectual.²² Amendment may be made after judgment²³ on notice and leave given,²⁴ but not after appeal pending,²⁵ unless in the appellate court.²⁶ Service and return to a justice of the peace may be amended on appeal to show the facts.²⁷ According to the usual practice, a formal defect, such as an incorrect return to a good service, may be regarded as made, when assailed, as if actually made.²⁸ In any court a full showing of the facts and production of the officer may be required.²⁹

Lumber Co. v. Brooks, 46 W. Va. 732, 34 S. E. 921.

Nature and office of return, see § 3012, *supra*.

¹⁷ *Boyd v. Chesapeake & O. Canal Co.*, 17 Md. 195, 79 Am. Dec. 646; *Behan v. Phelps*, 27 N. Y. Misc. 718, 59 N. Y. Supp. 713.

¹⁸ *Shenandoah Valley R. Co. v. Ashby's Trustees*, 86 Va. 232, 19 Am. St. Rep. 898, 9 S. E. 1003.

¹⁹ *Weaver v. Southern Oregon Co.*, 30 Ore. 348, 48 Pac. 171; *Commercial Union Assur. Co. v. Everhart's Adm'r*, 88 Va. 952, 14 S. E. 836.

²⁰ *Seaboard Air Line Ry. v. Davis*, 13 Ga. App. 14, 78 S. E. 687.

²¹ Where summons ran to the corporation and its named receivers, a return of service on the receiver's local agent describing him as the "agent of defendant's Co." may be amended by striking out "Co.," thus leaving a good service on the receivers and thereby on the railroad also under the statute. *Grady v. Richmond & D. R. Co.*, 116 N. C. 952, 21 S. E. 304.

²² An amendment supplying description of the person served but leaving other defects in the return will not save it. *Youngtown Bridge Co. v. White's Adm'r*, 105 Ky. 273, 20 Ky. L. Rep. 1175, 49 S. W. 36.

²³ *Chicago Planing-Mill Co. v. Mer-*

chants' National Bank, 86 Ill. 587.

²⁴ *Chicago Planing-Mill Co. v. Merchants' Nat. Bank*, 86 Ill. 587.

²⁵ *Continental Ins. Co. v. Milliken*, 64 Tex. 46.

After petition in error had divested the jurisdiction of the trial court the return could not be amended by leave therein given, so as to show good service. *St. Louis & S. F. R. Co. v. Loughmiller*, 193 Fed. 689.

²⁶ Amendment of return is allowable in appellate court to state true facts. *Holtschneider v. Chicago, R. I. & P. R. Co.*, 107 Mo. App. 381, 81 S. W. 489.

²⁷ Amendment on appeal from justice may be granted whenever the justice could grant it, e. g., addition of name of defendant in return to conform to facts. *Transier v. St. Louis, K. C. & N. R. Co.*, 54 Mo. 189.

But it has been held that a failure of the return to a justice's court to show jurisdiction by service on a qualified agent is incurable. *Hoben v. Citizens' Tel. Co.*, 176 Mich. 596, 142 N. W. 1070.

²⁸ It may be amended in the action or regarded as amended in an action to enjoin enforcement of a judgment based on it. *M. Rumely Co. v. Bledsoe*, — Okla. —, 155 Pac. 872.

²⁹ Amendment was denied on appeal where the officer was not produced

All defects in summons and service may be cured by appearance³⁰ and subsequent pleadings may do so.³¹ Immaterial ones will be disregarded; for example, if more than one officer was served and the service was good as to any, it is immaterial that it was bad as to the others.³²

§ 3015. Process in rem; citations; proceedings not inter partes. Mention has already been made of jurisdiction in rem being of a thing rather than of a corporation owning or claiming it.³³ Process in rem against corporate property is nearly always by attachment and garnishment, which are fully treated in the ensuing chapter.³⁴ In probate proceedings the notice or citation may be served on a corporation according to the practice allowed by the statute.³⁵ A statute in California, and perhaps other western states, allows the courts to devise any suitable process to effectuate their jurisdiction; and this has been applied in a contempt proceeding by ordering service of an order to show cause on attorneys of record for the corporation.³⁶

§ 3016. Notices analogous to process. The rule that notice to the agent is notice to the principal permits service of notices which must be "personal" on any agent of the corporation who represents it in respect to the subject-matter of the notice, and the want of a statute prescribing who shall be served does not imply that such notices can-

for examination as to the facts. *Thomasson v. Mercantile Town Mut. Ins. Co.* (Mo. App.), 81 S. W. 911.

³⁰ See § 3019, *infra*.

³¹ Filing an amended petition with the correct name does not cure misdescription in citation. *Southern Pac. Co. v. Block*, 84 Tex. 21, 19 S. W. 300.

Waiver of defects by pleading to merits, see § 3069, *infra*.

³² *Com. v. Wilmington & R. R. Co.*, 2 Pearson (Pa.) 408.

³³ See § 2977, *supra*.

³⁴ See chapter on Attachment and Garnishment, *infra*.

³⁵ By statute (Comp. L. § 4442), the probate judge on appeal from allowance of a claim is to prescribe the manner of notice; and by another statute (section 6544) if prescribed service cannot be made it shall be

"in such other manner as the court" may direct. Under these personal service on a director and also on an attorney was good. *Simpson v. Mansfield, C. & L. M. R. Co.*, 38 Mich. 626. Not only the manner of service but the persons to be served may be prescribed by his order. *Id.*

³⁶ In a contempt proceeding the order to show cause may be served on the attorneys of the corporation of record in the action or who appear therein. The court may direct such mode of service under its statutory power (Code Civ. Proc. § 187) to devise "any suitable process or mode of proceeding." *Golden Gate Hydraulic Const. Min. Co. v. Superior Court*, 65 Cal. 187, 3 Pac. 628.

See also chapter on Contempts, *supra*.

not be served on corporations,³⁷ unless a more restrictive meaning is ascribed to the word "personally."³⁸ Accordingly notices in the course of legal proceedings may be served on the attorney of record,³⁹ or on the person served with summons.⁴⁰ In the absence of a statute notices preliminary to an action and required by statute to fix a right or a lien should be served on the president or chief officer or manager, and in absence of them on any officer whose relation to the governing body or head would require him to transmit it or communicate such notice to them,⁴¹ but if there is a statutory mode of service it must be followed.⁴² Notices of certain kinds⁴³ may by statute be

³⁷ Notice of demand for rent in dis-possession proceedings may be served on secretary and treasurer, as the officer in charge of payment of debts. *Facts Pub. Co. v. Felton*, 52 N. J. L. 161, 19 Atl. 123.

"Personal notice" of motion for leave to issue execution may be served on superintendent and general agent. *Rush v. Halcyon Steamboat Co.*, 84 N. C. 702.

³⁸ Notice to file an affidavit of merits is required by the statute to be served personally on defendant; and hence service on its secretary is bad. *Laufman & Co. v. Hope Mfg. Co.*, 54 N. J. L. 70, 23 Atl. 305.

³⁹ Service of a copy of declaration for purpose of fixing answer day may be made on the attorney, if there has been an appearance, or on any officer whose agency enables him to represent it in respect of litigation. *Dock v. Elizabethtown Steam Mfg. Co.*, 34 N. J. L. 312. A bookkeeper is not competent for such service. *Id.*

Notices in the course of "ordinary proceedings in the action" may be served on its attorney. *Rossner v. New York Museum Ass'n*, 20 Hun (N. Y.) 182. Order to produce books for inspection and order to show cause why answer should not be stricken for disobedience may be so served. *Id.*

⁴⁰ "Notice of any proceeding in the action on the same agent [as served with summons] would suffice in the absence of any allegation that thereby

any injustice has befallen." *Katzenstein v. Raleigh & G. R. Co.*, 78 N. C. 286.

⁴¹ A material man's lien notice may be served on the secretary of the corporation. *Heltzell v. Chicago & A. R. Co.*, 77 Mo. 315. But not on one who merely has desk room in the office of the owner against whom the lien is claimed. *Heltzel v. Kansas City, St. L. & C. R. Co.*, 77 Mo. 482.

⁴² A notice of laborer's claim for wages against a subcontractor must appear to have been served in the statutory way. They need give only substantially the nature and amount of the claim. *Cosgrove v. Tebo & N. R. Co.*, 54 Mo. 495. Effect of such a statute as repeal of laws relating to process, see *Vicksburg & M. R. Co. v. McCutchen*, 52 Miss. 645.

⁴³ Notice of taking of depositions is not process or a "notice" of the kind mentioned in connection therewith (Code Civ. Proc. § 68c), which may be served as process. *Atchison, T. & S. F. R. Co. v. Sage*, 49 Kan. 524, 31 Pac. 140.

The statutory notice of claim (Gen. St. 1909, §§ 6999, 7000) may be served by leaving a copy at any depot or station with the person in charge. It is not primarily necessary to serve a designated agent or show that none has been designated. *Dowell v. Chicago, R. I. & P. R. Co.*, 83 Kan. 562, 112 Pac. 136.

served in like manner to process. A notice, such as one for an injunction, may be sufficient to bind the corporation and its officers and not the stockholders.⁴⁴

§ 3017. Admission or acknowledgment of service. It is a general rule that a proper officer on whom service might be made may acknowledge the service thereof with the same effect as if service had been proved by the regular return or proof,⁴⁵ and when the chief officer is absent or cannot be served this authority devolves on the one next eligible for service.⁴⁶ Such officers may also waive citation or summons.⁴⁷ An attorney employed by the president may also accept service,⁴⁸ provided the authority to employ an attorney rested with the president, but not otherwise.⁴⁹ Even if acceptance by an attorney is invalid, it may be effectual as an order to enter an appearance⁵⁰ and this seemingly sound rule seems to reduce the question, as far as attorneys are concerned, simply to one of whether the attorney was lawfully the attorney for the corporation; for if he was, then the authority to enter an appearance is within his representative powers.⁵¹ The superintendent of insurance, or other designated officer for service, may also make an acceptance or acknowledgment,⁵² and

⁴⁴ The reasonable notice of application for injunction required by statute is sufficiently given to bind it and defendant directors by service on the company at its office, but shareholders will not be bound. *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. 525, Fed. Cas. No. 2,025.

As to conclusiveness of a judgment on the stockholders, however, see § 3124, *infra*.

⁴⁵ Any one on whom service may be had may acknowledge that he has been served. *Talladega Ins. Co. v. Woodward*, 44 Ala. 287.

The president who could be summoned could accept service. *First Nat. Bank of Ceredo v. Huntington Distilling Co.*, 41 W. Va. 530, 56 Am. St. Rep. 878, 23 S. E. 792.

⁴⁶ One who was cashier, also secretary, and was the only managing officer, the president being nonresident could be served, and hence could accept service. *Whitman v. Citizens' Bank of Reading*, 110 Fed. 503.

⁴⁷ Waiver of citation by president and secretary is binding, they being officers who could have been served. *Fox v. Robbins* (Tex. Civ. App.), 70 S. W. 597.

⁴⁸ Attorney may acknowledge service, though not employed by resolution but only by president. *Beebe v. George H. Beebe Co.*, 64 N. J. L. 497, 46 Atl. 168.

⁴⁹ Employment of attorneys was left with the board of directors. *Bridgeport Sav. Bank v. Eldredge*, 28 Conn. 556, 73 Am. Dec. 688.

⁵⁰ Admission of service on writ by attorney (who is not qualified for service) is equivalent to an order to enter an appearance, but is not good as a service. *Northern Cent. R. Co. v. Rider*, 45 Md. 24.

⁵¹ See §§ 2933, 2934, *supra*, § 3018, *infra*.

⁵² *Appelbaum v. Star Fire Ins. Co.*, 115 N. Y. App. Div. 117, 100 N. Y. Supp. 747.

the statutes often so provide.⁵³ To the foregoing statements exception must be made that one who is adversely interested,⁵⁴ or is acting in fraud or collusion,⁵⁵ cannot effectively accept or acknowledge service, nor can one who is dominated or directed by such a person do so.⁵⁶ The acceptance is ordinarily shown by an indorsement on the summons, or accompanying it, and must identify the process served⁵⁷ and show the signer's relation to the corporation and capacity so to act.⁵⁸ These facts will not be questioned on collateral attack.⁵⁹ It must sufficiently appear in the record that the corporation is one for which service may be accepted in the manner that was followed, e. g., where the insurance commissioner of the state accepted it.⁶⁰ In the example last mentioned judicial notice of the official character and signature was taken.⁶¹ If provable by affidavit of service, which would seem to be a questionable practice, it must show fully and by

⁵³ See *State v. Brotherhood of American Yeomen*, 111 Minn. 39, 126 N. W. 404.

⁵⁴ *Fox v. Robbins* (Tex. Civ. App.), 70 S. W. 597. And see *Fox v. Robbins* (Tex. Civ. App.), 62 S. W. 815.

⁵⁵ Thus, where two directors owning a large interest in a claim against a corporation which had become insolvent assigned it to a third party to have it placed in judgment against the corporation, and pursuant to such plan accepted service for the corporation, and judgment was entered by default and the corporate property sold at an inadequate price, the entry of the judgment was set aside as a fraud upon remaining creditors. *Portland Consol. Min. Co. v. Rossiter*, 16 S. D. 633, 102 Am. St. Rep. 726, 94 N. W. 702.

Agent of a corporation having a claim against it may not assign the claim to a third party and then accept service, as the corporate representative, in suit brought on such claim. *White House Mountain Gold Min. Co. v. Powell*, 30 Colo. 397, 70 Pac. 679.

⁵⁶ Admission of service made by a bookkeeper, who is under the control of the general manager in whose favor

the action is instituted. *New River Mineral Co. v. Seeley*, 120 Fed. 193.

⁵⁷ *McKeever v. Supreme Court Independent Order of Foresters*, 122 N. Y. App. Div. 465, 106 N. Y. Supp. 1041.

⁵⁸ A bare "service accepted" and date is not enough. *Adkins v. Globe Fire Ins. Co.*, 45 W. Va. 384, 32 S. E. 104.

⁵⁹ On collateral attack an acknowledgment of service in due form by the hand of the president will be presumed good and that the officer was within the jurisdiction when it was made. *Merchants' Nat. Bank v. Chattanooga Const. Co.*, 53 Fed. 314.

⁶⁰ It sufficiently appears that the corporation is of the class for which the state insurance commissioner may receive service (foreign benefit association) by an allegation in the petition for mandamus so designating it. *State v. Brotherhood of American Yeomen*, 111 Minn. 39, 126 N. W. 404.

⁶¹ Acceptance by the insurance commissioner is proved by judicial knowledge of his signature and official character. *State v. Brotherhood of American Yeomen*, 111 Minn. 39, 126 N. W. 404.

setting out the facts that acknowledgment was made,⁶³ and an affidavit cannot supply that which the waiver or acknowledgment lacks.⁶³ The incidental act of forwarding copies by mail to the corporation need not be affirmatively shown unless it is a part of the jurisdictional process.⁶⁴

§ 3018. Voluntary appearance. Appearance is "a coming into court as party to a suit, whether as plaintiff or defendant." It is generally used in respect to the defendant, and in that sense is the proceeding by which he submits himself to the jurisdiction of the court, either generally, being an absolute submission, or specially, for a qualified and limited purpose.⁶⁵ To undertake a collection and presentation of all cases in which a corporation made or was claimed to have made a general appearance, and the effect thereof, or to present in a like way all such cases of special appearance, would not be helpful but confusing. The present section is concerned only with general and special appearances by a defendant corporation, but the reader is reminded as elsewhere in this chapter that the general law of appearances is assumed as a predicate for all of the special applications of it to corporate defendants. A corporation may voluntarily appear in an action by attorney, and such appearance will have the same effect in conferring jurisdiction as appearance by a natural person.⁶⁶ For this purpose a formal entry of appearance may be made or an order by attorney to enter it,⁶⁷ but any action which invokes or recog-

⁶³ A gratuitous statement in an affidavit of service made out of the state that the person served [president] "made due acknowledgment of the service" will not suffice to prove that fact being a mere conclusion. *Dillard v. Central Virginia Iron Co.*, 82 Va. 734, 1 S. E. 124.

⁶³ A waiver of service by one whose authority as "attorney in fact" does not appear cannot be aided by affidavits that he had such authority. *Lamb v. Gaston & Simpson Gold & Silver Min. Co.*, 1 Mont. 64.

⁶⁴ Where the mailing of copies is not a part of the service but is merely an official duty imposed on the insurance commissioner after service, his acceptance need not show whether the copy mailed by him was one delivered

to him. *State v. Brotherhood of American Yeomen*, 111 Minn. 39, 126 N. W. 404.

⁶⁵ *Cyc. Law Dictionary*, "Appearance."

Bouvier's Law Dictionary, "Appearance."

⁶⁶ *Attorney General v. Guardian Mut. Life Ins. Co.*, 77 N. Y. 272.

Dispenses with further notice. *Zabron v. Cunard S. S. Co.*, 151 Iowa 345, 34 L. R. A. (N. S.) 751, 131 N. W. 18.

See also § 2977, *supra*.

⁶⁷ Appearance will be considered as having been entered where attorneys order to enter it appears by construction on the record. *Northern Cent. R. Co. v. Rider*, 45 Md. 24.

nizes the jurisdiction of the court over the defendant is equally a general appearance.⁶⁸ Therefore moving for a change of venue on grounds other than privilege,⁶⁹ demurring to the complaint or declaration,⁷⁰ pleading or answering to it,⁷¹ making motions addressed to it,⁷² entering into stipulations,⁷³ taking an appeal or a writ of error⁷⁴

⁶⁸ Giving a forthcoming bond to a levying officer with no obligation to respond to the action but merely to surrender property does not involve an appearance. Otherwise where the bond is to answer in the action. *Winter v. Union Packing Co.*, 51 Ore. 97, 93 Pac. 930.

⁶⁹ Moving for change of venue on the ground of prejudice before plea to jurisdiction over the person waives it. *Cook v. Globe Printing Co. of St. Louis*, 227 Mo. 471, 127 S. W. 332. So also where the plea stands undisposed of. *Julian v. Kansas City Star Co.*, 209 Mo. 35, 107 S. W. 496, but see dissenting opinion to contrary.

⁷⁰ *Clarkson v. Erie & N. S. Dispatch*, 6 Ill. App. 284; *Thompson v. Michigan Mut. Ben. Ass'n*, 52 Mich. 522, 18 N. W. 247.

A demurrer to a petition for a receiver and a motion to set aside the appointment made without limitation was a general voluntary appearance by a foreign corporation. *Lively v. Pieton*, 218 Fed. 401.

⁷¹ Answering and through its attorney joining in an agreement for a certain judgment is an appearance. *Forty-Acre Spring Live Stock Co. v. West Texas Bank & Trust Co. (Tex. Civ. App.)*, 111 S. W. 417.

Answering in bar on the day the motion to quash was filed and before a ruling on it is an appearance. *National Equitable Society of Belton v. Tennison*, — Tex. Civ. App. —, 174 S. W. 978.

⁷² Motion to strike part of a pleading held under the circumstances not an appearance for all purposes contrary to intent of the parties. *Thom-*

son v. McMorran Milling Co., 132 Mich. 591, 94 N. W. 188, 10 Det. L. N. 48.

⁷³ Signing a stipulation and endeavoring to compromise. *Martin v. Atlas Estate Co.*, 72 N. J. Eq. 416, 65 Atl. 881.

Stipulating for time to plead. *National Coal Co. v. Cincinnati Gas Coke, Coal & Mining Co.*, 168 Mich. 195, 131 N. W. 580.

It has been held, however, that a stipulation for time to answer does not recognize jurisdiction of the court. *Columbia Placer Co. v. Bucyrus Steam Shovel & Dredge Co.*, 60 Minn. 142, 62 N. W. 115.

⁷⁴ Appeal. *Louisville & N. R. Co. v. S. D. Chestnut & Bro.*, 115 Ky. 43, 24 Ky. L. Rep. 1846, 72 S. W. 351; *Chesapeake, O. & S. W. R. Co. v. Heath's Adm'r*, 87 Ky. 651, 9 S. W. 832; *Aycock v. Wilmington & W. R. Co.*, 51 N. C. 231.

Giving bond for appeal admits existence as alleged. *Meyer Bros. v. Insurance Co. of North America*, 73 Mo. App. 166.

Writ of error. *Drew Lumber Co. v. Walter*, 45 Fla. 252, 34 So. 244.

Taking appeal from justice is appearance. *Powell v. St. Louis, I. M. & S. Ry. Co. (Mo. App.)*, 178 S. W. 212, overruling *Handlan-Buck Mfg. Co. v. Chester, P. & Ste. G. R. Co.*, 167 Mo. App. 683, 151 S. W. 171, and certifying question to supreme court on account of conflicting decisions; *Ruthe v. Green Bay & M. R. Co.*, 37 Wis. 344.

An appeal from the county court to the district court, unlike one from a justice of the peace, does not waive

are regarded as general appearances. There is considered to have been a special appearance, or at any rate no general appearance, where special demurrer is made to the question of jurisdiction over demurrant,⁷⁵ or plea to such jurisdiction is made,⁷⁶ or motion attacking the process or service thereof,⁷⁷ or motion for security for costs is made,⁷⁸ or further time for answer is requested,⁷⁹ or motion is made to vacate the judgment regarded as void.⁸⁰ It is settled that an appearance

defect in service. *White House Mountain Gold Min. Co. v. Powell*, 30 Colo. 397, 70 Pac. 679.

⁷⁵ A special demurrer for want of jurisdiction over the person of demurrant with an appearance limited thereto is not general. *Ogdensburgh & C. R. Co. v. Vermont & C. R. Co.*, 16 Abb. Pr. N. S. (N. Y.) 249, aff'd 4 Hun (N. Y.) 712.

An untenable demurrer to the jurisdiction was held an appearance in *Reynolds v. La Crosse & M. Packet Co.*, 10 Minn. 178.

⁷⁶ Special appearance to object to jurisdiction does not submit to it. *Commercial & Railroad Bank v. Slocomb*, 14 Pet. (U. S.) 60, 10 L. Ed. 354; *Decker v. New York Belting & Packing Co.*, 11 Blatchf. 76, Fed. Cas. No. 3,727.

A plea in abatement to the jurisdiction because of defendant's not being within the state, also because of bad service, and limited thereto, is not an appearance. *United States v. American Bell Tel. Co.*, 29 Fed. 17.

Special appearance to the jurisdiction over the case does not waive service. *Ellsworth Trust Co. v. Parramore*, 108 Fed. 906.

⁷⁷ The motion when limited to an attack on the return and the service because untrue in fact and bad in law does not constitute an appearance. *N. K. Fairbank & Co. v. Cincinnati*, N. O. & T. P. R. Co., 54 Fed. 420, 38 L. R. A. 271.

Motion to set aside service is a special appearance even though notice of motion is subscribed by attorneys

without special reservation. *Schlesinger v. Modern Samaritans*, 121 Minn. 145, 140 N. W. 1027.

May appear specially to quash attachment because property was not attachable that being the sole means of jurisdiction. *Davis v. Cleveland, C. & St. L. R. Co.*, 217 U. S. 157, 54 L. Ed. 708, 27 L. R. A. (N. S.) 823, 18 Ann. Cas. 907.

⁷⁸ Motion for security for costs limited to that end is not a general appearance. *Collier v. Morgan's Louisiana & T. R. & S. S. Co.*, 41 La. Ann. 37, 5 So. 537.

⁷⁹ *Klatte v. McKeand*, 95 S. C. 219, 78 S. E. 712. But see *National Coal Co. v. Cincinnati Gas Coke, Coal & Mining Co.*, 168 Mich. 195, 131 N. W. 580, where a stipulation for time was held an appearance; *Columbia Placer Co. v. Bucyrus Steam Shovel & Dredge Co.*, 60 Minn. 142, 62 N. W. 115.

⁸⁰ Filing motion to set aside a judgment does not constitute an appearance. *Little Rock Trust Co. v. Southern Missouri & A. R. Co.*, 195 Mo. 669, 93 S. W. 944.

Moving to set aside the judgment does not constitute an appearance waiving defective service, since the judgment must be got rid of before the process can be attacked. *Adkins v. Globe Fire Ins. Co.*, 45 W. Va. 384, 32 S. E. 194.

But in *Detroit v. Detroit City R. Co.*, 54 Fed. 1, it was held that an appearance to set aside a default void for fatal defect in service is voluntary.

If the motion to open a default goes into the merits, it is a general appear-

solely to remove the cause to the federal court does not waive the objection that the corporation was not well served and was not brought under the jurisdiction of the state court,⁸¹ even though the petition was not expressly limited to a special appearance reserving objection to jurisdiction over the person,⁸² but the New York court has distinguished the federal doctrine as inapplicable when jurisdiction of the person is questioned in the state court after remand, and has held that the necessary averment that the action is "pending" admits jurisdiction.⁸³

Appearance must either be made by some act of defendant or by some representative of it; and hence where appearance was by another and defendant's answer was not equivalent to appearance, no appearance by defendant could be found.⁸⁴ While a solicitor's appearance for "defendants" to a bill will include only those served it may also include others who by answering make themselves parties.⁸⁵ Hence care should be taken to make appearance only for those intended where the officers are also joined. In Texas and Kentucky and other states it is enacted that objection to the process or service

ance. *Chicago Copy Co. v. Original Mfg. Co.*, 162 Ill. App. 500.

Opening default conditionally on entry of appearance and subsequent trial shows appearance. *Washington, A. & G. R. Co. v. Brown*, 17 Wall. (U. S.) 445, 21 L. Ed. 675.

⁸¹ *Commercial Mut. Acc. Co. v. Davis*, 213 U. S. 245, 53 L. Ed. 782; *Goldrey v. Morning News*, 156 U. S. 518, 39 L. Ed. 517, in which case the petition expressly limited the appearance thereby made. *International Text-Book Co. v. Heartt*, 136 Fed. 129; *Collins v. American Spirit Mfg. Co.*, 96 Fed. 133.

⁸² *Wabash Western Ry. v. Brow*, 164 U. S. 271, 41 L. Ed. 431, rev'g 65 Fed. 941; *Webster v. Iowa State Traveling Men's Ass'n*, 165 Fed. 367.

Motion to set aside return can be made in federal court after removal based on the record as it stood when removed. *Webster v. Iowa State Traveling Men's Ass'n*, 165 Fed. 367. Overruling earlier cases such as *Tallman v. Baltimore & O. R. Co.*, 45 Fed. 156, distinguishing cases in which plea

or objection was interposed before removal.

⁸³ Petition for removal is an appearance and waives sufficiency of service on insurance commissioner and of his admission, so held where question was made in state court after remand. *Farmer v. National Life Ass'n of Hartford*, 138 N. Y. 265, 33 N. E. 1075, aff'g 67 Hun (N. Y.) 119, 21 N. Y. Supp. 1056. So where after remand it moved to open a default (service on insurance superintendent after revocation of power held waived). *Tierney v. Helvetia Swiss Fire Ins. Co.*, 138 N. Y. App. Div. 469, 122 N. Y. Supp. 869.

⁸⁴ *Southern Pac. Co. v. Burns* (Tex. Civ. App.), 23 S. W. 288.

Authority to enter appearance, see § 3020, *infra*.

⁸⁵ An appearance for "defendants" binds all of them including an officer joined as a defendant but not served, who, however, swore to the answer and signed it as an individual. *Smith v. Standard Laundry Machinery Co.*, 19 Fed. 826.

shall constitute a general appearance which is to be entered and the case stand over for trial of the issue so made with others.⁸⁶ This is not followed in the federal courts in such states,⁸⁷ and a rule of a federal court attempting to establish a similar practice was held obnoxious to law.⁸⁸ A so-called special appearance will be considered as one addressed to the only ground open to question on the record⁸⁹ and where by such statute it must be treated as a general appearance, if based on alleged defective service, such an appearance cannot be withdrawn.⁹⁰ If an appearance be erroneously set aside it may be reinstated, and this may be presumed to have been done in a proper case.⁹¹

In order to avoid the complete submission to the jurisdiction which a voluntary general appearance entails⁹² an appearance to question the jurisdiction should be made special and limited to the objection presented,⁹³ and must be limited to a jurisdictional question presented

⁸⁶ See § 3019, *infra*, as to effect of this appearance.

⁸⁷ It is not practicable in federal practice. *Mexican Cent. R. Co. v. Pinkney*, 149 U. S. 194, 37 L. Ed. 699; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 943.

Oregon Code Civ. Proc. §§ 61, 520, were held not to exclude special appearance to attack the service merely because it provided that a voluntary appearance should be equivalent to personal service, and provided for appearance by demurrer, answer or "written notice" without one of which defendant should not be heard in the action. *Lung Chung v. Northern Pac. Ry. Co.*, 19 Fed. 254.

⁸⁸ A circuit court rule which required a special appearance to be conditioned that if objection was not sustained defendant would appear generally, was held invalid (U. S. Rev. St. § 918). *Davidson Bros. Marble Co. v. United States*, 213 U. S. 10, 53 L. Ed. 675.

⁸⁹ Under a statute making an appearance to object to service in the way prescribed a general appearance, the making of a so-called "special appearance" will be regarded as one

to object to jurisdiction over the person by the process, where no other question could be made on the record. *Maysville & B. S. R. Co. v. Ball*, 108 Ky. 241, 21 Ky. L. Rep. 1693, 56 S. W. 188.

⁹⁰ *Maysville & B. S. R. Co. v. Ball*, 108 Ky. 241, 21 Ky. L. Rep. 1693, 56 S. W. 188.

Whether it be done by motion to quash or by plea the result is the same. *York v. State*, 73 Tex. 651, 11 S. W. 869, *aff'd* 137 U. S. 15, 34 L. Ed. 604.

⁹¹ Order overruling motion to quash may be treated as one reinstating entry of appearance, where it was erroneously set aside to admit of the motion. *L. Dodge Lumber Co. v. Macquithy*, 14 Ky. L. Rep. (abstract) 142.

⁹² Effect of such appearance, see § 3019, *infra*.

⁹³ Appearance on motion in justice's court to dismiss because his county had not jurisdiction, it not being corporation's residence or that where cause of action arose is not general when specially limited. *Winter v. Union Packing Co.*, 51 Ore. 97, 93 Pac. 930. But see *Schlesinger v. Modern Samaritans*, 121 Minn. 145,

by it,⁹⁴ and if the object of the appearance be enlarged to an invocation of jurisdictional power it becomes a general one.⁹⁵ Under the former practice, which is still followed to some extent, a special appearance to the jurisdiction must not be in person or by attorney, but may be made in the name of the president of the corporation.⁹⁶

Answering or pleading over after special appearance and the overruling of plea or objection thereon does not waive the objection. It can be reviewed on appeal by a properly saved exception and record⁹⁷ or in the trial court by any mode which remains open. This is not regarded as a general appearance voluntarily made,⁹⁸ but when a plea in abatement was stricken out because improperly grounded a plea over of the general issue is a general appearance.⁹⁹

§ 3019. Waivers and admissions by appearance. A necessary consequence to an absolute submission to the jurisdiction of the court by voluntary general appearance is the waiver of all questions of the sufficiency of the means taken to bring it unwillingly there, that is to

140 N. W. 1027, where it was held not essential.

⁹⁴ Special appearance can only reach the process service or venue. It cannot be made for the purpose of moving for service of a copy of the complaint in order to object later to jurisdiction. *Muslusky v. Lehigh Valley Coal Co.*, 96 N. Y. Misc. 68, 159 N. Y. Supp. 571.

⁹⁵ A special appearance becomes general if a motion be made which goes to the merits, e. g., a motion to open a default. *Chicago Copy Co. v. Original Mfg. Co.*, 162 Ill. App. 500.

⁹⁶ Appearance on plea to the jurisdiction should not be by attorney or in person but may be by president. *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582.

See also § 3014, *supra*, as to mode of making objections.

As to the form of pleas to the jurisdiction, see § 3069, *infra*.

⁹⁷ See § 3125, *infra*.

Not waived where answer is made after special plea is overruled attacking service. *St. Louis & S. F. R. Co. v. Loughmiller*, 193 Fed. 689.

Answering to the merits without reserving the question waives the objection made and overruled on a motion to quash (failure to return that copy was delivered). *Missouri, K. & T. R. Co. v. Scoggin & Dupree*, 57 Tex. Civ. App. 349, 123 S. W. 229.

⁹⁸ Taking part in trial after objection to service made on special appearance was overruled is not a voluntary general appearance. *Dickerson v. Burlington & M. River R. Co.*, 43 Kan. 702, 23 Pac. 936.

Where there has been no service on any one who was agent, an answer to the merits ordered by the court after overruling a plea to the jurisdiction does not constitute an appearance. *Chesapeake, O. & S. W. R. Co. v. Heath's Adm'r*, 87 Ky. 651, 9 S. W. 832.

⁹⁹ Where a plea in abatement was stricken out because grounded on a bad service of a good writ, and defendant then pleaded the general issue, this was an appearance. *Protection Life Ins. Co. v. Palmer*, 81 Ill. 88.

say the process, and all other objections dependent solely on the will of the defendant. Otherwise phrased, the jurisdiction over the person is conceded,¹ but the jurisdiction of the subject-matter, dependent on law and not on the will of the defendant, cannot be conferred by its appearance or by any other consent.² The methods of practice are said not to be a test of jurisdiction, and where the corporation appeared such questions are waived as might have been made against the practice.³ In order to have effect the appearance must be proved or established according to law, for a bad appearance cannot cure a bad process or service.⁴

Defects thus waived are those in the summons or writ,⁵ the service

¹ *Indiana*. Kirkpatrick Const. Co. v. Central Elec. Co., 159 Ind. 639, 65 N. E. 913.

Kentucky. Georgetown Water Co. v. Central Thomson-Houston Co., 17 Ky. L. Rep. 1270, 35 S. W. 636, 34 S. W. 435.

Missouri. Meyer v. Ruby-Trust Mining & Milling Co., 192 Mo. 162, 90 S. W. 821.

New York. Heenan v. New York, W. S. & B. Ry. Co., 34 Hun 602, 1 How. Pr. (N. S.) 53.

South Carolina. Jenkins v. Southern Ry., 73 S. C. 292, 53 S. E. 481.

A domestic corporation answering to the merits in the marine court, which had jurisdiction of the subject-matter, waived objection to jurisdiction of its person. Carpenter v. Central Park, N. & E. River R. Co., 11 Abb. Pr. N. S. (N. Y.) 416.

² This is illustrated by the disability of parties to confer jurisdiction on the federal courts by consenting to be sued therein. Such courts will refuse jurisdiction if the requisite diversity of citizenship does not exist or if there is no federal question involved, notwithstanding the action is otherwise within their jurisdiction. See § 2965, *supra*.

The court must see to the jurisdiction, and may object *sua sponte*. Metcalf v. Watertown, 128 U. S. 586, 32 L. Ed. 543. In a removal case, re-

moved by a corporation, it was held that the grounds for removal (diverse citizenship) were jurisdictional and could not be waived but the procedure for removal so far as it was merely modal might be cured by waiver, e. g., delay might be waived. Martin's Adm'r v. Baltimore & O. R. Co., 151 U. S. 673, 38 L. Ed. 311.

The insufficiency of the case to invoke equity may be waived and the judgment stand if other requisites of federal jurisdiction are present. Granite Brick Co. v. Titus, 226 Fed. 557.

³ Jurisdiction of justice of the peace. Dennis v. Atlantic Coast Line R. R., 86 S. C. 258, 68 S. E. 465.

⁴ Sherwood v. Saratoga & W. R. Co., 15 Barb. (N. Y.) 650. See also Southern Pac. Co. v. Burns (Tex. Civ. App.), 23 S. W. 288, where the appearance was bad as to a given corporation because made by another, and the answer by the given one was not an appearance because made on appeal and not originally.

⁵ Frankfort Bank v. Anderson, 10 Ky. 1.

Objection that summons runs to an officer and not to defendant. Shorter University v. Franklin, 75 Ark. 571, 88 S. W. 587, 974.

Failure to issue *distringas* rather than summons in first instance. Bank of Vincennes v. State, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234.

of it,⁶ the return,⁷ or affidavit of service and the acknowledgment thereof.⁸ The prevailing rule is that general appearance waives the right and privilege of being sued in a particular venue or county, unless the venue is regarded as jurisdictional as is the law in some states.⁹ This, it seems, ought to be qualified by the following exception: If the general appearance was not one consisting in an answer or plea to the complaint, and if opportunity remained in the regular course of practice to move for the privilege, it could be claimed notwithstanding the waiver of objections to jurisdiction of the person; but where the venue is jurisdictional even this exception is inhibited. By pleading to the merits dilatory pleas to the jurisdiction are waived; also by pleading a dilatory matter which presupposes jurisdiction of the person objections to such jurisdiction are waived.¹⁰ Pleading to

A warrant "to take the body of L, a director," etc., is not subject to objection where the corporation was adjudged liable and took an appeal. *Aycock v. Wilmington & W. R. Co.*, 51 N. C. 231.

Objection to service of citation in error. *Stephenson v. Texas & P. Ry. Co.*, 42 Tex. 162.

⁶ Waives service on improper person. *St. Louis, I. M. & S. R. Co. v. Barnes*, 35 Ark. 95; *Thoroughgood v. Georgetown Water Co.*, 9 Del. Ch. 84, 77 Atl. 720.

Cures defective service. *Flynn v. Hudson River R. Co.*, 6 How. Pr. (N. Y.) 308.

Waives defective service. *Zion Church v. St. Peter's Church*, 5 Watts & S. (Pa.) 215.

Waives defective service and return. *Chesapeake & O. Ry. Co. v. Wright*, 50 W. Va. 653, 41 S. E. 147; *Wickham v. South Shore Lumber Co.*, 89 Wis. 23, 61 N. W. 287.

⁷ Irregularity in return is waived. *Chamberlin v. Mammoth Min. Co.*, 20 Mo. 96.

Waives defective return. *Washington, A. & G. R. Co. v. Brown*, 17 Wall. (U. S.) 445, 21 L. Ed. 675; *Anderson v. Southern Minnesota R. Co.*, 21 Minn. 30; *Fee v. Big Sand Iron Co.*, 13 Ohio St. 563.

Answering to the merits while motion to quash the return is pending waives it. *Newport News & M. V. R. Co. v. Thomas*, 96 Ky. 613, 29 S. W. 437.

⁸ Waives any question of propriety of acknowledgment of service. *Buckfield Branch R. Co. v. Benson*, 43 Me. 374.

⁹ See § 2978, *supra*.

¹⁰ See § 3065, *et seq.*, *infra*.

These rules of pleading are based on the cardinal rule that "pleas are to be made in due order." Stephen on Pleading (Tyler's Ed.), p. 373. But inasmuch as a plea to the merits is also a general appearance, the cases so holding are also good as precedents on the proposition that appearance waives objection that might have been made by those pleas or by the equivalent motions under the modern practice. Hence an untenable demurrer to the jurisdiction over the person may amount to a general appearance by demurring. *Reynolds v. La Crosse & M. Packet Co.*, 10 Minn. 178 (Gil. 144), but see *Ellsworth Trust Co. v. Parramore*, 108 Fed. 906, where a special appearance to question jurisdiction over the case was held not to waive service.

the merits after removal waives all objections to the original jurisdiction of the state court.¹¹ Reversal of the judgment after various appearances does not reopen the case to the objections once waived in the former trial,¹² nor is the effect of an appearance destroyed by ruling out as insufficient the pleading by which it was made.¹³ An involuntary appearance entered by virtue of statute on making a motion to quash waives nothing except the objections to citation and service; other matters like the privilege of venue are left open.¹⁴ In the case of a mandamus, appearance to the rule to show cause does not necessarily cut off objections to the service of the writ issued thereon.¹⁵ In addition to waiving these objections a general appearance also necessarily admits certain facts without which the appearance would be nugatory. Thus, it admits existence of defendant as a corporation,¹⁶ also that the name by which defendant is impleaded is

¹¹ After general appearance entered without reservation in the federal court to which the case was removed no objection can be made that the action was beyond the jurisdiction of the state court. *Texas & P. R. Co. v. Bigger*, 239 U. S. 330, 60 L. Ed. 310; *Texas & P. R. Co. v. Hill*, 237 U. S. 208, 59 L. Ed. 918.

¹² Plea in abatement was properly stricken when made after appearance and numerous motions and a plea in bar; and a reversal which in the meantime had vacated the judgment did not prevent this. *Eel River R. Co. v. State*, 155 Ind. 433, 57 N. E. 388.

¹³ Jurisdiction acquired over a garnishee corporation by its answer is not waived by a contesting plea thereon on which the answer was held insufficient and judgment against the garnishee rendered accordingly. *Gerhard Hardware Co. v. Texas Cotton-Press Co.* (Tex. Civ. App.), 26 S. W. 168.

¹⁴ *Kelly v. A. B. Crouch Grain Co.*, — Tex. Civ. App. —, 174 S. W. 630.

Under Rev. St. art. 1243, if the motion to quash be overruled defendant is deemed to have appeared to the next term; and can try the service on appeal from judgment. *Central & M.*

B. Co. v. Morris, 68 Tex. 49, 3 S. W. 457.

Right to withdraw such appearance, see § 3018, *supra*.

¹⁵ After a general appearance to a rule to show cause why an alternative writ of mandamus should not issue, the respondent was permitted without prejudice to move to quash the service of the alternative writ. *State v. Bay State Gas Co.*, 4 Pennw. (Del.) 214, 57 Atl. 291.

¹⁶ *Colorado*. *Baldwin Coal Co. v. Davis*, 15 Colo. App. 371, 62 Pac. 1041; *A. Gauthier Decorating Co. v. Ham*, 3 Colo. App. 559, 34 Pac. 484.

Indiana. *Pittsburgh, C., C. & St. L. Ry. Co. v. Lighthouse*, 168 Ind. 438, 78 N. E. 1033.

Iowa. *Coates v. Galena & C. U. R. Co.*, 18 Iowa 277.

Kansas. *Missouri River, Ft. S. & G. R. Co. v. Shirley*, 20 Kan. 660.

Missouri. *Witthouse v. Atlantic & P. R. Co.*, 64 Mo. 523; *Meyer Bros. v. Insurance Co. of North America*, 73 Mo. App. 166.

Oklahoma. *Herald Shoe Co. v. Oklahoma Pub. Co.*, 15 Okla. 29, 79 Pac. 111.

Vermont. *Johnson v. Bennington & N. A. St. R. Co.*, 87 Vt. 519, 90 Atl. 507.

its name, though in fact not correct.¹⁷ The existence of the alleged corporate plaintiff is not admitted.¹⁸

An appearance by the corporation as garnishee may be efficient as to it, though it cannot bring in the main defendant.¹⁹

A foreign corporation puts itself under the jurisdiction by general appearance,²⁰ even, it has been held, though it has already been dissolved in its domicile.²¹

§ 3020. Authority to enter appearance for corporation. As in the analogous matter of service the appearance must be by such a person as has authority to represent the corporation for that purpose²² for which reason its receiver's appearance is not its appearance,²³ nor is that of an individual party or codefendant.²⁴ Neither is an ap-

¹⁷ A "railway" company by appearing and pleading to suit against a "railroad" company of similar name admits that both are the same corporation. The resultant judgment is conclusive. *Mobile & M. Ry. Co. v. Yeates*, 67 Ala. 164.

Misnomer of a school district. *School Dist. No. 14 v. Griner*, 8 Kan. 224.

As to pleas in abatement for misnomer, see § 3072, *infra*.

¹⁸ Waives only objections to service of the writ and leaves open the defense that plaintiff is not a corporation. *Greenwood v. Lake Shore R. Co.*, 10 Gray (Mass.) 373.

¹⁹ Motion by garnishee to set aside judgment on the merits. *Wickham v. South Shore Lumber Co.*, 89 Wis. 23, 61 N. W. 287.

Bad garnishment process is waived by appearance and submission to a rule to answer. *Baltimore, O. & C. R. Co. v. Taylor*, 81 Ind. 24.

But in *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 450, 62 L. R. A. 178, 44 S. E. 300, it was held that it will not cure defective process of garnishment on appearing party.

²⁰ *National Coal Co. v. Cincinnati Gas Coke, Coal & Mining Co.*, 168 Mich. 195, 131 N. W. 580; *Piedmont & A. Life Ins. Co. v. Fitzgerald*, 1

White & W. Civ. Cas. Ct. App. (Tex.) § 1346. See generally chapter on Foreign Corporations, *infra*.

²¹ A foreign dissolved corporation submits itself to the jurisdiction by answering and can only answer to the merits. *Frink v. National Mut. Fire Ins. Co.*, 90 S. C. 544, Ann. Cas. 1913 D 221, 74 S. E. 33.

²² Where it appeared that the president did not reside in and was in fact absent from the state, the corporation was bound by an acceptance of service by its cashier or by his voluntary entry of appearance, he being competent for service in the president's absence, although the corporation had suspended business more than a year prior to the institution of the suit. *Whitman v. Citizens' Bank of Reading*, 110 Fed. 503.

Necessity that person served be representative of the corporation, see § 2991, *supra*.

²³ *Price v. Delano*, 187 Mich. 49, 153 N. W. 7.

²⁴ Individual appearances do not waive defects going to the corporation (school district). *People v. Jones*, 254 Ill. 521, 98 N. E. 962.

A cause for a sum below the original jurisdiction of the district court (having general jurisdiction) is not brought under its jurisdiction as

pearance as *amicus curiae* one by the corporation, though made by an attorney who also represents it and for the purpose of questioning a defective service on it.²⁵ While an attorney of a court of record has presumable authority to appear²⁶ proof may be required when the appearance is made before an inferior court, such as a justice of the peace.²⁷ When unauthorized an appearance may nevertheless be ratified by any subsequent action recognizing it.²⁸ It may also be assailed for want of authority.²⁹

IV. PARTIES

§ 3021. **General law of parties.** The general law of parties is applicable to actions by or against corporations with a very few adaptations necessitated by their impersonal nature. This follows from their capacity to sue or be sued like natural persons. Most of the cases here cited on the law of parties are really but illustrations of general law with no feature peculiar to corporations except that one of the parties was a corporation. But they are of utility as illustrations. To be a party on either side the corporation must be correctly or at least with certainty named as such³⁰ and must have come under the jurisdiction of the court by appearance or process in the particular suit.³¹ In nothing is the distinctness of the corporation from its members and officers more marked and emphasized than in the determination of parties. They are not parties by reason of its being one,³² and when

to a given corporation where another appeals from a justice's judgment but not defendant corporation, and where defendant answers, but the answer is not an appearance because the jurisdiction is not original. *Southern Pac. Co. v. Burns* (Tex. Civ. App.), 23 S. W. 288.

²⁵ *International & G. N. R. Co. v. Moore* (Tex. Civ. App.), 32 S. W. 379.

²⁶ See § 2934, *supra*.

Attorney presumably has authority to appear to indictment. *State v. Passaic County Agr. Society*, 54 N. J. L. 260, 23 Atl. 680.

²⁷ A bad process from a justice is not cured by an appearance also, bad because not legally proved before him. *Sherwood v. Saratoga & W. R. Co.*, 15 Barb. (N. Y.) 650.

Appearance before a justice cannot be claimed where the attorney's au-

thority for the corporation was neither admitted nor proved. *Boyn-ton v. Keeseville Elec. Light & Power Co.*, 5 N. Y. Misc. 118, 25 N. Y. Supp. 741.

Appearance before return day by one who swore he had authority suffices to give jurisdiction in justice's court. *Behan v. Phelps*, 27 N. Y. Misc. 718, 59 N. Y. Supp. 713.

²⁸ Entry of appearance by attorney is ratified by filing an affidavit in the case that he is "its duly appointed attorney." *Famous Mfg. Co. v. Wilcox*, 80 Ill. App. 54, *aff'd* 180 Ill. 246, 54 N. E. 211.

²⁹ *Great West Min. Co. v. Woodmas of Alston Min. Co.*, 12 Colo. 46, 13 Am. St. Rep. 204, 20 Pac. 771.

³⁰ See § 3041, *infra*.

³¹ See §§ 2977, 2985 *et seq.*, *supra*.

³² See § 33 *et seq.*, *supra*.

a stockholder sues, the rule requires strictly that it be in his own name if suing for individual rights, or in his name with sufficient allegations of a refusal or inability to sue when it is derivative and based on a corporate right.³³ So when it sues or is sued they must be specifically made parties by impleading or intervention to be such.³⁴ Whether the corporation or some other is the proper plaintiff or defendant in a proposed action is substantially a question of rights rather than of parties. The party plaintiff is known by ascertaining the person entitled or injured, and the person doing the wrong or sustaining the obligation is the defendant. Ordinarily this does not depend on the law of corporations or of parties, but on the law of contracts, torts, real property, and the like, which subjects should be consulted first.

§ 3022. Actions and suits by or in favor of corporation—In general. The corporation is the only proper plaintiff when the cause of action runs in its favor as the aggregate body; and neither officer, stockholder or creditor as such, or one to whom it stands as a trustee to a cestui que trust, without additional equities special to himself can bring the suit.³⁵ They cannot even join themselves as coplaintiffs and thereby sue unless they have some community of right or interest with it held by them as individuals.³⁶ Apparent but unreal exceptions to this rule are: actions under authority of statute whereby one of the officers or perhaps a stockholder sues to redress official misconduct or wrongdoing;³⁷ equitable actions or suits, stockholders' suits, brought by one or more stockholders on allegations that the corporation cannot or will not sue;³⁸ actions by the stockholders or officers as common law or statutory successors of an extinct or dissolved corporation;³⁹ actions entitled in the name of "trustees," "president and directors of," etc., the same being a part of the corporate name;⁴⁰ actions by virtue of statute in which the attorney general or other public officer

³³ See chapter on Stock and Stockholders, subdvs. Actions by Stockholders, Remedies of Stockholders, etc., *infra*.

³⁴ They must become such before they can have a hearing (receivership suit against corporation). *Hearn v. Clare*, 131 Ga. 374, 62 S. E. 187.

As to intervention, see § 3037, *infra*.

³⁵ *Bradley v. Richardson*, 2 Blatchf. 343, Fed. Cas. No. 1,786; *Donovan v. Dean*, 1 Flip. 182, Fed. Cas. No. 3,992.

³⁶ See § 3023, *infra*.

³⁷ See Chap. 42, § 2670 et seq., *supra*.

³⁸ See chapter on Stock and Stockholders, subd. Remedies of Stockholders, etc., *infra*.

Even in a stockholders' suit the right of action and recovery are primarily in the corporation. *Kelly v. Dolan*, 218 Fed. 966.

³⁹ See § 2955, *supra*, and chapter on Forfeiture, Dissolution and Winding Up, *infra*.

⁴⁰ See § 3041, *infra*.

sues officers or directors for official misconduct or wrong;⁴¹ and others, perhaps, where an equity or right running to the corporation is invoked through a suit begun by some of the officers or members or a creditor who also has a standing to sue.⁴² In all of these but the fourth exception it will be seen that a distinct right by statute or in equity exists in favor of the individual plaintiff. The corporation is the sole plaintiff on all contracts running to it as the sole promisee,⁴³ by whatever name, so be it the real party in interest, unless the technical common-law practice remains of suing in the nominal party's name,⁴⁴ and so long as the right of action has not been passed to another.⁴⁵ It and not its officers or its stockholders should be plaintiff, if recovery of its property is sought,⁴⁶ or the establishment of its

⁴¹ See Chap. 42, § 2670 et seq., supra.

⁴² Of this class may be mentioned suits for a receiver or winding up of the corporation, which may be to its interest and desired by it, but where the plaintiff has also a right of action on which he sues usually making the corporation a formal defendant. See chapters on Receivers; Forfeiture, Dissolution and Winding Up, *infra*.

⁴³ Action by trustees for the corporation on a note to it should be by it. *Leftwick v. Thornton*, 18 Iowa 56.

See also § 3023, *infra*.

⁴⁴ This is a statutory rule under the codes providing that the real party in interest may sue (see the local statutes) but it was also admissible at common law to sue on a contract made to it by some other name or to its officer, if in fact the promise was made to it by that name. (See § 3032, *infra*.)

⁴⁵ A corporation is the real party in interest even though its name has been changed. *Philapy v. Aukerman-Bright Lumber Co.*, 56 Ind. App. 266, 105 N. E. 161.

⁴⁶ A foreign selling corporation maintained merely for convenience and subordinate to complainant is not the real party plaintiff in a trade-mark suit. *Rubber & Celluloid Harness Trimming Co. v. Rubber Bound Brush*

Co., 81 N. J. Eq. 419, 519, Ann. Cas. 1915 B 365, 88 Atl. 210.

New Equity Rule 37 declaring that every action shall be prosecuted in the name of the real party in interest states only the previous established rule. *Kardo Co. v. Adams*, 231 Fed. 950.

⁴⁵ A resolution to transfer the cause of action, not executed and afterward rescinded is no obstacle to suit by the corporation. *Medlin Milling Co. v. Moffatt Commission Co.*, 218 Fed. 686.

⁴⁶ Corporation and not the treasurer of a local lodge should be plaintiff in action to recover its property. *Conboy v. Mathews*, 174 N. Y. App. Div. 523, 160 N. Y. Supp. 538.

The corporation and not a stockholder is the proper plaintiff to recover assets belonging to it, unless a stockholders' suit is brought with proper allegations, in which suit the corporation must be a defendant. *Allen v. New Jersey Southern R. Co.*, 49 How. Pr. (N. Y.) 14.

The corporation is a proper plaintiff to sue for cancellation of spurious stock certificates uttered by its officer, its right is based on the right of cancellation in equity and not as trustee for the holders of its genuine stock. *New York & N. H. R. Co. v.*

rights therein.⁴⁷ It may therefore sue for injury to it arising from the making of improper subscriptions, and for a decree cancelling them.⁴⁸ And it may sue though the facts also disclose causes of action pertaining to the individual stockholders, for example where an invalid tax is assessed against its shares in the hands of numerous holders and multiplicity of suits would ensue if they all sued or it might be exposed to loss if it was forced to pay for them.⁴⁹

In selecting the defendants to a suit by the corporation all necessary to administration of the relief prayed must be joined, and in equity all who are proper to a full and complete adjudication may be joined; but this does not depend on the corporate character of the plaintiff, and is determined by the nature of the cause of action and the subject-matter of the suit.⁵⁰ Like a natural person the corporation may sue as many or as few tort feorsors as it chooses, they being severally liable as well as jointly.⁵¹ Officers who exceeded their authority in making a contract need not be made defendants to a suit to set it aside if no relief against them is sought.⁵² When the corporation sues one who stands as trustee, he represents the beneficiaries of the trust as to matters within its contemplation but not when its annulment is sought,⁵³ and therefore it has been held that not all of the policy holders need be joined when the insurance commissioner

Schuyler, 7 Abb. Pr. (N. Y.) 41, rev'g 1 Abb. Pr. (N. Y.) 417.

⁴⁷ The corporation is the necessary and proper party to sue to vacate a foreclosure decree against property owned by it on the ground of fraud in the service, where the proof fails to show that it had become dissolved vesting title to sue in the stockholders. They should not be joined. *Fox v. Robbins* (Tex. Civ. App.), 62 S. W. 815.

⁴⁸ *Union Bank v. McDonough*, 5 La. 63.

⁴⁹ A national bank may sue as plaintiff to enjoin unlawful taxation of its shares, proper averments to show a case for avoiding multiplicity being made. *City Nat. Bank v. Paducah*, 2 Flip. 61, Fed. Cas. No. 2,743.

⁵⁰ See generally treatises on the law of parties and also the provisions of the various codes of procedure. As to parties in equity, which has been

called a "very complex and difficult" doctrine, see Mitford's and Tyler's *Pleadings and Practice in Equity*, pp. 16, 256 et seq; *Fletcher's Equity Pl. & Pr.*; *Daniell, Chan. Prac.*

Actions against officers and stockholders or members, see also § 3024, *infra*.

⁵¹ One or any number of persons defrauding a corporation in promotion may be sued by it. *Davis v. Las Ovas Co.*, 227 U. S. 80, 57 L. Ed. 426; *Las Ovas Co. v. Davis*, 35 App. Cas. (D. C.) 372. Especially where no charge is attempted for such profits as the omitted one may have made. *Id.*

See also § 142, *supra*.

⁵² *Pioneer Gold Min. Co. v. Baker*, 20 Fed. 4.

⁵³ In action to annul trust mortgage and bonds, the bondholders are necessary parties, as the trustee cannot as defendant represent them for that purpose. *In re Harrisburg & E. R.*

is sued to release a part of the fund deposited for security.⁵⁴ Under statutes or the charter it is sometimes made possible for a corporation to join as defendants parties who could not be joined in an ordinary law action.⁵⁵ Although a state cannot be sued, it is proper to name as defendants the officers of the state when the suit is to restrain the enforcement of an alleged unconstitutional law of the state to the destruction or injury of the corporation's rights.⁵⁶

§ 3023. — Necessary or proper co-plaintiffs. Officers, members or stockholders are not necessary co-plaintiffs unless they have an indivisible right with the corporation to the relief sought;⁵⁷ accordingly stockholders or members need not join in an action for damages or injunction for nuisance or other torts,⁵⁸ or to enforce a contract.⁵⁹ The former owner of a chose in action is not a proper co-plaintiff merely because the title of it passed on its formation to the corporation.⁶⁰ Even a holding corporation is represented by its subsidiary suing as plaintiff.⁶¹ In suing as a trustee of a charity the corporation may

Co.'s Appeal, 1 Monag. (Pa.) 692, 1 L. R. A. 230, 15 Atl. 459.

⁵⁴ In an action to require the superintendent of insurance to transfer a portion of a security fund deposited with him it is not necessary to join as defendants all of the policyholders protected by such funds, they numbering several thousand. *Lancashire Ins. Co. v. Maxwell*, 5 N. Y. Supp. 399.

⁵⁵ Bank charter authorized joining in one action of all parties to bill or note. *Davis v. Bank of Fulton*, 31 Ga. 69.

⁵⁶ Attorney general of state may be made defendant in suit to restrain enforcement of invalid laws. It is not a suit against the state. *Ex parte Young*, 209 U. S. 123, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764. Or a state tax officer may be defendant in a suit to enjoin execution of an invalid state tax on a federal corporation. *Osborn v. United States Bank*, 9 Wheat. (U. S.) 738, 6 L. Ed. 204.

⁵⁷ There must be community of interest to warrant joining officers. *Schell v. Alston Mfg. Co.*, 149 Fed. 439.

⁵⁸ A church corporation as such may sue for a nuisance of noise which disturbed worship and depreciated its church building for that purpose. The members are not the necessary plaintiffs. *First Bapt. Church v. Schenectady & T. R. Co.*, 5 Barb. (N. Y.) 79. See also *Baltimore & P. R. Co. v. Fifth Bapt. Church*, 108 U. S. 317, 27 L. Ed. 739.

⁵⁹ Stockholders, or a trustee for them, are not proper co-plaintiffs with a corporation, willing and able to sue, in an action to enforce an agreement to hold a franchise to the use of the corporation. *Havana City Ry. Co. v. Ceballos*, 49 N. Y. App. Div. 263, 63 N. Y. Supp. 417.

⁶⁰ Members of a former partnership to whom the action accrued and who assigned it to the corporation are not proper co-plaintiffs. *Lottman Bros. Mfg. Co. v. Houston Waterworks Co.* (Tex. Civ. App.), 38 S. W. 357.

⁶¹ *Lucia Min. Co. v. Evans*, 146 N. Y. App. Div. 416, 131 N. Y. Supp. 280.

unite as plaintiff with it others, through whom the title comes,⁶² but it may sue as a sole plaintiff on a subscription for a distinct object, such as a school, under its control.⁶³ A joinder of the corporation and the stockholder, one of whom is necessarily the proper plaintiff because he has succeeded to all of its rights, is harmless to the defendant even if erroneous.⁶⁴

§ 3024. — By corporation against officers or stockholders. The corporation sues its officers, agents or members as it sues any other distinct persons.⁶⁵ It may sue to enjoin usurping officers without joining others who claim such offices⁶⁶ and on the other hand may in equity sue all of its members in an accounting for overpayments who have or claim an interest in the fund.⁶⁷ Other chapters in this work treating of actions on subscriptions⁶⁸ and the liability of the stockholder to the corporation,⁶⁹ the liability of officers and agents,⁷⁰ and of promoters to the corporation,⁷¹ will afford precedents on parties in the respective actions.

§ 3025. Actions and suits against corporation—In general. When the corporation is to be sued the plaintiff is selected or named according to usual rules; thus in suits founded on an alleged right of plaintiff as a stockholder, he must be entitled to the stock in such

⁶² Where a corporation has been formed to become the trustee of a charitable trust, it may join as co-plaintiffs the successors of original donees in a suit to turn over the fund to the corporation. *Proprietors of White School House v. Post*, 31 Conn. 240.

⁶³ Though a contract to pay money is for a school under control of a church, yet if the church corporation is the promisee it may sue as a sole party. *Northwestern Conference of Universalists v. Myers*, 36 Ind. 375.

⁶⁴ *Bellevue Mills Co. v. Baltimore Trust Co.*, 214 Fed. 817.

⁶⁵ See § 33 et seq., supra.

⁶⁶ A suit to restrain usurpation of offices may be carried on in the corporate name though it also tries title to such offices claimed by another faction. *De Zavala v. Daughters of Republic of Texas*, 58 Tex. Civ. App. 19, 124 S. W. 160.

⁶⁷ In a suit for an accounting of overpayments, a marketing corporation formed by growers may join as defendants all who have been overpaid, the agreement of all having been to sell all of the crop through it and accept the average price realized according to grade. Each "has or claims an interest." (*Code Civ. Proc. § 379.*) *California Raisin Growers' Ass'n v. Abbott*, 160 Cal. 601, 117 Pac. 767. Attaching creditors of the association and its debtor were also proper defendants. *California Raisin Growers' Ass'n v. Abbott*, 160 Cal. 601, 117 Pac. 767.

⁶⁸ See Chap. 17, § 657 et seq., supra.

⁶⁹ See chapter on Stock and Stockholders, infra.

⁷⁰ See Chap. 42, supra.

⁷¹ See Chap. 5, § 142, supra.

time, manner and circumstances that his right to recover can be predicated thereon,⁷² and a stockholder, creditor or other member of a class may and under some circumstances must sue on behalf of all of the class who are similarly situated and will come in as co-plaintiffs.⁷³ In ordinary tort or contract actions, the ordinary law of torts applies to determine the parties. The corporation's promisee, or one in succession to him, or the person injured by its tort should sue.⁷⁴ On a creditors' bill it is usual to sue on behalf of all who may come in as plaintiffs, and such is the better practice;⁷⁵ but it has been held not obligatory to do so, and one may sue for himself alone,⁷⁶ being required, however, in such suits and other equitable actions to align on the defendants' side all others who have interests to be affected by the relief prayed.⁷⁷ On a foreclosure of a corporate mortgage the suit is in a sense one against the corporation, and may be unqualifiedly so. The corporation is usually made a defendant, and must be one when it retains the title to the mortgaged property or an interest in it, or when any personal judgment against it is prayed.⁷⁸ The state or the public cannot be a plaintiff against a corporation unless some public right, as distinguished from private ones, is to be vindicated or enforced.⁷⁹ When the suit runs in the name of the state as plaintiff and is on a direct obligation to it no relator is necessary, but if one

⁷² A plaintiff founding his right on holding of stock must be the owner thereof, or a trustee for the owners. *MacVeagh v. Denver City Water-Works Co.*, 107 Fed. 17.

See generally chapter on Stock and Stockholders, subdivisions treating of actions and remedies by the stockholders, *infra*.

⁷³ See generally other chapters in this work, e. g., chapter on Execution, etc., and Creditors' Bills, *infra*, and chapter on Stock and Stockholders, *infra*. When a stockholders' suit in equity is brought to obtain relief against a hostile majority or against controlling officers, the suit is generally so entitled and the opposing officers or stockholders are made defendants. See chapter on Stock and Stockholders, subd. Remedies of Stockholders, etc., *infra*.

An action to recover guaranteed

dividends on stock is properly brought by plaintiff, holder of stock on his own behalf and on that of all other holders similarly situated. *Prouty v. Michigan Southern & N. I. R. Co.*, 4 *Thomps. & C.* (N. Y.) 230.

⁷⁴ Consult the general laws of Torts, Contracts, and other specific subjects.

⁷⁵ See chapter on Execution, etc., and Creditors' Bills, *infra*.

⁷⁶ *Barksdale v. Finney*, 14 *Gratt.* (Va.) 338.

⁷⁷ See § 3026, *infra*, and see also chapter on Execution, etc., and Creditors' Bills, *infra*.

⁷⁸ See § 1372 *et seq.*, *supra*.

⁷⁹ The state cannot maintain a proceeding in equity to compel a railroad company to give facilities to a private shipper if it has no public interest to represent. *State v. Chicago, M. & St. P. Ry. Co.*, 86 *Iowa* 641, 53 *N. W.* 323.

is necessary the attorney general is ordinarily a competent relator unless the statute plainly confers that capacity wholly on another.⁸⁰

The distinctness of the corporation from its members and officers is just as important in naming the defendant as in naming the plaintiff. It and not they are to be named, and unless this is done and it is properly brought into court no binding judgment will result against it.⁸¹ Separate branches or suborganizations are not to be named as the defendants, but the corporation itself is to be, if it is the real defendant in interest.⁸² And only when they have distinct interests to defend are members, officers or related corporations proper co-defendants.⁸³ Moreover to make it a party it must be rightly named in the complaint⁸⁴ and be rightly served or voluntarily appear,⁸⁵ and in chancery practice it is not a party unless process against it is prayed.⁸⁶ It may be sued though the contract or cause of action accrued to a predecessor under a different name.⁸⁷

§ 3026. — Necessary or proper co-defendants. At common law every person jointly bound by contract must have been joined; every

⁸⁰ A suit by the state to recover license fees and taxes from a foreign insurance company may be either without or with a relator; and under the statute empowering the auditor of state to institute suits for violation of the statute either by the attorney general or by such other attorney as he may designate, either the auditor or the attorney general could be relator. *State v. Insurance Co. of North America*, 115 Ind. 257, 17 N. E. 574.

The general rule is that there need be no relator when the suit immediately concerns the rights of the state or is on a direct obligation to it, and no private individual interest is sued on. *Fry v. State*, 27 Ind. 348 (on a bond); *Attorney General v. Delaware & B. B. R. Co.*, 27 N. J. Eq. 1, aff'd 27 N. J. Eq. 631 (public nuisance); *People v. Metropolitan Bank*, 7 How. Pr. (N. Y.) 144 (injunction against unlawful discounting).

⁸¹ See the sections following, and see §§ 3118, 3124, *infra*, as to judgments.

A state owned bank may be sued.

Bank of Commonwealth v. Wister, 2 Pet. (U. S.) 318, 7 L. Ed. 437.

A railroad corporation owned solely by a sister state as stockholder may be sued. *Hutchinson v. Western & A. R. Co.*, 53 Tenn. 634; *Western & A. R. Co. v. Taylor*, 53 Tenn. 408.

See also § 2931, *supra*.

⁸² A branch which is not a separate corporation cannot be sued. The main corporation is the proper defendant under the statute authorizing suits against the bank in the county where the branch is. *Tomkins v. Branch Bank*, 11 Leigh (Va.) 372.

⁸³ See § 3026, *infra*.

But the nature of the defense, as that a related corporation was to accept services in payment for goods furnished to plaintiff, may afford reason for joining that corporation. *Bloch Queensware Co. v. Metzger*, 70 Ark. 232, 65 S. W. 929.

⁸⁴ See § 3041, *infra*.

⁸⁵ See §§ 2977-3019, *supra*.

⁸⁶ In *re Binney*, 2 Bland (Md.) 99, holding corporation was not made party.

⁸⁷ See § 3032, *infra*.

one jointly and severally bound might have been joined or some might have been omitted; and in tort any or all might have been sued who were liable. In equity generally stated all persons interested in the subject of the suit ought to be joined in order that complete justice may be done and that parties may safely obey the decree. The codes of procedure adhere to these rules having regard to the nature of the action, whether legal or equitable in object.⁸⁸ Applying these rules the members and officers or agents of the corporation are ordinarily improper co-defendants merely because of their relation to the corporation, and are never necessary ones unless they have a distinct individual and indivisible interest,⁸⁹ or a distinct several liability, as participants in wrongdoing or breach of contract,⁹⁰ or have been participants in the transaction concerning which an accounting is asked or other equitable

⁸⁸ See generally the codes of procedure, also treatises on parties or practice in general. As to rules in chancery, see Mitford's & Tyler's Pl. & Pr. in Equity, p. 256 et seq.; Fletcher's Equity Pl. & Pr.; Daniell, Chan. Prac.

In suits in equity all persons should be made parties who have a material interest, either legal or beneficial, in the subject-matter of the suit. Where it appears that if the prayer of the bill be granted persons interested in the subject-matter not made parties will be affected injuriously, the bill will be dismissed. *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 46 L. Ed. 499.

⁸⁹ Officers who have no individual interest should not be joined, and if joined, should be dismissed. *Wood v. Bank of Kentucky*, 5 T. B. Mon. (Ky.) 194.

The agents and officers are not proper parties where the corporation represents them. *State v. Jacksonville, P. & M. R. Co.*, 15 Fla. 201.

It represents the stockholders. *Pierce v. Somersworth*, 10 N. H. 369.

Officers are improperly joined in an action against the corporation for breach of the right of plaintiff's privacy, if no individual act is charged against them. *Vassar Col-*

lege v. Loose-Wiles Biscuit Co., 197 Fed. 982.

Where the acts of officers or employees of the corporation were in the corporate behalf, and the corporation is solvent, such officers or employees cannot be made parties with it in a suit for infringement. *Panzl v. Battle Island Paper & Pulp Co.*, 132 Fed. 607.

Where through negligence of the employees of a street railway a party was injured and suit was brought for recovery, it was improper to join the president of defendant corporation as a defendant. *Brooks v. Galveston City R. Co.* (Tex. Civ. App.), 74 S. W. 330.

When it is desired to have an answer under oath the practice is to join some of the officers or corporators, supposed to have knowledge of matters averred in the bill and to require sworn answers from them. *Fulton County Supervisors v. Mississippi & W. R. Co.*, 21 Ill. (11 Peck) 338.

⁹⁰ Officers cannot be joined in a negligence action without allegations to show duties incumbent on them and a breach thereof. *Henry v. Brackenridge Lumber Co.*, 48 La. Ann. 950, 20 So. 221.

May be joined with its officers in

relief,⁹¹ or unless discovery without relief is prayed against them.⁹² The same is true of affiliated or related corporations,⁹³ or third persons claiming rights in the corporate property unrelated to the cause of action,⁹⁴ but without regard to relationship a participant in tort can be joined.⁹⁵ There are apparent exceptions to these rules. Thus where the statute makes stockholders jointly and severally liable for corporate debts, it is proper to make them co-defendants in a suit against it;⁹⁶ and there are other statutes authorizing joinder under certain circum-

deceit on a sale of stock by them. *Lare v. Westmoreland Specialty Co.*, 155 Pa. St. 33, 25 Atl. 812.

Officers and agents may be joined as defendants to an action for damages and injunction against nuisance to which as individuals they contributed and where a decree against them is essential to complete justice. *Cedar Lake Hotel Co. v. Cedar Creek Hydraulic Co.*, 79 Wis. 297, 48 N. W. 371.

Where one owns practically all the stock and directs the corporate affairs, he may be named as a defendant with the corporation where there has been conspiracy in the matter of infringement of a patent. *Whiting Safety Catch Co. v. Western Wheeled Scraper Co.*, 148 Fed. 396.

Directors may be joined as defendants to a trade-mark suit. *Armstrong v. Savannah Soap Works*, 53 Fed. 124.

Directors may be joined if participating in breach of contract as individuals succeeding thereto. *Pope v. Kelly*, 24 N. Y. Misc. 508, 53 N. Y. Supp. 904.

⁹¹ Participant officers may be joined though no relief against them may be proper. *O'Brien v. Champlain Const. Co.*, 107 Fed. 338.

The president alleged to have been a participant is a proper co-defendant to a bill to recover fraudulent profits from the corporation. *Berwind v. Van Horne*, 104 Fed. 581.

⁹² See this section, *infra*.

⁹³ Other corporations related to defendant only by reason of having

common directors and members should not be joined. *Rubber & Celluloid Harness Trimming Co. v. Rubber-Bound Brush Co.*, '81 N. J. Eq. 419, 519, Ann. Cas. 1915 B 365, 88 Atl. 210.

Subsidiary corporations, members of the proper defendant, should not be made defendants. *Clegg v. Aikens*, 5 Abb. N. Cas. (N. Y.) 95.

⁹⁴ Persons claiming an equitable right in defendant corporation's property are not on that ground alone proper co-defendants in a tort action against it. *Gudger v. Western North Carolina R. Co.*, 21 Fed. 81.

⁹⁵ Another person whether a servant or not can be joined as defendant in trespass against a corporation. *Botkew v. New Jersey R. & Transp. Co.*, 33 N. J. L. 328, 90 Am. Dec. 659.

⁹⁶ Stockholders may be joined in equity where by statute they are jointly and severally liable with the corporation notwithstanding they might have been sued at law alone. *Marine & River Phosphate Min. & Mfg. Co. v. Bradley*, 105 U. S. 175, 26 L. Ed. 1034.

In California the stockholder being liable on theory of contract may be joined with defendant corporation. (This is because of the peculiar nature of stockholder's liability.) *Kennedy v. California Sav. Bank*, 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846; *Kiefhaber Lumber Co. v. Newport Lumber Co.*, 15 Cal. App. 37, 113 Pac. 691.

stances.⁹⁷ On allegations that the nominal defendant is a myth, the real corporation may be made a defendant.⁹⁸ While officers and members are improper defendants unless either relief or discovery is prayed against them, it may be proper to join them as participants in the transaction though no personal decree against them would be proper.⁹⁹ If a co-defendant is suable only by reason of its privity to the corporation, jurisdiction of the corporation is essential to such joinder.¹ Statutes, similar to the federal statute quoted in the footnote, often provide that the suit can proceed without absent or non-resident defendants who otherwise would be necessary.² Joinder of defendants may be excused by proper allegations of want of knowledge or information as to their identity.³

In actions or suits concerning the right to stocks, dividends or voting, present claimants are necessary co-defendants with the corpora-

⁹⁷ In a statutory action against stockholders of a corporation that ceased business leaving unpaid debts they and the corporation may be joined as defendants pursuant to terms of the statute. *Tabor v. Goss & Phillips Mfg. Co.*, 11 Colo. 419, 18 Pac. 537.

⁹⁸ A corporation is properly made a co-defendant to an action on contract with another corporation which is alleged to be a myth representing the former one. *O'Brien v. Champlain Const. Co.*, 107 Fed. 338.

⁹⁹ Officers are improper parties when neither discovery nor relief against them is prayed. *Colonial & U. S. Mortg. Co., Ltd. v. Hutchinson Mortg. Co.*, 44 Fed. 219.

It appeared in the case that the officers had made certain personal guarantees to induce persons to undertake a contract. The court said: "The making of the guarantors and these promisors parties to the bill for such an accounting does not produce multifariousness. There is but one main contract. The others are ancillary to it. And the elastic methods of a court of equity, by which the respective liabilities of the several parties may be decreed, are peculiarly appropriate to the situation. The joinder of officers

taking part in such proceedings is quite usual and proper, although no decree against them personally may be appropriate." *O'Brien v. Champlain Const. Co.*, 107 Fed. 338.

A case in equity cannot be made by suing the stockholders directly for the distributed proceeds of deceit practiced by their corporation which has not been sued at law to ascertain the damages. *Swan Land & Cattle Co., Ltd. v. Frank*, 39 Fed. 456.

¹ An insurance company which assumed an insurer's liabilities but without contract with each insured cannot be sued as a co-defendant without legal service on the original insurer. *Empire State Ins. Co. v. Collins*, 54 Ga. 376.

² Nonjoinder of parties neither "inhabitant of nor found within the district" is not matter of abatement of or objection to a suit which can proceed against those parties who are before the court. *Judicial Code*, § 50.

³ A creditor's bill against the corporation and all its stockholders for discovery and contribution need not name all of them where by reason of loss of books or concealment they cannot be ascertained and such reason is pleaded. *Brewer v. Michigan Salt Ass'n*, 58 Mich. 351, 25 N. W. 374.

tion and former owners may be proper ones.⁴ And generally no rights of stockholders can be adjudicated unless they are joined.⁵

In suits based on corporate bonds and mortgages or trust-deeds, it is generally the rule that the corporation represents the stockholders and the trustee the bondholders for all purposes within the trust; if the suit goes beyond the matters in which they thus stand represented they must be joined.⁶ In a suit by the bondholder the trustee is a necessary party if an accounting is sought,⁷ but need not be joined

⁴See generally chapter on Stock and Stockholders, and see also the following, *infra*.

In suit for restoration of stock turned in with forged indorsements and reissued to a third person, he is not a necessary party. *Chicago Edison Co. v. Fay*, 62 Ill. App. 55, *aff'd* 164 Ill. 323, 45 N. E. 534.

In suit to compel transfer of stock to purchaser at foreclosure sale the mortgagor is not a necessary party, but he may be brought in as a proper party under Code Civ. Proc. § 389. *Tregear v. Etiwanda Water Co.*, 76 Cal. 537, 9 Am. St. Rep. 245, 18 Pac. 658.

In action by a stockholder claiming a contract right to a percentage of profits before dividends are made the other stockholders claiming a right to immediate distribution must also be made parties. *Dupignac v. Bernstrom*, 37 N. Y. Misc. 677, 76 N. Y. Supp. 381, *aff'd* 76 N. Y. App. Div. 105, 78 N. Y. Supp. 705.

In an action for recovery of guaranteed dividends by a stockholder, the stockholders need not be joined as parties. *Prouty v. Michigan Southern & N. I. R. Co.*, 4 Thomps. & C. (N. Y.) 230.

⁵In the absence of stockholders as parties the decree should not adjudicate rights to vote for directors which pertain to the stockholders as such, though they may have contracted to exercise them in a certain way. *Arkansas Valley Sugar Beet & Irrig-*

ated Land Co. v. Ft. Lyon Canal Co., 173 Fed. 601.

⁶See generally § 1372 et seq., *supra*, and see the following:

Stockholders and creditors who personally have no liens need not be made parties to an action to enforce a lien against the corporate property. *Godchaux v. Morris*, 121 Fed. 482.

The president of a corporation is not a necessary party to a suit for foreclosure under a trust deed where he has assisted in placing bonds in order to secure additional funds for the corporation. *Unity Co. v. Equitable Trust Co.*, 204 Ill. 595, 68 N. E. 654.

Bondholders or their trustee are necessary parties to an action to subject the mortgaged corporate property to payment of its debts. *Georgetown Water Co. v. Central Thomson-Houston Co.*, 17 Ky. L. Rep. 1270, 35 S. W. 636, 34 S. W. 435.

In an action by the corporation to cancel bonds for fraud with a cross-petition to enforce the bonds, the stockholders are not necessary parties. *Des Moines Gas Co. v. West*, 50 Iowa 16.

In a cancellation suit stockholders are not necessary parties where trustees holding the title to the land are sued. They represent the corporation. *Anderson v. Stockdale*, 62 Tex. 54.

⁷The sole trustee in an income mortgage is an indispensable party to an accounting suit by a bondholder. *Barry v. Missouri, K. & T. Ry. Co.*, 22 Fed.

if direct relief against the corporation without his intervention is asked.⁸

On a creditors' bill the necessity and propriety of making the stockholders parties defendant depends on several factors. If the suit is to reach their contract or statutory liability, as most such suits are, all of the stockholders who are liable may be joined and in some suits must be joined.⁹ But if the suit is not to subject them to any liability and only designs to reach materialized corporate assets, it would seem improper or at least unnecessary to join them.¹⁰ Other creditors are necessary parties if their rights are to be affected.¹¹

In actions against insurance corporations the rights of the policyholders cannot be determined in their absence,¹² but when the policies have been rescinded, the ultimate beneficiaries are not necessary parties to litigation against the corporation by the holders to recover premiums paid.¹³

In equity the practice has been thoroughly established from an early time of joining officers, stockholders and agents of the corporation for the sole purpose of discovery on a bill against it for relief,¹⁴ and with-

631; *Morgan v. Kansas Pac. Ry. Co.*, 21 Blatchf. (U. S.) 134, 15 Fed. 55.

⁸ A bondholder's suit against a corporate mortgage for relief under the agreement but not involving the trust or security does not require the trustee as a party. *Spies v. Chicago & E. I. R. Co.*, 30 Fed. 397.

⁹ See chapters on Execution, etc., and Creditors' Bills; Stock and Stockholders, subd. Remedies of Creditors, *infra*.

¹⁰ Stockholders ought not to be made parties in a suit against a defunct corporation to subject assets to payment of debts. *Lewis' Adm'r v. Glann*, 84 Va. 947, 6 S. E. 866.

See also chapter on Execution, etc., and Creditors' Bills, *infra*.

¹¹ On a creditor's suit to set aside a transfer in trust by the corporation as fraudulent the beneficiaries of the trust, being creditors, should be made parties. *Adam Roth Grocery Co. v. Hotel Monticello Co.*, 148 Mo. App. 513, 128 S. W. 542.

¹² In a public suit by the insurance commissioner to revoke a license as

insurer, the policies issued under it should not be adjudged void if holders are not parties. *Equitable Life Assur. Soc. v. Host*, 124 Wis. 657, 4 Ann. Cas. 413, 102 N. W. 579.

¹³ Beneficiaries of life insurance need not be joined in suit to recover premiums based on a termination of the policy by defendant insurer's insolvency during lifetime of insured. *Universal Life Ins. Co. v. Cogbill*, 30 Gratt. (Va.) 72.

¹⁴ Officers. *King v. Livingston Mfg. Co.*, 180 Ala. 118, 60 So. 143; *Le Grand v. McKenzie*, 110 Ala. 493, 20 So. 131; *Many v. Beekman Iron Co.*, 9 Paige (N. Y.) 188; *Vermilyea v. Fulton Bank*, 1 Paige (N. Y.) 37; *Twells v. Costen*, 1 Pars. Eq. Cas. (Pa.) 373.

Former as well as present officers may be so joined. *Fulton Bank v. Sharon Canal Co.*, 1 Paige (N. Y.) 219.

The secretary, bookkeeper or some member may be made co-defendants for purposes of discovery and answer under oath. *McKim v. Odom*, 3 Bland (Md.) 407.

A mere member may be joined for

out so joining them discovery could not be required.¹⁵ To do so it was essential to plead the necessary grounds for discovery, or to pray relief against them so that discovery would follow as an incident.¹⁶ This was permitted in view of its inability to answer under oath and thus to afford the required discovery. It has fallen more or less into disuse under the modern equity practice, and completely so under the codes, which frequently provide for examination of parties, sometimes called "discovery" before trial. A discovery is also provided for in federal courts by the New Equity Rules, but it is not the same as the former chancery discovery.¹⁷

§ 3027. Corporation as co-party in actions between others—In general. There are many actions and suits, such as foreclosures, suits to quiet title, injunction, accounting, and other equitable remedies as well as legal ones, where the corporation though not a principal party is joined for the purpose of complete relief. This is done on general principles of law not peculiar to corporations. The impleading and alignment of the corporation is done in the usual manner determined by the nature of its claim or interest and by the distinct nature of the corporate entity. The reports abound with instances where this has been done without any question of the propriety of the practice, and an attempt to collect these instances would not only be futile but also confusing. In the next four sections are collected references to various portions of this work where some of the actions are treated where this has most frequently been done. Whenever the cause of action is such that the corporation is primarily liable, it is of course a necessary party notwithstanding the fact that the beneficial operation of the decree will be solely against the stockholders.¹⁸ It is also a necessary party where its property rights are to be affected by the proposed decree,¹⁹ and it has been held a proper party where a defense was that performance of the contract sued on was to be rendered to

purposes of discovery and it is not necessary that relief be prayed against him. *Wright v. Dame*, 1 Metc. (Mass.) 237.

¹⁵ *Brumly v. West Chester County Mfg. Society*, 1 Johns. Ch. (N. Y.) 366; *Teter v. West Virginia Cent. & P. Ry. Co.*, 35 W. Va. 433, 14 S. E. 146.

¹⁶ See § 3064, *infra*.

¹⁷ See § 3110, *infra*.

¹⁸ On a bill to recover from stock-

holders in vendor corporations because of fraud in a sale to plaintiff corporation, the purchaser, the vendor corporations are primary parties and must be joined notwithstanding distribution has been made to shareholders. *Swan Land & Cattle Co., Ltd. v. Frank*, 39 Fed. 456.

¹⁹ *Northern Indiana R. Co. v. Michigan Cent. R. Co.*, 5 McLean 444, Fed. Cas. No. 10,321.

the corporation as a third party.²⁰ Thus in the foreclosure of corporate mortgages, the corporation if still the owner of the property is a necessary party but only a proper one if it has parted with the title, unless a personal judgment is sought, in which case it would be a necessary defendant on that ground alone.²¹ If it has become extinct by dissolution or expiration it is of course not a party or capable of being one, and those who have succeeded to it in respect to the subject of the action take its place; and where its power of defending is in suspense by a receivership or the like it may be represented by the receiver or corresponding administrator.²² The joinder of it when otherwise necessary is not excused, however, by any allegations that do not show either such extinction or suspension.²³ If the nature of a suit is such as to affirm that a corporation exists, and it is a necessary party, nonjoinder cannot be excused by denying that it was or could be a corporation.²⁴ The question of joining a foreign corporation is complicated with the further questions of jurisdiction over it and of making an effective and enforceable decree²⁵ and it can

²⁰ On a suit for the price of goods which defendant claimed was to be paid for in services to plaintiff's related corporation that corporation was a proper but not a necessary party. *Bloch Queensware Co. v. Metzger*, 70 Ark. 232, 65 S. W. 929.

²¹ See § 1372 et seq., *supra*.

Corporation is indispensable party to foreclosure of mortgage on its property. *Samuel v. Holladay*, 1 Woolw. 400, Fed. Cas. No. 12,288.

In a suit to foreclose a lien, the corporation holding legal title is a proper defendant. *Fox v. Robbins* (Tex. Civ. App.), 70 S. W. 597; *Fox v. Robbins* (Tex. Civ. App.), 62 S. W. 815.

²² See chapters on Forfeiture, Dissolution and Winding Up; Insolvency; Bankruptcy; Receivers, *infra*.

In case of extinction occurring pendente lite an abatement takes place and a proper substitution must be made to carry on such defenses as have survived. See § 2955, *supra*.

²³ Nonjoinder of the corporation as a necessary defendant is not excused

by allegations that for want of officers and suspension of business it cannot be served. That is not equivalent to alleging its dissolution. *Swan Land & Cattle Co., Ltd. v. Frank*, 39 Fed. 456.

A suit to restrain collection of a tax for aid in construction of a gravel road is not one to destroy the corporation, though its failure to organize is alleged; hence it may be joined as a defendant by its pretended name. *Knight v. Flatrock & W. Turnpike Co.*, 45 Ind. 134, with dissenting opinion.

As to mode of pleading these facts see § 3069 et seq., *infra*.

²⁴ A bill to dissolve an association pretending to be a corporation requires that it be a party, although it is alleged that it is not and could not be even a corporation de facto. *Lincoln Park Chapter No. 177, R. A. M. v. Swatek*, 105 Ill. App. 604, *aff'd* 204 Ill. 228, 68 N. E. 429.

²⁵ See generally chapter on Foreign Corporations, *infra*, and see also §§ 2957 et seq., 2985, *supra*.

only be joined when brought into the jurisdiction.²⁶ Of course a corporation may be barred or estopped by privity in estate or law to some defendant by a judgment to which it was not a party.²⁷

§ 3028. — Between officers or promoters and members or stockholders. Those actions and suits which officers or promoters may have against members or stockholders, and vice versa, or which stockholders may wage among themselves, or officers among themselves, are individual not corporate. The corporation is not a necessary party to them unless it has an interest of its own or participated as a corporation in the thing complained of; but on general principles it may be a proper party. There is a considerable variety of such suits, and a treatment of them will be found in other chapters of this work.²⁸ Thus in membership corporations the corporation is a necessary party if restoration to membership is sought against members who excluded plaintiff,²⁹ but if nothing is sought but enjoyment of membership rights without its active intervention it need not be joined.³⁰ Similar

²⁶ Foreign corporation cannot be joined as defendant in creditors' suit where it is not served and does not appear. *Elkhart Nat. Bank v. Northwestern Guaranty Loan Co.*, 87 Fed. 252.

²⁷ See § 3124, *infra*, as to effect of judgment, and see also on the general law of *res adjudicata*, such works as *Freeman on Judgments and Black on Judgments*.

By consolidation or succession the later corporation is oftentimes bound by what was adjudicated against the predecessor. The adjudication enters into the rights so devolved. See generally chapter on Consolidation and Merger, and chapter on Reorganization, *infra*. A similar principle would apply where the corporation resumes its property after a receivership. See chapter on Receivers, *infra*.

With reference to the necessity of joining the corporation in a suit by parties who are trustees for its use, see *Hecker v. Cook*, 20 Colo. App. 282, 78 Pac. 311.

²⁸ See Chap. 42, *supra*, and chapter on Stock and Stockholders, *infra*.

Consult also §§ 165, 166, *supra*, as to liability of promoters to subscribers, and §§ 627-629, *supra*, as to remedies of subscribers or purchasers in case of fraud, and § 134, *supra*, as to relation of promoters to stockholders or subscribers.

Corporation should be party on bill to remove officers. *Krecker v. Shirey*, 2 Pa. Dist. Ct. 24.

In action to obtain relief from conversion of treasury owned shares to the use of officers, and to prevent excessive assessments, the corporation is a proper party defendant. *Marshall v. Golden Fleece Gold & Silver Min. Co.*, 16 Nev. 156.

An injunction against trustees in respect to matters within their powers should have the corporation joined, but after the writ issued the non-joinder would not invalidate it. *Morgan v. Rose*, 22 N. J. Eq. 583.

²⁹ *Ross v. Crockett*, 9 La. Ann. 337.

³⁰ It is not necessary that the corporation be joined as a party, where members of a church corporation composed of two separate classes institute action to restrain certain other

principles will be found exemplified in the ensuing chapter on Stock and Stockholders. The question may be governed by statutes enabling specified persons to sue for official misdoing or the removal of officers or to assert other internal rights, but such a statute has been held not to apply to a pending action.³¹

§ 3029. — Suits in right of the corporation by officers and stockholders. These suits are of two kinds, those of an equitable nature, commonly called stockholders' suits, and those of a statutory origin and authority, such as that in New York, brought by an officer or director or stockholder for relief against official misdoing. They are both fully treated in appropriate places. In the former class of actions the corporation is a necessary party, in the latter the statute determines and it must be consulted.³²

§ 3030. — Insolvency, receivership, bankruptcy and dissolution suits. These suits are distinctive and technical not only as conducted in chancery but also under the numerous statutes which regulate them. They have received a separate treatment, which is hereby referred to, with the general statement that the corporation is a necessary party because of the fact that its very existence and self-control is the prime matter of the suit.³³ The fact of a corporation being affirmed by such a suit inhibits the pleading as an excuse for non-joinder that it was not and could not be a corporation.³⁴

§ 3031. — Creditors' suits against officers or stockholders or debtors of corporation. The general subject of creditors' bills is treated

members from barring plaintiff members from occupying the church a portion of the time for separate services as the by-laws provide. *Peterson v. Christianson*, 18 S. D. 470, 101 N. W. 40.

³¹ See Chap. 42, *supra*, as to statutory remedies against officers and directors.

On a bill by stockholders against directors for waste and misapplication of funds, the corporation should be made party. (This suit was pending and was not affected by the statute enacted to regulate such suits.) *Robinson v. Smith*, 3 Paige (N. Y.) 222, 24 Am. Dec. 212.

³² Equitable actions by stockholders, see chapter on Stock and Stockholders, subd. Remedies of Stockholders, etc., *infra*.

Statutory remedies against wrongdoing officers and directors, see Chap. 42, §§ 2670-2685, *supra*.

Statutory remedy to try title to corporate office or to contest elections, see §§ 1830, 1831, *supra*.

³³ See chapters on Insolvency; Bankruptcy; Receivers; Forfeiture, Dissolution and Winding Up, *infra*.

³⁴ *Lincoln Park Chapter No. 177, R. A. M. v. Swatek*, 105 Ill. App. 604, *aff'd* 204 Ill. 228, 68 N. E. 429.

fully in a later chapter, and the pursuit of officers' and stockholders' liability for the satisfaction of creditors is further treated in another chapter. Both these are to be consulted to see the necessity or propriety of joining the corporation as a party defendant. The chancery rules are no longer a safe guide for the reason that many statutory regulations of practice have intervened or even displaced the former procedure.³⁵ If the debtor primarily liable is not the corporation, and it stands merely as a secondary party having or thought to have available assets, it may be a proper or a necessary party.³⁶

§ 3032. Suits on contracts or causes running in name of officer, agent, etc. It is well settled that the corporation can sue as plaintiff whenever the contract or other cause of action really belongs to it, though it does not run to it in its true corporate name. At common law this was accomplished by alleging that the promise was made to it by the name in which the contract runs, and that it is the same party as that intended by said name. In equity and also under the codes of procedure the rule that the real party in interest should sue brought the same result.³⁷ A like rule prevails where the corporate name has been changed from that to which the contract runs.³⁸ The most common instance of this is where the contract is made in the name of an officer or agent but in fact for the corporation.³⁹ Of course there is always a previous question whether or not the contract was one in-

³⁵ See chapters on Execution, etc., and Creditors' Bills; Stock and Stockholders, subds. on Liability of Stockholders, infra, and Chapter 42, subds. on Liability of Officers, supra.

³⁶ This does not depend on any principle of corporation law, and satisfactory precedents may be found in any standard work on Creditors' Bills. Indeed the cases hereinafter cited on creditors' bills against the corporation as the primary debtor will afford precedents where the secondary party is properly or necessarily joined, and these are authority on the point.

On a bill to reach assets of a bankrupt promoter the corporation may be a proper party to an accounting. *Kimmerle v. Dowagiac Gas Co.*, 159 Mich. 34, 123 N. W. 565, 16 Det. L. N. 855.

³⁷ This is nothing more than an application of a well-known rule of

agency and contracts. See treatises on those topics.

See generally cases in notes following in this section.

May sue in assumpsit on note made to it under another name. *Medway Cotton Manufactory v. Adams*, 10 Mass. 360.

³⁸ A corporation having had its name changed can sue as plaintiff on obligations running to it by the old name. *Northwestern College v. Schwagler*, 37 Iowa 577.

³⁹ *Alabama*. Note to "treasurer of the [name of corporation]" is a note to it. *Alston v. Heartman*, 2 Ala. 699.

California. The corporation as real party in interest can sue on a contract known to be its own, but made in the name of its officer. *Escondido Oil & Development Co. v. Glaser*, 144 Cal. 494, 77 Pac. 1040.

tended to run to the corporation, where it is made in the name of an officer or agent. The pleader will assure himself on that point and frame the action accordingly.⁴⁰ It may also sue as plaintiff where it is the successor in title to the original promisee or obligee.⁴¹ A trustee should sue for injuries to the trust property held for the benefit of a corporation,⁴² but if it has an equity in a property or chose of which the title is in the stockholders, it may sue to protect it, making them parties as may be necessary.⁴³ The corporation as a trustee of a charity may sue for the charitable fund notwithstanding the gift specified that a certain committee should call for and receive it,⁴⁴ but where the cause accrues to the officer as an individual, even

Florida. Note payable to its agent. *Southern Life Insurance & Trust Co. v. Gray*, 3 Fla. 262.

Indiana. Note payable to "treasurer of Lebanon Corporation." *McBroom v. Lebanon*, 31 Ind. 268. Subscription running to "the directors of the" named corporation. *Thompson v. Marion & M. Gravel Road Co.*, 98 Ind. 449.

Maine. *Warren Academy v. Starrett*, 15 Me. 443; *Ministerial & School Fund v. Parks*, 10 Me. 441. So held of a municipality. *Garland v. Reynolds*, 20 Me. 45.

Michigan. Corporation held not a privy to contract in question. *O'Brien v. Dunn Iron Min. Co.*, 141 Mich. 616, 105 N. W. 133, 12 Det. L. N. 583.

New York. *Thomas Gordon Malting Co. v. Bartels Brewing Co.*, 206 N. Y. 528, 100 N. E. 457, 461; *Bayley v. Onondaga County Mut. Ins. Co.*, 6 Hill 476, 41 Am. Dec. 759. An incorporated school can sue in its own name on a subscription given to a committee for its benefit though not assigned to it. It is entitled by operation of law. *Dansville Seminary v. Welch*, 38 Barb. 221.

Pennsylvania. Subscriptions made to unincorporated predecessor for a school. *Edinboro Academy v. Robinson*, 37 Pa. St. 210, 78 Am. Dec. 421.

Vermont. *Rutland & B. R. Co. v. Cole*, 24 Vt. 33. In an early Vermont

case it was held the officers must sue in their own names on a note, otherwise semble if mere servants or agents took the note. *Binney v. Plumley*, 5 Vt. 500, 26 Am. Dec. 313. And see *Whitelaw v. Cahoon*, 1 D. Chip. 295.

Virginia. Contract running to "President and Managers of" plaintiff. *Culpeper Agr. & Mfg. Society v. Digges*, 6 Rand. 165, 18 Am. Dec. 708.

⁴⁰ As to the form in which a contract shall be executed to be a corporate contract, see §§ 1467-1486, *supra*.

⁴¹ A corporation may sue on a bond running to its former receiver and his "successors." *American Surety Co. of New York v. Campbell & Zell Co.*, 138 Fed. 531.

⁴² Where a cemetery corporation's lands are held in trust for it, the trustees should bring action for damages to it. *Packard v. Old Colony R. Co.*, 168 Mass. 92, 46 N. E. 433.

⁴³ A corporation, being equitable owner of a judgment recovered by its stockholders, may sue in its own name to set aside a conveyance in fraud thereof, but the stockholders should be joined as necessary parties. *Lawson v. Alabama Warehouse Co.*, 73 Ala. 289.

⁴⁴ A charitable corporation may sue for a donation though the act of incorporation authorizes a named committee to call for and receive it, it being only a corporate agency. Pro-

when designated by his relation to the corporation, he is the proper plaintiff. For example a legacy to the person who at a given time shall hold a certain office must be recovered by such person though it is ultimately for the benefit of the corporation.⁴⁵

What has been written does not imply that the officer cannot sue; he may do so too.⁴⁶ And the corporation may be a necessary party to a bill by the officer on a contract for its benefit.⁴⁷ Just as it may sue on such a contract, so may it be sued though the contract runs to the names of the officers,⁴⁸ provided there has been no election to hold him individually,⁴⁹ and conversely the officer cannot hide his wrongdoing and avoid suit by use of the corporate name.⁵⁰ It may be sued though it ran in the name of a predecessor.⁵¹ Both the corporation and the officer may be sued, if both are liable and no election can be forced between them.⁵²

§ 3033. In statutory and special proceedings. In a proceeding not according to the common law but according to statute, the stockholders need not be made parties if they are represented by the corporation which is a party or has the requisite notice.⁵³ No other

prietors of *White School House v. Post*, 31 Conn. 240.

⁴⁵ The treasurer at the time and not the president or the corporation is the proper plaintiff to sue for a legacy payable to "the person, who when the same is payable, shall act as treasurer of a" named society for its use and benefit, where a reorganization has occurred the treasurer of the successor should sue. *Dewitt v. Chandler*, 11 Abb. Pr. (N. Y.) 459.

⁴⁶ Suit may also be in the officer's name, though he had no personal part in accepting delivery of the note sued on and given to cover a debt to the corporation. *Hymer v. Ijama*, 56 Md. 470.

⁴⁷ *Nichols v. Williams*, 23 N. J. Eq. 63.

⁴⁸ See *Farmers' & Mechanics' Bank v. Troy City Bank*, 1 Dougl. (Mich.) 457, where suit was maintained on bill accepted by cashier.

Contract by them as "directors of" the corporation was in fact its con-

tract. If not they should be sued as individuals. *Herod v. Rodman*, 16 Ind. 241.

May be sued on notes made in de facto officers' names for a loan to it. *Wanner v. Emanuel's Church of Evangelical Ass'n*, 174 Pa. St. 466, 34 Atl. 188.

⁴⁹ *Richmond Union Passenger Ry. Co. v. New York & S. B. Ry. Co.*, 95 Va. 386, 28 S. E. 573.

⁵⁰ Officers who have used the corporate name to cover their own wrongdoing must answer individually. *Morrison v. Blue Star Nav. Co.*, 26 Wash. 541, 67 Pac. 244.

⁵¹ Successor by different name may be sued. *Wilson v. Chesapeake & O. R. Co.*, 21 Gratt. (Va.) 654.

⁵² *Mason v. Morin*, 19 Ky. L. Rep. 794, 42 S. W. 88.

⁵³ Notice to the corporation alone need be given. The stockholders are represented by it in a condemnation of its property for public use. *Peirce v. Somersworth*, 10 N. H. 369.

precedents have been found in which a question of parties determinable by corporation law was made in a special proceeding, but it would seem to be logical to adopt the rule that the stockholder is represented by the corporation in any such proceeding, and that if it does not represent him in the particular proceeding he should be cited or made a party. Mandamus and quo warranto, regarded as special proceedings in at least some of the code states, are treated in other chapters.⁵⁴ References to statutory proceedings between officers and members, and members and the corporation have already been made.⁵⁵

§ 3034. In proceedings not inter partes; admiralty, probate, etc. There is nothing peculiar, as evidenced by precedents thereon, about the practice of making parties by citing claimants in proceedings not in form by one party against another, but in form among all parties, inter omnes. As to these proceedings the statutes regulating them should be consulted and the corporation treated as a natural person and cited or omitted accordingly.

§ 3035. Effect of receivership, dissolution, suspension or succession. Both the corporation and the receiver were held necessary parties to a bill to bring in property to the corporation to which it had only a right in action or an equity.⁵⁶ Whether a receivership, for instance, makes it necessary to omit the corporation as a party in litigation affecting the corporate concerns, or to join it, or merely makes joinder proper, depends on the scope of the receivership within which the receiver represents the corporation, further on the propriety of allowing it to be engaged in litigation during the receivership, and on other things all of which are fully treated in another chapter. If dissolution is absolute it cannot be a party on either side, but if existence be continued by statute it all depends on the terms of the statute who are or may be parties. If the corporation be in suspense (not merely dormant) similar rules to those in the case of a receiver would afford the test for making or omitting it as a party. It has already been seen that dissolution abates the action (unless the corporation is extended by statute to wind up) and that substitution may be necessary.⁵⁷ When there has been a succession of corpora-

⁵⁴ See chapters on Quo Warranto; made party. *Swift v. Eckford*, 6 Mandamus, *infra*. Paige (N. Y.) 22.

⁵⁵ See § 3028, *supra*.

⁵⁶ On a bill to redeem land from a mortgage in fact held for a corporation, it as well as its receiver must be and see also chapters on Insolvency; Bankruptcy; Receivers; Forfeiture, Dissolution and Winding Up, *infra*.

tions, as by consolidation or reorganization, or a succession by the corporation to rights and liabilities of incorporators and promoters, the party plaintiff or defendant will depend on whether the right or the liability has devolved on the corporation succeeding or remains in the predecessor. This is explained in other parts of the work.⁵⁸ A consolidation of corporations also presents the prime question whether there is an extinction of the old corporations by merger, or simply a merger of their outward organic forms. The conclusion generally reached is that the old corporations become extinct and the new succeeds to all of their rights, franchises, privileges, duties, and liabilities, but this is not a universal rule. Terms of the consolidation agreement or the statutes may prevent extinction, at least until the old corporations have time to wind up their affairs.⁵⁹ If there is no determination of the former existence, but merely a continuance of it under a new organization in form with the old substance of membership and rights, then the actions by or against it which may have been pending do not abate or suffer interruption. If there is a new existence then abatement follows, unless the statute otherwise provides; and a revivor must be had.⁶⁰ The rights of action and defenses of the old corporation may pass to the new, in whole or in part, according to the terms of the several charters and the agreement of transfer or succession, and the statutes, if any, affecting and governing the succession. It is a frequent provision that the new one succeeds to all of the rights, franchises, privileges, duties and liabilities of the old.⁶¹ A supplemental or other additional pleading may be necessary in order to show the succession or to explain the change of corporate name, if the action is pending,⁶² or appropriate allegations may be required in the original pleading if a new action is brought afterwards,⁶³ and amendments as to parties may also be necessary.⁶⁴

§ 3036. New and additional parties and amendments of parties. In accordance with law and equity practice additional new parties may be brought in or original ones dismissed, subject to the rule that

⁵⁸ See Chapter 5, *supra*, as to succession to promoters; chapters on Consolidation and Merger; Reorganization, *infra*.

Liability or right of corporation succeeding partnership or association, see § 374 *et seq.*, *supra*.

⁵⁹ See chapter on Consolidation, *infra*.

⁶⁰ See §§ 2954, 2955, *supra*.

⁶¹ See generally chapters on Reorganization; Consolidation, *infra*.

If the new and the old remain distinct the new corporation cannot be sued as the old by an untrue allegation that they are the same. *Titus v. Minnesota Min. Co.*, 8 Mich. 183.

⁶² See § 3080, *infra*.

⁶³ See § 3045, *infra*.

⁶⁴ See § 3036, *infra*.

a new action or a new bill cannot be made thereby.⁶⁵ An amendment of pleadings to correct the name or description of the parties in the action may also be made, as will presently be shown.⁶⁶ A new party may be brought in to meet the requirements of a cross-complaint by the corporation.⁶⁷ A personal representative or other successor to an officer or stockholder party can be brought in only when his succession involves the thing or matter because of which the original party was joined to the action and therefore a party for discovery cannot be replaced with such a successor.⁶⁸ Some of the more frequent instances of substitution in actions affecting corporations are those whereby the corporate successors on a dissolution or the corporate receivers or liquidators are brought in.⁶⁹ In states where the practice of suing in the plaintiff's name to the use of the real party prevails a question is presented by the dissolution of a corporation so standing as plaintiff. Under such a practice, although by statute corporate actions are preserved from abatement, it was held proper to substitute the real party.⁷⁰ Under special circumstances shown it was held to be proper to substitute the stockholders as plaintiffs to a bill by a corporation which acquired title in a formative state without ever completing its incorporation.⁷¹ A proper petition or its equivalent showing the new party's interest, and an order thereon making it a party is the proper procedure, a mere suggestion being

⁶⁵ The rule that a new party cannot be made by amendment is exemplified in cases where an amendment of the description of the party or his authority is resisted as being in effect the substitution of a totally different party. See *Jemison v. Planters' & Merchants' Bank*, 23 Ala. 168, and other cases cited § 3080, *infra*.

⁶⁶ See § 3080, *infra*.

⁶⁷ The corporation can cross-complain asking annulment of the contract sued on and to the end of complete decision may bring in a new party. *Goodell v. Verdugo Canon Water Co.*, 123 Cal. 308, 71 Pac. 354.

⁶⁸ When an officer joined for purpose of discovery dies, his personal representative cannot be substituted. *Le Grand v. McKenzie*, 110 Ala. 493, 20 So. 131.

⁶⁹ As to necessity or propriety of

substitution where dissolution or receivership has occurred *pendente lite*, see §§ 2954, 2955, *supra*, and see also chapters on Insolvency; Bankruptcy; Receivers; Forfeiture, Dissolution and Winding Up, *infra*.

As to whether receivers may come in at discretion or of right, see chapter on Receivers, *infra*.

⁷⁰ See *Frye v. Bank of Illinois*, 10 Ill. (5 Gilm.) 332.

⁷¹ A bill in the corporate name to recover its property was properly amended by substituting names of the holders of the stock on its appearing that its organization was never completed after it acquired title. *Vermont Mining & Quarrying Co. v. Windham County Bank*, 44 Vt. 489. The foregoing precedent seems to be one that should be regarded with doubt or at least followed with great caution.

insufficient.⁷³ A successor corporation must appear to have succeeded in the same right that is in litigation, and will be denied leave if the showing admits of the inference that it has succeeded by a paramount right which the action cannot affect.⁷³ Proper process and service on the new party is essential to complete the impleading of him or it,⁷⁴ and for this purpose a service originally made on the officer affords no basis for substituting the corporation, though it bears his name.⁷⁵ It is not material whether the attorneys for the petitioner have any authority to represent the proposed new party,⁷⁶ but a notice of substitution cannot be served on the new party's attorneys validly unless their authority is made to appear on the record.⁷⁷ Supplemental pleadings are usually necessary to connect the new parties with the cause of action.⁷⁸ Objection to the mode by which a party is brought in, or that it has been brought in, must be seasonably made lest the error be cured by going into the trial.⁷⁹

Unnecessary parties and those improperly joined or aligned may ordinarily be dismissed according to the common practice at law, in equity, and under statutes,⁸⁰ but a dismissal was denied to a trustee joined as plaintiff, when he should have been a defendant, on the

⁷³ A mere suggestion that a corporate party has become merged by consolidation will not make the new corporation a party. Appropriate proceedings disclosing its interest and an order making it party are required. *Louisville, E. & St. L. Consol. R. Co. v. Surwald*, 147 Ill. 194, 35 N. E. 476, aff'g 34 Ill. App. 525.

⁷³ A new corporation succeeding by purchase under judicial sale will not be substituted on that showing alone as defendant to an action for recovery of possession of land. *Moseley v. Albany Northern R. Co.*, 14 How. Pr. (N. Y.) 71.

⁷⁴ Unless it was legally served the corporation could not by amendment be made defendant instead of its receivers. *Price v. Delano*, 187 Mich. 49, 153 N. W. 7, distinguishing *Daly v. Blair*, 183 Mich. 351, 150 N. W. 134.

⁷⁵ A substitution by amendment is erroneous. *Ziegler v. George Schleicher Co.*, 56 N. Y. Misc. 582, 107 N. Y. Supp. 85.

⁷⁶ An additional common tenant of plaintiffs brought in by them. *Union Naval Stores Co. v. Pugh*, 156 Ala. 369, 47 So. 48.

⁷⁷ A notice of substitution of a successor corporation as defendant served on attorneys without anything in the record to show that they represented it is a nullity. *Sturtevant v. Milwaukee, W. & B. V. R. Co.*, 11 Wis. 61.

⁷⁸ See § 3080, *infra*.

⁷⁹ When a corporation is added to a complaint as defendant after argument, it is too late to object that it ought to have come in by intervention, if at all. *State v. Jacksonville, P. & M. R. Co.*, 15 Fla. 201.

Objection that the corporation was substituted as an entirely new party by amendment cannot be made for the first time after verdict by the corporation which took part in the trial. *Shorter University v. Franklin*, 75 Ark. 571, 88 S. W. 587, 974.

⁸⁰ Consult general works on practice. See also § 3113, *infra*.

condition that his co-plaintiffs indemnified him against liability for plaintiffs' costs.⁸¹

§ 3037. Intervening and interpleaded parties. There is nothing about a corporation which prevents it from intervening in a suit or interpleading claimants like any natural person would under a similar state of the equities. Nor is there any reason why others should not in the ordinary manner interplead it or intervene in a suit where it is a party. The questions involved in either situation are mainly substantive questions of the existence of the right to intervene or to interplead, and few actual questions of parties can arise. In the code states they are both regulated by statutes. Intervention in federal equity practice is now regulated by New Equity Rule 37, which is not materially different from the established law on that subject.⁸² The right of the corporation to interplead claimants to stocks and dividends has been sustained, and there is no reason why it may not interplead any conflicting claimants to a fund or property which it has as a stakeholder. It is often done by an insurance corporation where a loss payable or a benefit is thus in dispute.⁸³ The corporation rather than its disbursing officer or agent is the one to file an interpleader bill or petition.⁸⁴

Stockholders who make a proper showing of equity are allowed to intervene in suits to which the corporation is a party, when necessary for the protection of their rights, or where a proper defense is available which it will not make,⁸⁵ and its creditors may also intervene.⁸⁶ Intervention is frequently allowed in corporate mortgage foreclosure suits and receivership suits.⁸⁷ The state may of its own

⁸¹ A trustee was joined as a co-plaintiff, whereas he might have been made a defendant for refusal to join. *McAllen v. Woodcock*, 60 Mo. 174.

⁸² See full text of the rule 226 U. S. appendix. See *Kardo Co. v. Adams*, 231 Fed. 950.

⁸³ As to claimants to stocks or dividends, see chapter on Stock and Stockholders, *infra*.

May interplead dividend claimants. *Salisbury Mills v. Townsend*, 109 Mass. 115.

⁸⁴ Mutual benefit insurance corporation can interplead claimants to a benefit. Its treasurer is not the one to file the interpleader bill as he does

not owe the money. *Hechmer v. Gilligan*, 28 W. Va. 750.

⁸⁵ A stockholder may intervene to make a defense or claim which the corporation will not or cannot make (practice on such a petition of intervention stated). *Ex parte Gray*, 157 Ala. 358, 131 Am. St. Rep. 62, 47 So. 286. See also chapter on Stock and Stockholders, *infra*.

⁸⁶ See case cited in note following.

⁸⁷ See § 1373, *supra*, and chapter on Stock and Stockholders, *infra*.

In a foreclosure suit against a corporation, individual bondholders on making a proper case against the trustee who primarily represents them and

motion intervene in a suit affecting a state owned corporation.⁸⁸ A so-called intervention has been allowed to enable a late officer to inform the court of the dissolution of the corporate defendant.⁸⁹ A petitioner will not be allowed to intervene on a side which would so align the parties as to oust the jurisdiction of a federal court, where equal protection could be given him on the other side.⁹¹ In the federal courts and chancery courts generally, equitable owners or claimants of corporate property cannot be admitted as defendants to assert their equities in a law action against it for tort.⁹²

Unless the petitioner shows equities involved in the suit,⁹³ or shows that his corporation cannot properly make defense⁹⁴ leave to intervene should be refused.

V. PLEADINGS

§ 3038. General law of pleading. The same rules of pleading apply to corporate parties as to other parties. The law of pleading is

stockholders who make a case of inability or unwillingness of the corporation to defend may be allowed to intervene. *Continental & Commercial Trust & Savings Bank v. Allis-Chalmers Co.*, 200 Fed. 600.

A lessor may intervene in a suit against its lessee for receivership of the leased street railroad. *Re Metropolitan Ry. Receivership*, 208 U. S. 90, 52 L. Ed. 403 (intervention to ask for extension of receivership to its own properties).

Bill of intervention for receiver. *Farwell v. Great Western Tel. Co.*, 161 Ill. 522, 44 N. E. 891, rev'g 47 Ill. App. 579.

See also chapter on Receivers, *infra*.

⁸⁸ In a stockholders' suit to restrain action proposed by a state owned railroad, the state may intervene of its own motion. *Central Ry. Co. v. Collins*, 40 Ga. 582.

⁸⁹ The late secretary may intervene to inform the court. *Combes v. Keyes*, 89 Wis. 297, 27 L. R. A. 369, 46 Am. St. Rep. 839, 62 N. W. 89.

As to the mode of pleading nonexistence or dissolution of the corporation, see §§ 3069-3074, *infra*, and com-

pare § 3018, *supra*, as to the mode of appearing for that purpose.

⁹¹ A stockholder asking to come in as a plaintiff will be obliged to come in as a defendant to avoid ousting the jurisdiction by aligning against the corporation where full relief can be given him as defendant. *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. 525, Fed. Cas. No. 2,025.

⁹² *Gudger v. Western North Carolina R. Co.*, 21 Fed. 81.

⁹³ In action by the holder against a corporation on its notes, it denying execution, a third person cannot intervene to plead that he has sold the corporation to one not a party and indemnified him against debts owing by it. *Wilson v. Tyler Coffin Co.*, 28 Tex. Civ. App. 172, 66 S. W. 865.

⁹⁴ Until the corporation has been dissolved, the corporation is the proper party defendant in an action brought against it for its failure to pay the franchise tax. It is not proper for the directors to intervene as defendants. *Rippstein v. Haynes Medina Valley R. Co.* (Tex. Civ. App.), 85 S. W. 314.

See also chapter on Stock and Stockholders, *infra*.

general to all of them.⁹⁵ This decision made with respect to a municipal corporation applies equally to a private one. In fact it was made in response to an argument which conceded that as to private corporations no distinction could be made. It was made respecting a system of pleading established by statute but is true of any general system, common-law or statutory. Later, on mature consideration it was reiterated by the same court,⁹⁶ and others accord with it.⁹⁷ Since no commentary on the general law of pleading is fit or proper for this book, many cases might be discarded as presenting nothing of corporation law, though a corporation was one of the parties. But a great many of such cases are of illustrative value and have been retained in this chapter for that purpose. The same pleadings are proper or necessary as with natural parties pursuing similar remedies, and a statutory remedy is not construed as dispensing with them unless it plainly appears that such was the intendment of it.⁹⁸ In earlier days when the distinctive kinds of process were still preserved, it was held that actions which do not proceed according to the ordinary course of a common-law action by summons may be pleaded according to the practice peculiar to them after jurisdiction by ordinary summons is had.⁹⁹ On the law side the federal practice "shall conform as near as may be to the practice, pleadings and forms" of the respective states wherein the district is situated,¹ while on the equity

⁹⁵ Per Field, J., in *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453, at page 466.

⁹⁶ "The rules of pleading are general. They were designed to embrace all persons, natural or artificial, capable of suing or being sued. No exception is made of corporations, by the statute, and we have no authority to interpolate any upon the system." *Hunt v. San Francisco*, 11 Cal. 250, per Baldwin, J.

⁹⁷ *Thorn & Maynard v. New York Cent. Mills*, 10 How. Pr. (N. Y.) 19, aff'd sub nom. *Shearman v. New York Cent. Mills*, 1 Abb. Pr. (N. Y.) 187.

⁹⁸ Code, § 3049, providing for notice, and the sections providing for the right to sue and the manner of service, held not to provide a method of suit by merely serving a notice of claim without other pleadings. *Hodges v. Atlantic & G. R. Co.*, 51 Ga. 244.

⁹⁹ In ejectment a rule to plead entered and noticed as in case of ordinary actions (2 R. S. p. 231) is proper, where a corporation is defendant and has been summoned. The action should be begun by summons as other actions and thence proceed as an action of ejectment. *Baker v. Long Island R. Co.*, 1 How. Pr. (N. Y.) 214. And see also *Brown v. Syracuse & N. R. Co.*, 5 Hill (N. Y.) 554.

In ejectment by a corporation, since defendant cannot plead nul tiel in abatement or bar, but is confined to the general issue, that will raise corporate nonexistence, notwithstanding the statute requiring it to be specially pleaded in ordinary actions. *Common & Undivided Land and Meadows of Southold v. Horton*, 6 Hill (N. Y.) 501.

¹ By virtue of the "Conformity Act" (R. S. § 914), "the practice,

side and in admiralty "the principles, rules and usages of courts of equity and of admiralty respectively" are followed except as otherwise provided by statute or rule of court.² The abolition of the distinctions in forms of action by the codes has done away with some of the rules which were formerly applicable to corporations, and even where the distinction between law and equity remains there have been many simplifications in equity pleading. Thus, in the federal practice the adoption of the New Equity Rules abolished the technical forms of pleadings in equity, and the bill is now to contain a short and simple statement of the cause of action.³ Succeeding sections in this subchapter deal with the various rules by which matters of pleading peculiar to corporations which are parties are governed. It will be observed on reading them that many of the accepted rules are but special phrasings of the ordinary rules of pleading.⁴

Such officers as are incumbent at the time of pleading should officiate in making the pleadings,⁵ and they are presented to the court by the attorney for the corporation.⁶

§ 3039. In suits affirming or assuming corporate character and existence. A distinction not always made and frequently assumed is that between suits which affirm or assume the corporate character of the party and those which do not. Especially in the case where the defendant or one of the defendants is a corporation it will be found that the right asserted or the defense made often does not rest on any corporate attribute or even on the existence of the corporate defendant as a corporation. Of course it must rest on the existence

pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes in the * * * district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such * * * district courts are held, any rule of court to the contrary notwithstanding."

² By virtue of U. S. Rev. St. § 913, the federal equity and admiralty practice is according to "the principles, rules and usages of courts of equity and of admiralty, respectively, except when it is otherwise provided by statute or by rules of court made in pur-

suance thereof; but the same shall be subject to alteration and addition by the said courts, respectively, and to regulation by the supreme court by rules prescribed from time to time," etc. The supreme court in November 4, 1912, promulgated the New Equity Rules superseding the former ones. See 226 U. S. appendix.

³ See New Equity Rules 18 and 25, printed in 226 U. S. appendix.

⁴ See the sections following.

⁵ *Mechanics' Nat. Bank v. H. C. Burnet Mfg. Co.*, 32 N. J. Eq. 236.

⁶ See §§ 2933, 2934, *supra*. As to signature and verification, see § 3083, *infra*.

of some entity or person, for a suit without parties cannot be; but it is in such suits immaterial whether it be that of a corporation.⁷ Much of the controversy formerly made over the necessity of and particularity with which allegations of corporate name, existence and locality should be made found its cause in the question whether the fact of incorporation was a part of the cause of action or was merely a fact essential to the capacity of the party to sue or defend. Whenever it is essential in the cause of action or defense, it must be alleged with much greater particularity than when it is merely an allegation of capacity.⁸ Actions and suits between the corporation and its stockholders or officers necessarily affirm the corporate existence as a basis of the relationship on which the rights are predicated, and corresponding allegations are required.⁹

§ 3040. Caption and entitlement of pleadings. There seems to be nothing required in the heading or style of a pleading by or against a corporation which differentiates it from other litigants. The rule is familiar that the caption is not a part of the pleading, unless a statute makes it so, but it is important and desirable to make the caption accurate in respect to the names and description of the parties as well as in all other particulars. The names in the caption may by reference aid a defective name or description in the body of the pleading, though they will not serve its office.¹⁰ On the other hand

⁷ In such actions as *quo warranto* and dissolution suits where the very existence of the corporation is the principal issue, a stricter rule applies than in ordinary tort and contract actions. See chapters on *Quo Warranto*; *Forfeiture, Dissolution and Winding Up*, *infra*.

A like illustration can be found in litigation between the corporation and its officers or stockholders or members, and between officers and members, for without incorporation the litigated rights could not exist. See Chapters 17, 42, *supra*, and chapter on *Stock and Stockholders*, *infra*. Thus in suing a stockholder on his contract of subscription he is entitled to an allegation that the plaintiff is or represents by privity the corporation with which the contract was made, and that any precedent conditions have been fulfilled by it. See § 659, *supra*.

⁸ The New York doctrine that incorporation must have been pleaded and proved by the party holding the affirmative, even on the general issue, and that want of such an allegation could be challenged by a general demurrer, was based on the hypothesis that incorporate character inhered in the substance of the cause of action. Much useless technicality was the result of this doctrine, which finally was done away with by a statute. See §§ 3042, 3043, 3068, 3073, 3083, 3086, *infra*.

⁹ See §§ 3058-3060, *infra*, and references there collected.

¹⁰ Mention in caption of defendant as "a corporation" is not enough. *Miller v. Pine Min. Co.*, 3 Idaho (Hasb.) 493, 35 Am. St. Rep. 289, 31 Pac. 803.

A description in the title as "a corporation," will not supply the required allegations under the statute in New

the pleading may aid the caption or make a misnomer therein not material. In this respect the body of the complaint controls the caption, if there be a variance.¹¹

§ 3041. Naming and describing corporation. As a general rule, both actions at law and suits in equity by or against corporations must be brought by or against the corporation itself in the corporate name,¹² whether it be de jure or de facto a corporation.¹³ This is merely an application of the common-law rule which required that the names of the parties to the suit must be set forth accurately in the pleadings.¹⁴ Sometimes, by express provision in a charter, an action is

York. *Schillinger Fire-Proof Cement & Asphalt Co. v. Arnott*, 14 N. Y. Supp. 326.

Descriptive words, "a corporation" in the caption are surplusage. *Iroquois Mfg. Co. v. Annan-Burg Milling Co.*, 179 Mo. App. 87, 161 S. W. 320.

The words "a corporation" after the name in the title are not allegations. *Boyce v. Augusta Camp No. 7429, Modern Woodmen of America*, 14 Okla. 642, 78 Pac. 322; *Leader Printing Co. v. Lowry*, 9 Okla. 89, 59 Pac. 242.

But it has been held that the designation in caption as a corporation suffices. *Board Education Walton Dist. Roane Co. v. Board Trustees Walton Lodge No. 132, I. O. O. F.*, — W. Va. —, 88 S. E. 1099. And see *Exchange Nat. Bank v. Capps*, 32 Neb. 242, 29 Am. St. Rep. 433, 49 N. W. 223.

But the corporation should sue in its own name described as a corporation. A caption, "The K. P. Co., who sues by M., its agent," is bad. *Krell Piano Co. v. Kent*, 39 W. Va. 294, 19 S. E. 409.

Reference in body of complaint to "defendant" suffices where title named defendant as a corporation. *Saunders v. Sioux City Nursery*, 6 Utah 431, 24 Pac. 532.

See also §§ 3041, 3043, *infra*.

¹¹ Complaint against a corporation by name describing it as composed of

named persons prevails over caption against such individuals described as composing the corporation. *White v. Equitable Nuptial Ben. Union*, 76 Ala. 251, 52 Am. Rep. 325.

Omission of a word from the name of the corporation in the caption is cured by exhibits made part of the complaint whereby it fully and truly appears. *Simons v. Kosciusko Building Loan & Savings Ass'n*, 180 Ind. 335, 103 N. E. 2.

¹² *Louisiana. Hill v. Tessier*, 2 Mart. (N. S.) 539 (municipality).

Massachusetts. Smith v. Hurd, 12 Metc. 371, 46 Am. Dec. 690.

New York. Ogdensburgh Bank v. VanRensselaer, 6 Hill 240.

North Carolina. Young v. Barden, 90 N. C. 424 (municipal corporation).

Virginia. Porter v. Nekervis, 4 Rand. 359.

Wisconsin. Button v. Hoffman, 61 Wis. 20, 50 Am. Rep. 131, 20 N. W. 667.

And see generally the cases cited this section, *infra*.

¹³ Corporation de facto may sue in its own name. *First Bapt. Church of San Jose v. Branham*, 90 Cal. 22, 27 Pac. 60.

See the de facto doctrine discussed, Chap. 10, *supra*, and see also § 2929, *supra*.

¹⁴ *Stephen on Pleading* (Tyler's Ed.), 284.

allowed to be brought in the name of a particular officer or officers. At common law an action to enforce a right belonging to a corporation, or to redress a wrong against a corporation can never be brought by a stockholder in his own name, or even by all of the stockholders, and, as a general rule, the same is true of suits in equity, for a corporation and its stockholders, as we have seen, are separate and distinct persons in the law.¹⁵ Of this character was a statute of New York permitting a bank to sue in the name of its president, as well as in its corporate name,¹⁶ but it did not reciprocally enable the bank to sue on the president's individual cause of action, though, having done so, the error was regarded as formal and not a ground for reversal;¹⁷ and it did not apply to an individual banker not incorporated or associated with others.¹⁸ Another statute allowing the bringing of suit for an association in the president's name was construed as not disabling an incorporated association from suing in its own name.¹⁹ It seems that by comity a foreign corporation might sue or be sued by the name of its president if that was the law of its existence and creation, but it would not be obligatory to do so.²⁰

A stockholder, however, may sue in equity in his own name, for the benefit of the corporation, to enforce rights of the corporation or redress or enjoin wrongs, if the officers of the corporation and a

¹⁵ *Tomlinson v. Bricklayers' Union* No. 1 of Indiana, 87 Ind. 308; *Smith v. Hurd*, 12 Metc. (Mass.) 371, 46 Am. Dec. 690; *Button v. Hoffman*, 61 Wis. 20, 50 Am. Rep. 131, 20 N. W. 667.

A charter provision that suits should be in the name of the trustees prevents its being in the corporate name. *Marsh v. Astoria Lodge No. 112, I. O. O. F.*, 27 Ill. 421.

Statutory action by director or officer against other officers for wrongdoing, see Chap. 42, *supra*.

Distinctness of the entities, see § 33, *supra*.

Disability of stockholder to sue on corporate cause of action, see chapter on Stock and Stockholders, *subd. Remedies of Stockholders, etc.*, *infra*.

¹⁶ The statute is permissive and cumulative. It may also sue by its corporate name. *Leonardsville Bank v. Willard*, 25 N. Y. 574; *Columbia*

Bank v. Jackson, 24 N. Y. St. Rep. 738, 4 N. Y. Supp. 433.

¹⁷ *Bank of Havana v. Magee*, 20 N. Y. 355, *aff'g* 16 How. Pr. (N. Y.) 97, 7 Abb. Pr. (N. Y.) 134.

¹⁸ An individual banker is not under the law a corporation sole by a given name, and may not sue thereunder. *Bank of Havana v. Magee*, 20 N. Y. 355, *aff'g* on other grounds 7 Abb. Pr. (N. Y.) 134, 16 How. Pr. (N. Y.) 97.

¹⁹ Even if the act allowing the president to sue for an association applied to corporations, they might still sue by their corporate name. *New York Marbled Iron Works v. Smith*, 11 N. Y. Super. Ct. 362.

²⁰ *Saunders v. Adams Exp. Co.*, 71 N. J. L. 270, 57 Atl. 899, explaining earlier cases in all of which the defendant was an unincorporated association within New York and there suable in the president's name.

majority of the stockholders fraudulently refuse to sue, or are themselves guilty of the wrongs sought to be redressed or prevented. In this state of affairs there is an individual cause of action founded on the existence of the corporation's rights and the nonenforcement of them.⁸¹

The corporate charter may be such that action should be instituted against a department involved in the litigation in its separate corporate name,⁸² but a branch which is integral in corporate existence cannot be sued separately though legislatively recognized as a branch.⁸³ If there are two corporations, or individuals constituting distinct corporations, that name should be used which pertains to the particular corporation to be affected by the action.⁸⁴ If two corporations are sued as one and the same, their identity must be averred.⁸⁵

The name to be used is the true and correct name as fixed by the charter construed as a whole,⁸⁶ and if the right runs to the corporation by a variant or common name, that should be brought in under explanatory allegations.⁸⁷ If there is a corporation but in the creation of it no precise name has been fixed, the suit may be in the name of the body through which it acts and is known.⁸⁸ When the name

⁸¹ *Dodge v. Woolsey*, 18 How. (U. S.) 331, 15 L. Ed. 401; *Peabody v. Flint*, 6 Allen (Mass.) 52; *Atwool v. Merryweather*, L. R. 5 Eq. 464, note. See also chapter on Stock and Stockholders, subd. Remedies of Stockholders, etc., *infra*.

⁸² Where a banking corporation may be suable in its departments separately by departmental name, the designation of the particular department is material. *State v. Banking Department of Citizens' Bank*, 113 La. 150, 36 So. 921.

⁸³ *Morris v. St. Paul & C. Ry. Co.*, 19 Minn. 528.

The "Medical Institution of Geneva College" instituted by Geneva College, is not a corporation, though by similitude to English universities the college had their powers. But the power to create corporations is not recognized as one of such powers. *Medical Inst. of Geneva College v. Patterson*, 1 Den. (N. Y.) 61, *aff'd* 5 Den. (N. Y.) 618.

⁸⁴ Where selectmen and town officers are *ex officio* declared to be a corporation for a certain purpose, they should sue in respect thereto by that name and not in the names of individuals then incumbent of the principal offices. *Ministerial & School Fund v. Parks*, 10 Me. 441.

Where a new company and an old one are distinct and both existing the new one cannot be sued for the old one's doings, under an allegation, contrary to the fact, that they are identical. *Titus v. Minnesota Min. Co.*, 8 Mich. 183.

⁸⁵ *White v. Pecos Land & Water Co.*, 18 Tex. Civ. App. 634, 45 S. W. 207.

⁸⁶ The name recognized by the charter is to be used though words therein might alone indicate additional description to be prefixed. *Frazier v. Virginia Military Institute*, 81 Va. 59.

⁸⁷ See this section, *infra*.

⁸⁸ The society of Shakers having been made or recognized by statute as

has once been well pleaded it is permissible to plead it thereafter by brief reference under the word "said."²⁹ Many of the earlier corporations especially bore names which included such words as, "President, Directors and Company of," prefixed to the distinctive words of the name. Good pleading required that such a name should be fully and correctly stated. Eleemosynary and charitable corporations were often so named but commonly called by shortened names. It is incorrect to sue such a corporation by its common name,³⁰ and equally erroneous to sue members by individual names, describing them as "trustees" constituting a corporation;³¹ care in this respect is important in suing religious corporations or suing for them.³² Thus a Roman Catholic church corporation cannot be sued by or sue in the name of the priest or bishop as such, but the corporate name must be used,³³ due regard being had to statutes constituting them cor-

a corporation it may be described as "Trustees of the Mutual Society Called Shakers," that being the body through which the society exercises its temporal functions. *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13.

Suit by church trustees in the chosen corporate name is good. *Richwine v. Presbyterian Church of Noblesville*, 135 Ind. 80, 34 N. E. 737.

²⁹ "The said trustees," does not describe them as individuals. *Antopæda Bapt. Church v. Mulford*, 8 N. J. L. 182.

³⁰ An eleemosynary corporation should be sued by its corporate name and not by the name by which it may be known. Suing by latter name without official prefix "Trustees of," was held fatal. *Illinois State Hospital for Insane v. Higgins*, 15 Ill. 185.

³¹ Describing them as "being a body corporate known by [corporate name]" is mere personal description. *Hay v. McCoy*, 6 Blackf. (Ind.) 69.

Entitling a bill against the "President and Directors of" a corporation and praying process against them does not make the corporation a party. *In re Binney*, 2 Bland (Md.) 99.

An action, or an attachment or garnishment, or any other process,

against "A, president of" a certain corporation, is against A. individually, and not against the corporation. *State v. Montegudo*, 48 La. Ann. 1417, 20 So. 911; *Plemmons v. Southern Improvement Co.*, 108 N. C. 614, 13 S. E. 188; *Fidelity Insurance, Trust & Safe-Deposit Co. v. Shenandoah Valley R. Co.*, 33 W. Va. 761, 11 S. E. 58.

³² A religious corporation should be sued by name and not by names of the persons who are its trustees constituting the corporation and described in the pleading as such. *Tartar v. Gibbs*, 24 Md. 323; *North St. Louis Christian Church v. McGowan*, 62 Mo. 279.

The name of the church and not its trustees should be used in petitioning for construction of a will bequeathing money to it. *First Bapt. Church v. Robberson*, 71 Mo. 326.

President of religious corporation cannot bring its suit in his own name as "president of" the society named unless a statute warrants it. *Lowenthal v. Wiseman*, 56 Barb. (N. Y.) 490.

³³ A Roman Catholic church should be sued by its corporate name. To sue its priest by his name describing him as agent of the church but not

porations sole.³⁴ The suit by the corporation should be in the corporate name and not in the individual names of officers or trustees,³⁵ but the judgment will be erroneous and not void by reason of so doing.³⁶ A much cited case from Illinois seems to indicate that the power of suing or being sued was in the "trustees of" the corporation without the quoted words having been a part of the name, but it is not entirely clear that this was true.³⁷ Like this, in a way, was a case in which it was enacted that a lessee of a state owned railroad should be a corporation and should sue and be sued by a given name.³⁸

It is determined by reference to the cause of action pleaded whether a suit in the name of or against one described as bearing a certain relation to the corporation is a corporate or an individual action.³⁹

otherwise identifying him with it is not enough. *Keller v. Tracy*, 11 Iowa 530.

³⁴ In some states, e. g., California, a bishop or priest may be a corporation sole. In such case the foregoing decision should be qualified by the statement that he may sue or be sued as such a corporation with proper allegations of the facts.

³⁵ Plaintiffs suing by name and describing themselves as "trustees of Greencastle Commandery of Knights Templar" import that they are a corporation formed under the law enabling such bodies to become incorporated. *Smythe v. Scott*, 124 Ind. 183, 24 N. E. 685, see also former appeal in same case 106 Ind. 245, 6 N. E. 145.

Where the charter declares that "by that name and style" the corporation named "shall sue and be sued," no action or suit will lie against it by the name of its president. *Mauney v. High Shoals Mfg. Co.*, 39 N. C. 195. To the same effect, holding that a power to the president and directors to receive tolls did not imply that they could sue for them in their names. *Brittain v. Newland*, 19 N. C. 363.

See also two notes last preceding.

³⁶ Suing in treasurer's name instead of the corporation's makes judg-

ment erroneous but not void. *Nicholson v. Stephens*, 47 Ind. 185.

³⁷ Where the terms of the charter repose the power of suing in the "trustees of [corporate name]," that and not the bare corporate name should be used. *Marsh v. Astoria Lodge No. 112, I. O. O. F.*, 27 Ill. 421.

³⁸ Under the Georgia statute authorizing the leasing of a state owned railroad and enacting that the lessee should be a corporation named the W. & A. R. Co. with power to sue and be sued, that name should be used rather than the name of the corporation which became the lessee. *Nashville, C. & St. L. Ry. Co. v. Edwards*, 91 Ga. 24, 16 S. E. 347.

³⁹ Whether a suit by one as president of a bank is to be regarded as one by an individual, or as one in the president's name by the bank according to the statute depends on whether averments of a corporate action and cause of action also appear. *Hallett v. Harrower*, 33 Barb. (N. Y.) 537.

It must be remembered that in New York a statute permitted a bank to sue by the name of its president. The rule as stated in the text is correct notwithstanding. For further illustrations see chapter on Stock and Stockholders, subd. Remedies of Stockholders, etc., infra, where numerous

A reference in the body of the pleading or elsewhere in the record to the parties in the plural is sometimes taken as decisive that individuals and not the corporation was made the party.⁴⁰ Therefore a prayer for process against "them" rather than against "it" showed that it was not a party.⁴¹ Even if directors may answer for the corporation the answer should purport to be its answer and not theirs.⁴²

The names of the component individuals need not be stated,⁴³ and indeed ought not to be unless the cause of action requires proof of such as a fact.⁴⁴

In suing on a contract with the corporation by a name which varies from its true name, the pleader should explain by allegations that the corporation is the party intended,⁴⁵ for the suit should be in the true name of the corporation.⁴⁶ Ordinarily this is done by alleging that

cases brought by stockholders were considered with respect to the same question.

Suit by "trustees of" a corporation held to have been an individual one. *Rike v. Floyd*, 42 Fed. 247.

Petition declaring on notes signed by president held to show that corporation, and not he, was sued; and that judgment against it was good, though the suit was against him as "President of," etc. *Dyer v. Sullivan*, 18 Tex. 767.

⁴⁰ Action is not in corporate name where writ describes plaintiffs by name, as "Trustees of" the named corporation, and refers to them in the plural, and replevin bond likewise, it also being signed individually by them, and other papers the same. *Bartlett v. Brickett*, 14 Allen (Mass.) 62.

⁴¹ A prayer for process against them on a bill against the "president and directors," etc., does not make the corporation a party. *In re Binney*, 2 Bland (Md.) 99.

⁴² An answer by persons served, and who are directors, but not purporting to be the answer of the defendant corporation is bad. *Thoroughgood v. Georgetown Water Co.*, 9 Del. Ch. 84, 77 Atl. 720.

⁴³ Suit may be by or against cor-

porate name without designating component individuals. *Lexington v. McConnell's Heirs*, 10 Ky. (3 A. K. Marsh.) 224 (dictum).

A statute requiring names of all parties to be alleged in the petition (*Sayles' Ann. Civ. St.* 1897, art. 1191) does not require that names of corporation's officers be stated. *Yates v. Royston State Bank*, 62 Tex. Civ. App. 256, 131 S. W. 255.

May sue in its own name without alleging that of any officer. *Rockdale Mercantile Co. v. Brown Shoe Co.*, — Tex. Civ. App. —, 184 S. W. 281.

Names of trustees need not be alleged in suing under the corporate name "President and Trustees of Hampden Sidney College." *Legrand v. Hampden Sidney College*, 5 Munf. (Va.) 324.

⁴⁴ Mention of president's name is surplusage. *Crescent Mut. Ins. Co. v. Payne*, Man. Unrep. Cas. (La.) 247.

In stockholders' suits and suits against officers it is necessary to name and describe those alleged to be wrongdoers or those claimed to be liable. See chapter on Stock and Stockholders, *infra*, Chap. 42, *supra*.

⁴⁵ *Peake v. Wabash R. Co.*, 18 Ill. 88.

⁴⁶ Suit in the corporate name may be brought on a contract made in its

it made the contract under and by that name and is the same corporation thereby intended.⁴⁷ When there has been an actual change of name, the facts should be set forth.⁴⁸

The name of the successor is to be used when the suit is by or against it, proper allegations of succession being made,⁴⁹ but this is more often a question of parties than of the name to be used.⁵⁰ Thus, the original promisees may be sued as individuals after they have formed themselves into a corporation.⁵¹ The trustees should not sue on subscriptions made for an object which the corporation represents after it comes into existence.⁵² After dissolution also the stockholders or officers may sue or defend as the successors of the corporation, but this has no application until extinction is complete or a state of facts exists in which a statute enables them to do so.⁵³ To sue in the corporate name rather than those of the last officers or other successors after it is dissolved is error in the face of statutes casting that capacity on the officers or successors,⁵⁴ but in one case, which has been

trade name. *McClain v. Georgian Co.*, 17 Ga. App. 648, 87 S. E. 1090.

⁴⁷ The declaration should be against the corporation by its true name and should aver that it contracted in the other name. *Board of Education of Illinois v. Greenebaum & Sons*, 39 Ill. 609.

. An innuendo that it was meant is not good pleading. *Madison Ins. Co. v. Stangle*, 6 Blackf. (Ind.) 88.

Allegation that defendant made to plaintiff the contract set out sufficiently shows, at least after answer, that the corporation and the party promisee in the contract are identical. *Herring-Marvin Co. v. Smith*, 43 Ore. 315, 72 Pac. 704, rehearing denied 43 Ore. 315, 73 Pac. 340.

Petition against "K. C. R. Rail. Co." should allege that it is a corporation identical with Kentucky Central Railroad Company, intended as defendant. *Prewitt v. Kentucky Cent. R. Co.*, 6 Ky. L. Rep. (abstract) 522.

It is not necessary to allege that notes to G. B. & Co., "Inc.," were to plaintiff, G. B. & Co., a corporation.

Goldberg, Bowen & Co. v. Dimick, 169 Cal. 187, 146 Pac. 672.

⁴⁸ See § 3045, *infra*.

⁴⁹ See § 3045, *infra*.

⁵⁰ See references under § 3035, *supra*.

⁵¹ Members may be sued as such on a contract made by them as individuals before incorporation. *Anderson v. Ft. Worth Base-Ball Ass'n* (Tex. App.), 14 S. W. 1016.

See § 150 et seq., *supra*, as to liability of corporation and promoters on contracts made before incorporation.

⁵² *Edinboro Academy v. Robinson*, 37 Pa. St. 210, 78 Am. Dec. 421.

⁵³ See generally chapter on Forfeiture, Dissolution and Winding Up, *infra*; see also §§ 2954, 2955, *supra*.

Even when the number of stockholders is reduced below that legally requisite for a corporation (one became sole stockholder) such stockholders cannot sue in their own names, the corporation not being dissolved. *Mioton v. Del Corral*, 132 La. 730, 61 So. 771.

⁵⁴ See §§ 2954, 2955, *supra*.

criticised, this was held to be error of a technical quality and not ground for reversal.⁵⁵

It has already been stated that a misnomer not misleading or destructive of the identity of the corporation in a pleading may be treated as immaterial if not seasonably objected to, or may be amended to meet such an objection,⁵⁶ but this does not do away with the rule that the parties should be correctly named and described.⁵⁷ Furthermore, a misnomer in the pleadings differs in effect on the action from a misnomer in an instrument declared on. In the latter case the variance affects the cause of action while one in the pleadings affects the parties and therefore the action itself.⁵⁸ Therefore a correct pleading of names may, with allegations that the corporate party was the one intended in the instrument, forestall any difficulty with a variance in the proofs. In accordance with these rules a misspelling of a word or use of a wrong but similar word in the name,⁵⁹ or the omission or addition of words in the name as pleaded,⁶⁰ or of the name of the place, as a part of the corporate name,⁶¹ or of the prefixed words, "president," "trustees," and the like,⁶² or the transpo-

⁵⁵ Bringing action in name of dissolved corporation instead of names of its last officers would be a technical defect to defendant who contracted with the corporation. On appeal the statute of jeofails would apply. *Kansas City Hotel Co. v. Sauer*, 65 Mo. 279.

⁵⁶ See § 743, *supra*.

⁵⁷ Although the error may not be fatal to the judgment, it may entail difficulty and inconvenience in the enforcement of it or in the rights dependent on it.

⁵⁸ Variance in name in instrument, see § 3085, *infra*.

⁵⁹ Use of "at" instead of "of" in describing the town is immaterial. *Underwriters' Fire Ass'n v. Henry* (Tex. Civ. App.), 79 S. W. 1072.

⁶⁰ Omission of the word "Annual" from "Annual Alabama Conference," etc., in one place in a petition in probate, it being correctly named in all other parts of the petition is a mere clerical error, waived by not objecting. *Alabama Conference M. E.*

Church South v. Price, 42 Ala. 39.

The words "of 1874" used incorrectly as part of plaintiff's name may be regarded as immaterial. *Texas & N. O. R. Co. v. Barber*, 31 Tex. Civ. App. 84, 71 S. W. 393.

⁶¹ Omission of place. *Canal Bank v. Fisher*, 19 La. 365; and see *Mechanics' & Traders' Bank v. Prescott*, 12 La. 444.

Addition of name of city where located held immaterial. *Pape v. Capitol Bank*, 20 Kan. 440, 27 Am. Rep. 183.

Misnomer by mere omission of name of town is immaterial. *Schaeffer v. Phoenix Brewery Co.*, 4 Mo. App. 115.

⁶² Omission of prefix "President and Directors of" and of description "of Franklin" from name held immaterial. *Canal Bank v. Fisher*, 19 La. 365. To same effect, see *Mechanics' & Traders' Bank v. Prescott*, 12 La. 444.

Omission is a fatal variance. *Burham v. Savings Bank*, 5 N. H. 448.

sition of words,⁶³ have in the instances cited below been held not to be fatal. Addition or omission of "The" before a name is a misnomer pleadable in abatement,⁶⁴ but otherwise will be disregarded.⁶⁵ Any substantial deviation from the name is error.⁶⁶ By answering to and defending under a misnomer the same is waived⁶⁷ and the judgment cannot be overthrown for error.⁶⁸ Accordingly the rule is established that objection must be taken by a dilatory plea addressed to the misnomer.⁶⁹

§ 3042. Pleading formation and existence of corporation; necessity—In general. Pleading the name of the corporation is one thing and pleading that it is a corporation is quite another. The first identifies the party, the second ascribes a legal character or capacity to it. The first is essential. The second may not be. As previously stated, it depends on whether the incorporate character of the party is essential in the cause of action, and also whether capacity to sue or defend must affirmatively appear. And even in those states which originally held that the allegation of the corporate character was necessary for one of the reasons just stated, statutes have sometimes dispensed with the necessity or relieved plaintiff from the burden of proving incorporation unless an affirmative denial was put in with such verification as might be required.⁷⁰ The doctrine of estoppel and that

⁶³ A transposition of words in the name productive of no uncertainty is immaterial (public corporation). *Board of Education of Illinois v. Greenebaum & Sons*, 39 Ill. 609.

Misnaming defendant by transposing words in its name, held a mere clerical error and not misleading. *Knatt v. Dubuque & S. C. Ry. Co.*, 84 Iowa 462, 51 N. W. 57.

Misarrangement of words and syllables leaving substance certain is immaterial unless pleaded in abatement. *Burnham v. Savings Bank*, 5 N. H. 446.

⁶⁴ *Lapham v. Philadelphia, B. & W. R. Co.*, 4 Pennw. (Del.) 421, 56 Atl. 366.

⁶⁵ Addition of definite article "the" is not fatal. *Western Bank & Trust Co. v. Ogden*, 42 Tex. Civ. App. 465, 93 S. W. 1102.

⁶⁶ *Southern Pacific Railroad Co.* held not same as *Southern Pacific Co.*

Southern Pac. Co. v. Burns (Tex. Civ. App.), 23 S. W. 288.

"Gravel road" as part of name held not the same as "Turnpike." *Glass v. Tipton, T. & B. Turnpike Co.*, 32 Ind. 376 (suit to enjoin corporation).

⁶⁷ See § 3072, *infra*, and § 743, p. 1698, *supra*; and also *Hoboken Bldg. Ass'n v. Martin*, 13 N. J. Eq. 427.

⁶⁸ Misnaming defendant as "Burlington and Missouri," etc., Railroad Company, when the right name was "Chicago, Burlington and Quincy," etc., Company, is not material where it defended the suit by the wrong name and went to the merits. *Burlington & M. R. R. Co. v. Burch*, 17 Colo. App. 491, 69 Pac. 6. See also § 3125, *infra*.

⁶⁹ See § 3072, *infra*.

⁷⁰ Pleadings and verifications required to put incorporation in issue, see §§ 3073, 3083, *infra*.

of de facto existence must be mentioned. Both these doctrines for present purposes go to the fact of an incorporation, precluding any question thereof. As against the defendant it may be unnecessary to prove the fact of incorporation by reason of these doctrines, but the allegation is not thereby dispensed with if otherwise necessary or proper.⁷¹ The fact may therefore be alleged or not as in other cases, leaving it to the defensive pleadings and the proofs to apply the doctrines by which question or denial will be precluded. In pleading a transaction with a corporation it sometimes results that an estoppel will incidentally be disclosed by the complaint, and in that event the responsive pleadings by admitting the transaction cut off the right to plead or prove nonexistence of the corporation.⁷² A corollary to this is that in pleading a contract made with the corporation as such, for example a contract of subscription, the allegation of the making of the contract is equivalent to an allegation of incorporation of the promisee. No further allegation of the fact is necessary. Statutes have established this mode of pleading in one state.⁷³

Besides those actions described in a preceding section⁷⁴ the allegation is required whenever a corporate attribute must be proved to sustain the action; for example, in an action against the corporation for taxes on property owned by it.⁷⁵ In quo warranto the information must sufficiently aver that respondents are acting as a corporation and that it is done without legal right.⁷⁶ Whichever may be the rule as to its necessity, such allegation is a proper one and one which the careful pleader will make, unless there are circumstances of doubt rendering it unsafe to assume the burden of proving defendant's incorporation should that issue be accepted. The general rule in the majority of states is that the allegation is not a necessary one in ordinary actions on contract or tort by or against third persons, and does not inhere in the cause of action.⁷⁷ The same rule applies where

⁷¹ See chapters 10, 11, *supra*, as to operation of those doctrines.

⁷² See §§ 3068, *infra* (effect of demurrer), 3073 (pleas nul tiel corporation), 3086 (when issue is presented).

⁷³ See § 3043, *infra*.

⁷⁴ See § 3039, *supra*.

⁷⁵ A suit against the corporation for taxes must aver incorporation, and ownership of the taxable property by it. *People v. Central Pac. R. Co.*, 83 Cal. 393, 23 Pac. 303.

⁷⁶ Information held sufficient. *Smith*

v. State, 140 Ind. 343, 39 N. E. 1060. See also chapter on Quo Warranto, *infra*.

⁷⁷ *Arkansas*. Existence as a corporation and capacity to sue need not be averred. (In this case the declaration elsewhere called plaintiff a corporation.) *Mississippi, O. & R. R. Co. v. Gaster*, 20 Ark. 455.

Georgia. *Wilson & Co. v. Sprague Mowing Mach. Co.*, 55 Ga. 672.

Indiana. *Northwestern Conference of Universalists v. Myers*, 36 Ind.

the party is a foreign corporation.⁷⁸ In one case an unnecessary allega-

375; Cicero Hygiene Draining Co. v. Craighead, 28 Ind. 247; Heaston v. Cincinnati & Ft. W. R. Co., 16 Ind. 275, 79 Am. Dec. 430; Emery v. Evansville, I. & C. Straight Line R. Co., 13 Ind. 143, citing Anderson v. New Castle & R. R. Co., 12 Ind. 376, 74 Am. Dec. 218. Not necessary in complaint against decedent's estate on a claim. Bauer v. Jung Brewing Co. (Ind. App.); 42 N. E. 827. Need not aver how or that it is a corporation. Shearer v. R. S. Peale & Co., 9 Ind. App. 282, 36 N. E. 455.

Kentucky. Henderson & N. R. Co. v. Leavell, 55 Ky. (16 B. Mon.) 358; Louisville & N. R. Co. v. Com., 12 Ky. L. Rep. (abstract) 603.

Minnesota. "There is no more reason in the nature of things why it should be necessary to allege that it is an artificial person, than there is in an action by or against a natural person to allege that he is such." Per Justice Mitchell in Holden v. Great Western Elevator Co., 69 Minn. 527, 65 Am. St. Rep. 585, 72 N. W. 805. See also Howland v. Jenel, 55 Minn. 102, 56 N. W. 581, holding same as to garnishment of a corporation. Plaintiff need not allege that defendant is a corporation. Minneapolis Plumbing Co. v. Arcade Inv. Co., 124 Minn. 317, 145 N. W. 37; Klemik v. Henriksen Jewelry Co., 122 Minn. 380, 142 N. W. 871.

Nebraska. Loan & Trust Sav. Bank v. Stoddard, 2 Neb. (Unoff.) 486, 89 N. W. 301.

North Carolina. Griffin v. Asheville Light Co., 111 N. C. 434, 16 S. E. 423.

Ohio. Elektron Mfg. Co. v. Jones Bros. Elec. Co., 8 Ohio Cir. Ct. 311, 4 Ohio Cir. Dec. 555, aff'd 54 Ohio St. 659, 46 N. E. 1160.

Oklahoma. Leader Printing Co. v. Lowry, 9 Okla. 89, 59 Pac. 242.

Pennsylvania. Averment and pro-

fert are not necessary. Zion Church v. St. Peter's Church, 5 Watts & S. 215.

South Carolina. Palmetto Lumber Co. v. Risley, 25 S. C. 309.

Virginia. Grays v. Lynchburg & S. Turnpike Co., 4 Rand. 578.

West Virginia. Not necessary in action against. Douglass v. Kanawha & M. R. Co., 44 W. Va. 267, 28 S. E. 705.

Wisconsin. Central Bank v. Knowlton, 12 Wis. 624, 78 Am. Dec. 769. See also Chickerming Lodge, No. Fifty-Five I. O. O. F. v. McDonald, 16 Wis. 112; Farmers' & Millers' Bank v. Sawyer, 7 Wis. 379.

But complaint must allege that plaintiff is a corporation. Pryse v. Three Forks Deposit Bank's Assignee, 20 Ky. L. Rep. 1057, 48 S. W. 415.

The name is not enough. Holloway v. Memphis, E. P. & P. R. Co., 23 Tex. 465, 76 Am. Dec. 68.

Must allege defendant was a corporation. Tolmie v. Dean, 1 Wash. T. 46.

Must aver that defendant not named like a natural person is a corporation or a being capable of being sued. The fact that no issue is made unless non-existence be affirmative alleged according to the code, makes no difference. State v. Chicago, M. & St. P. R. Co., 4 S. D. 261, 46 Am. St. Rep. 783, 56 N. W. 894.

⁷⁸ A foreign joint stock association suable by its name where formed may be sued by name in New Jersey, and if it be a corporation it also may be so sued. Hence it is not material which it is. Saunders v. Adams Exp. Co., 71 N. J. L. 520, 58 Atl. 1101, aff'd 71 N. J. L. 270, 57 Atl. 899.

Foreign corporation suing need not allege incorporation. Smith v. Weed Sew. Mach. Co., 26 Ohio St. 562; Lewis v. Bank of Kentucky, 12 Ohio 132, 40

tion of this fact was called surplusage, but that was in connection with the decision that it need not be proved because immaterial,⁷⁹ and it was probably not meant that it was such impertinent matter as might be stricken out. In addition to the cases herein cited many hold that where the name imports a corporation nothing more is necessary. This implication from the name may be regarded as tantamount to a general allegation of incorporation, which is sufficient in most states, or the cases may sometimes mean that the name alone suffices without any allegation of the party's being a corporation. Some of the cases are not explicit as to which reason underlies the holding, and therefore they also should be studied in this connection.⁸⁰

The courts of New York which formerly regarded the allegation as one inherent in the cause of action have taken the contrary doctrine, and the failure to allege it is no longer a ground for general demurrer for failure to state a cause of action;⁸¹ but in that state and others the allegation is required by statute and is considered an allegation

Am. Dec. 469; *Rees v. Conococheague Bank*, 5 Rand. (Va.) 326, 16 Am. Dec. 755.

If the corporation be defendant and its charter powers or franchises become the foundation of the action they must be specifically pleaded, and the name of the state if it be foreign. *Brady v. National Supply Co.*, 64 Ohio St. 267, 83 Am. St. Rep. 753, 60 N. E. 218.

⁷⁹ *Brady v. National Supply Co.*, 64 Ohio St. 267, 83 Am. St. Rep. 753, 60 N. E. 218.

⁸⁰ See cases cited § 3043, *infra*.

⁸¹ Allegation of plaintiff's incorporation is no part of the cause of action, but relates solely to the capacity of a party. *Fox v. Erie Preserving Co.*, 93 N. Y. 54, followed by *Harmon v. Vanderbilt Hotel Co.*, 79 Hun (N. Y.) 392, 29 N. Y. Supp. 783, *aff'd* 143 N. Y. 665, 39 N. E. 20; *Adams v. Lamson Consol. Store-Service Co.*, 59 Hun (N. Y.) 127, 13 N. Y. Supp. 118, 20 N. Y. Civ. Proc. 152, 13 N. Y. Supp. 118; *John T. Noye Mfg. Co. v. Raymond*, 8 N. Y. Misc. 353, 28 N. Y. Supp. 693; *Fraser v. Granite State Provident*

Ass'n, 8 N. Y. Misc. 7, 28 N. Y. Supp. 65, 23 N. Y. Civ. Proc. 390, 28 N. Y. Supp. 65; *Bank of Havana v. Wickham*, 7 Abb. Pr. (N. Y.) 134, 16 How. Pr. (N. Y.) 97, *aff'd* 20 N. Y. 355; *Lafayette Ins. Co. v. Rogers*, 30 Barb. (N. Y.) 491; *Rothschild v. Grand Trunk Ry. Co.*, 19 N. Y. Civ. Proc. 53, 10 N. Y. Supp. 36, judgment *aff'd* 60 Hun (N. Y.) 582, 14 N. Y. Supp. 807; *Farmers' & Mechanics' Nat. Bank v. Rogers*, 15 N. Y. Civ. Proc. 250, 1 N. Y. Supp. 757; *Hafner & Schoen Furniture Co. v. Grumme*, 10 N. Y. Civ. Proc. 176; *Shoe & Leather Bank v. Brown*, 18 How. Pr. (N. Y.) 308, 9 Abb. Pr. (N. Y.) 218; *Bank of Waterville v. Belster*, 13 How. Pr. (N. Y.) 270; *Acome v. American Mineral Co.*, 11 How. Pr. (N. Y.) 24; *National Temperance Society & Publication House v. Anderson*, 17 N. Y. St. Rep. 389, 2 N. Y. Supp. 49; *Lighte v. Everett Fire Ins. Co.*, 18 N. Y. Super. Ct. 716. Contra, *Oesterreicher v. Sporting Times Pub. Co.*, 5 N. Y. Supp. 2. And see also *Kennedy v. Cotton*, 28 Barb. (N. Y.) 59, questioning the majority doctrine.

of capacity to sue.⁸² Such a statute has been held inapplicable except where the corporation is a principal plaintiff or defendant by or against which the action runs.⁸³ It has been held not necessary in oral pleadings to allege that defendant is a corporation, even though the statute requires it where they are written.⁸⁴

If the corporation is one of which the courts can take judicial notice, no allegation that it is such need be made.⁸⁵ For a converse reason incorporation may have to be alleged to rebut a presumption that a corporation of plaintiff's kind or class no longer exists⁸⁶ and where the fact of a local or subcorporation is relied on it must be alleged.⁸⁷ An amendment to allege that it is a corporation may be allowed⁸⁸ and a defective allegation may be cured in this respect by the answer.⁸⁹

The effect of alleging corporate existence and character will be, among other things, to raise an implication of power to do the thing or make the contract involved in the suit, wherever such an implica-

⁸² See New York cases and others, §§ 3043, 3068, 3073, *infra*. See *State v. Minahan Bldg. Co.*, 141 Wis. 400, 123 N. W. 258, applying this statute in a quo warranto proceeding.

⁸³ Only when the action is by or against the corporation (Stats. § 3205) need incorporation be expressly averred. A foreclosure suit to which it is joined as a defendant claiming some interest is not such a suit. *Greenya v. Reliance Security Co.*, 161 Wis. 483, 154 N. W. 972.

Plaintiff in a suit to quiet title need not aver that a defendant is a corporation if he claims through no corporate attribute of it. *Butterfield v. Graves*, 138 Cal. 155, 71 Pac. 510.

Place of defendant's incorporation and its purposes need not be alleged where it is a foreclosure defendant alleged to have some interest. *Crow v. VanSickle*, 6 Nev. 146.

⁸⁴ *Roberts v. National Ice Co.*, 6 Daly (N. Y.) 426.

⁸⁵ Held not necessary where incorporated under a public enabling act with a certificate recorded with the secretary of state where it became a public record. *Dutchess Cotton Manu-*

factory v. Davis, 14 Johns. (N. Y.) 238, 7 Am. Dec. 459.

Organization need not be pleaded by corporation of which judicial notice is taken. *Eel River Draining Ass'n v. Topp*, 16 Ind. 242.

⁸⁶ Where all corporations of plaintiff's class have been abolished by statute with stated exceptions, a complaint by plaintiff should allege that it is one of the excepted ones. For example, all ditching companies having been abolished except those contemplating less than sixteen miles of ditch, complaint for an assessment should allege plaintiff's line to be less than that long. *Cooper v. Arctic Ditchers*, 56 Ind. 233.

⁸⁷ Local lodge or group in a membership corporation. *Comboy v. Matthews*, 174 N. Y. App. Div. 523, 160 N. Y. Supp. 538.

⁸⁸ See § 3080, *infra*.

⁸⁹ A complaint describing defendant simply by name adding the words, "a corporation," if insufficient is cured by answer describing it as "a corporation of Montana." *Storer v. Graham*, 43 Mont. 344, 116 Pac. 1011.

tion is permissible in law, and thereby to dispense with alleging the possession of such powers in express terms. This is a distinct issue, however,⁹⁰ and where the nature of the action is such that special allegation of charter provisions is required, they must be alleged in addition to the fact of incorporation,⁹¹ to which may also need to be added allegations of fact to bring the action under the operation of special statutes,⁹² and allegations of the manner in which the corporation acted organically and through what agents.⁹³

§ 3043. — Mode and sufficiency. The accepted and formal allegation in a complaint or bill by the corporation is that plaintiff was, at the times in question, a corporation duly created by and duly organized and existing under and by virtue of the laws of the state, naming it. Other forms of equivalent import are in use. Corporate character of defendant is alleged in a similar way, but with less particularity because the pleader may not have all the data as to defendant's creation and existence or place. Other allegations as to place of business or residence may be appropriate for purposes of jurisdiction or venue, or other purposes⁹⁴ and in the case of foreign corporations such other facts bearing on the right to sue or be sued in the state as by its statutes must be affirmatively alleged.⁹⁵ The cases plainly show, however, that seldom does the question arise how much should be alleged. It is nearly always, how little will suffice? As in other departments of practice the decisions afford a great mass of precedents on the borderland of bad pleading or beyond it, and very few on the hither side of unquestioned soundness.

The general rule is that, in the absence of a statute requiring more, it suffices either to sue or be sued by a name importing incorporation,⁹⁶

⁹⁰ See § 3054, *infra*.

⁹¹ § 3052, *infra*.

⁹² § 3053, *infra*.

⁹³ §§ 3055, 3057, *infra*.

⁹⁴ See this section, *infra*, cases cited to rule that general allegations suffice.

"A corporation under the laws of Virginia, and a citizen of Virginia and a resident" thereof imports that it was created and existing by the laws of Virginia. *Mathieson Alkali Works v. Mathieson*, 150 Fed. 241.

As to jurisdictional allegations and those for venue, see § 3049, *infra*.

⁹⁵ See chapter on Foreign Corporations, *infra*.

⁹⁶ *United States. Union Cement Co. v. Noble*, 15 Fed. 502.

Alabama. *Seymour v. Thomas Harrow Co.*, 81 Ala. 250, 1 So. 45.

Arkansas. *Odd Fellows' Bldg. Ass'n v. Hogan*, 28 Ark. 261.

Georgia. *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 15 Ga. App. 142, 82 S. E. 784; *Edensfield v. Bank of Millen*, 7 Ga. App. 645, 67 S. E. 896; *Minchew v. Mahunta Lumber Co.*, 5 Ga. App. 154, 62 S. E. 716. Too late after ver-

or by the name of the party with the descriptive words "a cor-

diet to object. *Cribb v. Waycross Lumber Co.*, 82 Ga. 597, 9 S. E. 426.

Illinois. Suing as corporations by names which import incorporation is sufficient. *Frye v. Bank of Illinois*, 10 Ill. (5 Gilm.) 332. It need not state how it became or is such. *Legnard v. Crane Co.*, 54 Ill. App. 149.

Indiana. *Ohio Oil Co. v. Detamore*, 165 Ind. 243, 73 N. E. 906; *Cincinnati, H. & I. R. Co. v. McDougall*, 108 Ind. 179, 8 N. E. 571; *Sayers v. First Nat. Bank*, 89 Ind. 230; *Johnson v. Gibson*, 78 Ind. 282; *Beatty v. Bartholomew County Agr. Society*, 76 Ind. 91; *McKenzie v. School Trustees of Edinburg*, 72 Ind. 189; *Indianapolis Sun Co. v. Horrell*, 53 Ind. 527; *Estell v. Knightstown & M. Turnpike Co.*, 41 Ind. 174; *Blake v. Holley*, 14 Ind. 383; *O'Donald v. Evansville, I. & C. Straight Line R. Co.*, 14 Ind. 259; *Jones v. Cincinnati Type Foundry Co.*, 14 Ind. 89; *Richardson v. St. Joseph Iron Co.*, 5 Blackf. 146, 33 Am. Dec. 460; *Harris v. Muskingum Mfg. Co.*, 4 Blackf. 267, 29 Am. Dec. 372. The rule is not restricted to cases where there exists an estoppel by recognition. *Beatty v. Bartholomew County Agr. Society*, 76 Ind. 91. A name importing incorporation suffices to bring it under a statutory liability imposed only on corporations, e. g., that of the employers' liability act. *Ft. Wayne Gas Co. v. Nieman*, 33 Ind. App. 178, 71 N. E. 59.

Kansas. *Ryan v. Farmers' Bank*, 5 Kan. 658.

Kentucky. Name importing incorporation suffices though no domestic corporation by that name exists. *Commercial Bank v. Newport Mfg. Co.*, 1 B. Mon. 13, 35 Am. Dec. 171.

Maryland. *Powhattan Steamboat Co. v. Potomac Steamboat Co.*, 36 Md. 238.

Michigan. *Prussian Nat. Ins. Co. v.*

Eisenhardt, 153 Mich. 198, 116 N. W. 1097, 15 Det. L. N. 398; *Ladd v. Methodist Episc. Church of East Saginaw*, 1 Mich. N. P. 47.

Minnesota. *Woodson v. Milwaukee & St. P. Ry. Co.*, 21 Minn. 60.

Nebraska. *Fletcher v. Co-operative Pub. Co.*, 58 Neb. 511, 78 N. W. 1070; *German Ins. Co. of Freeport v. Frederick*, 57 Neb. 538, 77 N. W. 1106. Entitling action in corporate name is enough. *Exchange Nat. Bank v. Copps*, 32 Neb. 242, 29 Am. St. Rep. 433, 49 N. W. 223.

New Jersey. *German Reformed Church in America v. Von Puechelstein*, 27 N. J. Eq. 30.

New York. *Canandarqua Academy v. McKechnie*, 19 Hun 62; *Phenix Bank v. Donnell*, 41 Barb. 571, aff'd 40 N. Y. 410; *Lighte v. Everett Fire Ins. Co.*, 18 N. Y. Super. Ct. 716; *Union Mut. Ins. Co. v. Osgood*, 8 N. Y. Super. Ct. 707. But in New York a statute requires it to be expressly pleaded as an allegation of capacity, and for want of it a demurrer on that ground will lie. See this section, and section 3068, infra.

North Carolina. *Ramsay v. Richmond & D. R. Co.*, 91 N. C. 418; *Stanly v. Richmond & D. R. Co.*, 89 N. C. 331.

Ohio. The name of a bank as plaintiff will support a remedy allowable only to banks. *Lewis v. Bank of Kentucky*, 12 Ohio 132, 40 Am. Dec. 469.

Oregon. *Elliff v. Oregon R. & Nav. Co.*, 53 Ore. 66, 99 Pac. 76; *Wild v. Oregon Short-Line & U. N. Ry. Co.*, 21 Ore. 159, 27 Pac. 954.

Pennsylvania. *Zion Church v. St. Peter's Church*, 5 Watts & S. 215.

Tennessee. *Pemiscot County Bank v. Central State Nat. Bank*, 135 Tenn. 13, 185 S. W. 702; *Ingle System Co. v. Norris & Hall*, 132 Tenn. 472, 178 S. W. 1113.

poration," added,⁹⁷ though the addition of the descriptive words, "a corporation," have been held surplusage where the name was enough without them.⁹⁸ In oral pleadings the name imports regular creation and existence.⁹⁹ Illustrations of specific names considered in applying this rule are found below.¹ The Iowa doctrine is that it must in some way appear that the party is a corporation if the name is not that of a natural person,² and the suggestion was made, since adopted by statute, that declaring on a contract running to or recognizing

Virginia. *Gillett v. American Stove & Hollow Ware Co.*, 29 Gratt. 565.

West Virginia. *Hart v. Baltimore & O. R. Co.*, 6 W. Va. 336.

⁹⁷ *Head v. J. M. Robinson, Norton & Co.*, 191 Ala. 352, 67 So. 976; *Fegtly v. Village Blacksmith Min. Co.*, 18 Idaho 536, 111 Pac. 129, distinguishing *Miller v. Pine Min. Co.*, 3 Hasb. (Idaho) 493, 35 Am. St. Rep. 289, 31 Pac. 803.

Statement of name with addition, "a corporation of Hulett, Wyo.," is sufficient. *Fruth v. Bolt*, 37 S. D. 393, 158 N. W. 733.

⁹⁸ *Legnard v. Crane Co.*, 54 Ill. App. 149.

⁹⁹ *Howe Mach. Co. v. Robinson*, 7 Daly (N. Y.) 399.

¹ All of the cases in the four notes preceding illustrate the rule as well as those which follow. These are only a little more pointed. It will be observed that the name of one of the great express companies was by this rule held to import a corporation, though it is almost common knowledge that some of those companies are or have been unincorporated joint stock associations, there being numerous cases in the reports revealing such to be the fact.

The following illustrations show instances in which a corporation was imported by the name:

"*Valdosta Foundry and Machine Company.*" *Charles v. Valdosta Foundry & Machine Co.*, 4 Ga. App. 733, 62 S. E. 493.

"*Davis & Sanford Company.*" *Weller v. Davis & Sanford Co.*, 15 Ga. App. 79, 82 S. E. 593.

"*The Cable Company.*" *Holcomb v. Cable Co.*, 119 Ga. 466, 46 S. E. 671.

"*C. H. Perkins Company.*" *C. H. Perkins Co. v. Shewmake & Murphey*, 119 Ga. 617, 46 S. E. 832.

"*R. S. Peale & Co.*" *Shearer v. R. S. Peale & Co.*, 9 Ind. App. 282, 36 N. E. 455.

"*St. Cecilia's Academy*" imports a corporation of educational or like public purpose. *St. Cecilia's Academy v. Hardin*, 78 Ga. 39, 3 S. E. 305.

"*Adams Express Company*" imports a corporation, notwithstanding it is averred that such is "the style and firm name under which it does business," no individual name being disclosed. *Adams Exp. Co. v. Harris*, 120 Ind. 73, 7 L. R. A. 214, 16 Am. St. Rep. 315, 21 N. E. 340; *Adams Exp. Co. v. Hill*, 43 Ind. 157.

The following are illustrations of names which were held not to import a corporation:

"*M. Ferst's Sons and Company.*" *Austin v. M. Ferst's Sons Co.*, 2 Ga. App. 91, 58 S. E. 318.

² "*Mississippi & Missouri Railroad Company.*" held not sufficient in action for trespass. *Byington v. Mississippi & M. R. Co.*, 11 Iowa 502.

It must show whether plaintiff is a corporation or a partnership. *Sweet v. Ervin*, 54 Iowa 101, 6 N. W. 156.

it as a corporation would be equivalent to this.³ In New Hampshire it was held that the name does not carry such import, but imports an individual or a voluntary association.⁴ The general rule just stated cannot be taken literally and without qualification or relied on alone. It is to be remembered that it rests either on an implication of corporate existence from the character of the pleaded name, or on the general rule that incorporation need not be alleged in ordinary third party actions. The rule will therefore be an unsafe one if in the particular case such an implication is forbidden or repelled, or if the action is not an ordinary one between it and third persons but is one in which the very fact of its existence and regularity are material and substantial, or if for purposes of jurisdiction and venue further facts as to location, creation and residence are essential. And when the statutes prescribe the requisite allegations, it is abrogated.⁵ The name alone suffices where the corporation is one of which judicial notice is taken.⁶

Another rule as well or better established is that general allegations suffice without particularizing the formation and organization step by step,⁷ except where the facts themselves are a part of the

³ *Byington v. Mississippi & M. R. Co.*, 11 Iowa 502.

⁴ A bill in equity should describe a corporate party plaintiff or defendant by its name with an allegation of its incorporation in some certain state and its place of business. *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420.

⁵ See this section, *infra*, and section 3049.

The statutes should be consulted to see if there are restrictions on use of a name importing incorporation, which might, on the presumption against wrongdoing, supply an implication that incorporation existed by the name pleaded. See §§ 741, 748, 749, *supra*.

⁶ See § 3042, *supra*, and § 3088, *infra*.

⁷ *Alabama*. It "need not specially allege a compliance with every particular circumstance relating to organization." *Selma & T. R. Co. v. Tipton*, 5 Ala. 787, 39 Am. Dec. 344, quoted in *Planters' & Merchants' Independent Packet Co. v. Webb*, 144 Ala. 666, 39 So. 562.

Illinois. *Spangler v. Indiana & I. C. R. Co.*, 21 Ill. 276.

Indiana. *Washer v. Allensville, C. S. & V. Turnpike Co.*, 81 Ind. 78. "Is a railroad corporation," held sufficient and stronger than necessary. *Lake Erie & W. R. Co. v. Griffin*, 8 Ind. App. 47, 52 Am. St. Rep. 465, 35 N. E. 396.

Kentucky. "Plaintiff [name] states that it is a corporation with its principal office and place of business in Louisville, Jefferson County, Kentucky, where it was at all times hereinafter stated" is not a conclusion and is sufficient. *Martin v. Kentucky Lands Inv. Co.*, 146 Ky. 525, Ann. Cas. 1913 C 332, 142 S. W. 1038.

Maryland. A petitioning foreign corporate creditor in involuntary insolvency proceedings need not allege and exhibit proof of corporate existence or make proof of charter. That is matter for proof. *Whyte v. Betts Mach. Co.*, 61 Md. 172.

Massachusetts. Questioned whether allegation that defendant, named

cause of action, in which case more particular allegations are sometimes required,⁸ as for example in an action on subscription for stock.⁹ Thus, the filing or recording of the articles may be alleged in general terms.¹⁰ As against the corporation it is not necessary to add detailed allegations of a kind better known to defendant than to plaintiff.¹¹ It is generally sufficient to allege that it was "duly"¹² incorporated

Adams Express Company, is "a company having a place of business at Boston," sufficed. *Gott v. Adams Exp. Co.*, 100 Mass. 320.

Michigan. *Palmiter v. Pere Marquette Lumber Co.*, 31 Mich. 183; *Grand Rapids & I. R. Co. v. Southwick*, 30 Mich. 444; *Thatcher v. West River Nat. Bank*, 19 Mich. 196.

Minnesota. "Is a corporation constituted and organized under the laws of the state of Minnesota," etc., suffices as a reference to the act or proceedings under which incorporation was had (Gen. St. c. 63, § 94). *Dodge v. Minnesota Plastic Slate Roofing Co.*, 14 Minn. 49.

Missouri. The traversable acts necessary to constitute a legal corporation are evidence and need not be averred. *Chillicothe Sav. Ass'n v. Ruegger*, 60 Mo. 218.

Montana. *Storer v. Graham*, 43 Mont. 344, 116 Pac. 1011.

New Hampshire. A corporation "existing under and by virtue of laws of" a named state, is enough. *Educational Soc. of Denomination Called Christians v. Varney*, 54 N. H. 376.

New York. *Bank of Utica v. Smalley*, 2 Cow. 770, 14 Am. Dec. 526, aff'd 8 Cow. 398; *Dutchess Cotton Manufactory v. Davis*, 14 Johns. 238, 7 Am. Dec. 459; *Bank of Michigan v. Williams*, 5 Wend. 478.

Oklahoma. *Coyle v. Arkansas Valley & W. Ry. Co.*, 41 Okla. 648, 139 Pac. 294.

South Carolina. *Bank of Savannah v. Garrett*, 2 Brev. 148.

Texas. Bare allegation that de-

fendant is a corporation suffices. *Houston Water-Works v. Kennedy*, 70 Tex. 233, 8 S. W. 36; *Texas & P. Ry. Co. v. Virginia Ranch, Land & Cattle Co.*, 7 S. W. 341.

Virginia. *Baltimore & O. R. Co. v. Sherman's Adm'x*, 30 Gratt. 602.

Wisconsin. *Chickering Lodge No. Fifty-Five I. O. O. F. v. McDonald*, 16 Wis. 112. There is now a statute. See *infra*.

⁸ *Hain v. Northwestern Gravel Road Co.*, 41 Ind. 196.

⁹ Action on a subscription requires allegation of legal formation, and a general conclusion that plaintiff is a corporation is bad. *Brooksville R. Co. v. Byron*, 20 Ky. L. Rep. 1941, 50 S. W. 530.

See also § 659, *supra*.

¹⁰ "Caused said articles to be put on record in the recorder's office," etc., shows that they were filed there. *Vawter v. Franklin College*, 53 Ind. 88.

¹¹ *Salem Gravel Road Co. v. Penn-ington*, 62 Ind. 175.

The place of incorporation need not be stated. *Pearce v. Butte Elec. R. Co.*, 41 Mont. 304, 109 Pac. 275.

¹² *Hollis v. Brooklyn Heights R. Co.*, 128 N. Y. App. Div. 821, 113 N. Y. Supp. 4; *Williamson v. National Electric & Power Co.*, 48 N. Y. Super. Ct. 541.

"Is a corporation duly organized and doing business as such in the state of Nevada," alleges a Nevada corporation. *Little v. Virginia & G. H. Water Co.*, 9 Nev. 317.

"Was duly incorporated" suffices (R. S. art. 1190) when date and place

and organized, even in an action on a subscription,¹³ it being thereby intended that all things requisite were done regularly. "Duly" may be an essential word by virtue of statutory forms prescribed for alleging the facts.¹⁴

A method formerly more often necessary and more in vogue than now was to plead the act of incorporation. This was necessary in the days when the practice of forming corporations by private act of the legislature was common.¹⁵ It was also sometimes desirable, but not always needful, where there were several general or public acts and it was material to show under which the corporation came into being.¹⁶ A general allegation of the facts and of the statute by title only, is ordinarily sufficient¹⁷ and so pleading it by title does

of filing charter is added. *Marsalis v. Texas Cactus Hedge Co.*, 2 Tex. Unrep. Cas. 292.

¹³ See § 659, *supra*.

Sufficient on demurrer, regularity being presumed. *Avon Springs Sanitarium Co. v. Weed*, 119 N. Y. App. Div. 560, 104 N. Y. Supp. 58.

That plaintiff was "duly" organized avers sufficiently that it had the amount of subscriptions requisite thereto. *Minneapolis & St. L. Ry. Co. v. Morrison*, 23 Minn. 308.

¹⁴ The word "duly" is an essential word in alleging incorporation under R. S. art. 1190 in general terms. *Way v. Bank of Sumner* (Tex. Civ. App.), 30 S. W. 497.

Allegation that it was "duly" incorporated need not be added to allegation that it is a corporation (Rev. St. 1895, art. 1186). *Bury v. J. E. Mitchell Co.* (Tex. Civ. App.), 74 S. W. 341.

¹⁵ See § 3044, *infra*.

¹⁶ A bank suing by its president should allege act of incorporation by title. The provision (Code, § 162) for pleading a cause of action on a money obligation in writing by setting out a copy and stating the amount due thereon to the party does not dispense with pleading capacity to sue. *Johnson v. Kemp*, 11 How. Pr. (N. Y.) 186.

If in either of two views defendant is a corporation with power to make the contract, it does not matter by which statute it existed. *Board Education Walton Dist. Roane Co. v. Board Trustees Walton Lodge No. 132, I. O. O. F.*, — W. Va. —, 88 S. E. 1099.

¹⁷ *Oswego & S. Plank Road Co. v. Rust*, 5 How. Pr. (N. Y.) 390; *Onondaga County Bank v. Carr*, 17 Wend. (N. Y.) 443; *Farmers' Loan & Trust Co. v. Fisher*, 17 Wis. 114.

Allegation of incorporation, name, title of act of incorporation and date of its approval and powers conferred suffices. *Withee v. Citizens' Sav. Bank*, 1 White & W. Civ. Cas. Ct. App. (Tex.) § 489.

Complaint in action against directors for debt held to allege sufficiently that organization was under Manufacturing and Mining Corporations Act (R. S. 1881, § 3851) and not under another statute (section 4200) relating to incorporation of purchasers of works at judicial sale. *Clow v. Brown*, 134 Ind. 287, 33 N. E. 1126.

Allegations of incorporation first under laws of other named states and finally in New York sufficiently show whether plaintiff is foreign or domestic. *American Bapt. Home Mission Society v. Foote*, 52 Hun (N. Y.) 307, 5 N. Y. Supp. 236.

not invite a demurrer because of judicial knowledge that certain steps were required by the statute which are not alleged.¹⁸

Statutes in some of the states require allegation of the name, fact and place of incorporation, and its place of business or location,¹⁹ and similar requirements are imposed in federal courts of equity under the New Equity Rules.²⁰ Such a statute will not be satisfied by a name which imports incorporation.²¹

Under statutory provision in Iowa it is permissible to sue on an instrument in the name by which the party thereto has described himself or itself, and this is a sufficient description of a corporation imported by such name.²² The same result is also reached without such a statute by application of the general rule that a fact necessarily implied is the same as alleged,²³ especially where the contract

Allegation that plaintiff owns a bridge built under an act entitled "an act to incorporate the [name of plaintiff]" is good against demurrer. Falls County Turnpike Road & Bridge Co. v. Jordan, 2 Tex. Unrep. Cas. 370.

Amendatory acts of incorporation need not be pleaded by particular date and title. Sun Mut. Ins. Co. v. Dwight, 1 Hilt. (N. Y.) 50.

¹⁸ Cheraw & C. R. Co. v. Garland, 14 S. C. 63; Cheraw & C. R. Co. v. White, 14 S. C. 51.

¹⁹ Under the codes the facts of incorporation should be pleaded in the complaint. Girls' Industrial Home v. Fritchey, 10 Mo. App. 344.

Allegation that plaintiff is a corporation of New York suffices. Sun & Evening Sun Building, Mutual Loan & Accumulating Fund Ass'n v. Buck, 36 N. Y. App. Div. 637, 55 N. Y. Supp. 262.

The word "domestic" need not be used in characterizing such a corporation. Columbia Bank v. Jackson, 24 N. Y. St. Rep. 738, 4 N. Y. Supp. 433.

²⁰ The name, law under which created and place of business should be stated in the bill under New Equity Rule 25. Maxwell Steel Vault Co. v. National Casket Co., 205 Fed. 515.

²¹ Carpenter v. McCord Lumber Co., 107 Wis. 611, 83 N. W. 764.

²² Code, § 2558. Harris Mfg. Co. v. Marsh, 49 Iowa 11.

A contract was declared on and defendant was named by the name signed but the contract was not pleaded by copy, that being alleged to be impossible. In absence of a motion or demurrer this was held a good complaint. Wendall v. Osborne, 63 Iowa 99, 18 N. W. 709.

²³ This rule was suggested in Byington v. Mississippi & M. R. Co., 11 Iowa 502.

If a contract be declared on and it runs to plaintiff by a name under which for the purpose alleged it might have been incorporated under the act for incorporation of voluntary associations, it is good. Mullen v. Beech Grove Driving Park, 64 Ind. 202.

Complaint by corporation on note to it as corporation need not otherwise aver incorporation or state its residence or place of business. National Ins. Co. v. Bowman, 60 Mo. 252. See also to like effect, Farmers' & Merchants' Ins. Co. v. Needles, 52 Mo. 17.

Statement of plaintiff's name and of the agreement with it on which

expressly recites incorporation and citizenship as facts,²⁴ and pleading any transaction whereby it appears that defendant by his dealings recognized plaintiff's corporate existence comes to the same thing.²⁵ Even in action on a subscription contract thus made directly with the corporation itself and alleged to have been so made, further allegation of its existence is dispensed with;²⁶ although such allegations are otherwise required in such actions.²⁷

It need not be alleged whether the corporation is domestic or foreign, unless the statute requires such particulars or it is involved in pleading some fact essential in or prerequisite to the action,²⁸ but whenever the domestic or local existence of the corporation inheres in the cause of action it must be alleged.²⁹ Under such a statute as that in New York, it is necessary to allege it to the end that the facts may be traversed by denial in the answer and thus raise the issue in the statutory manner of the plaintiff's capacity to sue,³⁰ but it may

action is based suffices. *Kennedy v. Cotton*, 28 Barb. (N. Y.) 59.

Allegation that plaintiff is a corporation and a reference to a contract set out as an exhibit which only an irrigation corporation could make, shows incorporation. *Colorado Canal Co. v. McFarland & Southwell*, 50 Tex. Civ. App. 921, 109 S. W. 435.

Suing it as "Georgia Co-operative Fire Association" on a policy and alleging that "defendant insurance company or association" had an agency and a place of business in the county suffices even against a special demurrer. *Georgia Co-operative Fire Ass'n v. Borchardt & Co.*, 123 Ga. 181, 3 Ann. Cas. 472, 51 S. E. 429.

²⁴ Creation, location and citizenship is sufficiently pleaded by setting out verbatim a contract with the corporation and declaring on it, whereby these facts expressly appear. *Mathieson Alkali Works v. Mathieson*, 150 Fed. 241.

²⁵ *New Bern Banking & Trust Co. v. Duffy*, 156 N. C. 83, 72 S. E. 96.

²⁶ *Shick v. Citizens' Enterprise Co.*, 15 Ind. App. 329, 57 Am. St. Rep. 230, 44 N. E. 48.

In action on a subscription uncon-

ditional in terms and recognizing the corporate existence, that need not be pleaded nor need the condition that the charter amount has been subscribed. *Lail v. Mt. Sterling Coal Road Co.*, 13 Bush (Ky.) 32.

²⁷ See § 659, *supra*.

Where suit is on a subscription which regarded the company as one to be formed but not yet existing, the facts bringing it into existence must be alleged. *Hain v. Northwestern Gravel Road Co.*, 41 Ind. 196.

²⁸ *Head v. J. M. Robinson, Norton & Co.*, 191 Ala. 352, 67 So. 976; *Jones v. Pacific Dredging Co.*, 9 Idaho 186, 72 Pac. 956; *Imperial Curtain Co. v. Jacob*, 163 Mich. 72, 127 N. W. 772, 17 Det. L. N. 751.

See also chapter on Foreign Corporations, *infra*.

²⁹ The domestic incorporation or existence must be averred in any action founded on a liability imposed solely on domestic railroads, e. g., penalty for transporting slaves without master's consent. *Welton v. Pacific R. Co.*, 34 Mo. 358.

³⁰ In view of the statute (Code Civ. Proc. § 1776) dispensing with proof of incorporation unless allegations be

in lieu of such allegation plead a contract with it by defendant which is tantamount to an admission of its existence as a corporation.³¹ A foreign incorporation should be pleaded in the same general manner as a domestic one, with the additional allegation of the name of the state by which it was created and this may be stated in general terms in complaints either by or against the corporation.³²

Existence of a national bank should be pleaded by an allegation that it is a national bank organized and existing under the laws of the United States and located and doing business at a certain place.³³ Stating the place of business or location of a national bank shows whether it is foreign or domestic.³⁴

Strict attention must be paid to the nature and elements of the cause of action to be pleaded, whether by or against the corporation,

affirmatively denied under oath, it is important to allege as required by section 1775 whether it is domestic or foreign and if the latter under what law. *Kaulbach v. Knickerbocker Trust Co.*, 139 N. Y. App. Div. 566, 124 N. Y. Supp. 286.

Under Code Civ. Proc. § 481 requiring place of trial and names of parties to be specified, the domestic or foreign incorporation of plaintiff and in what state, if foreign, must appear. *Harmon v. Vanderbilt Hotel Co.*, 79 Hun (N. Y.) 392, 29 N. Y. Supp. 783, judgment aff'd 143 N. Y. 665, 39 N. E. 20.

This rule does not apply where plaintiff is not the corporation but sues as its assignee. *Roberts v. Pioneer Iron Works*, 125 N. Y. App. Div. 207, 109 N. Y. Supp. 230.

³¹ A foreign incorporation must either expressly allege incorporation and the state or country to which it belongs or declare on a contract made with it whereby defendant admits such facts. *Connecticut Bank v. Smith*, 17 How. Pr. (N. Y.) 487, 9 Abb. Pr. (N. Y.) 168.

³² Need not show how foreign corporation was incorporated. *Taylor's Adm'r v. Bank of Alexandria*, 5 Leigh (Va.) 471.

A foreign corporation need not plead its organic statute to support introduction of such foreign law in evidence. *Paine v. Lake Erie & L. R. Co.*, 31 Ind. 283.

Allegation that it is under "laws of Pennsylvania" will admit proof of such laws. *Gorton Steamer Co. v. Spofford*, 5 N. Y. Civ. Proc. 116. And see to same effect, *Saunders v. Sioux City Nursery*, 6 Utah 431, 24 Pac. 532.

See also chapter on Foreign Corporations, *infra*.

³³ *First Nat. Bank v. Doying*, 13 Daly (N. Y.) 509, 11 N. Y. Civ. Proc. 61.

³⁴ *First Nat. Bank v. Doying*, 13 Daly (N. Y.) 509, 11 N. Y. Civ. Proc. 61.

National bank not directly alleging that it is of a city in the state but that it has been doing business there for a long time and that it is a corporation under National Bank Act satisfies the statute. *Farmers' & Mechanics' Nat. Bank v. Rogers*, 15 N. Y. Civ. Proc. 250, 1 N. Y. Supp. 757.

By virtue of Judicial Code, § 24, par. 16, a national bank is declared to be a citizen of the state in which it is located. See also *42 Am. 293*, *supra*.

in determining with what additional particularity its formation and organization must or should be alleged. All that can be stated generally is that some actions, especially those between the corporation and its officers, or it and its stockholders, or it and the state, or those which for any reason involve its very existence and extinction, must be pleaded with greater particularity as to these facts than those which herein have been referred to as "ordinary actions between the corporation and third persons." The pleadings and practice peculiar to actions on subscriptions,³⁵ actions by or against officers and directors,³⁶ actions between the corporation and its stockholders,³⁷ mandamus, quo warranto and forfeiture or dissolution suits,³⁸ actions by or against foreign corporations,³⁹ and others that might be suggested, are the subjects of separate treatment at the places indicated below. A cause of action complete on mere incorporation does not call for any further allegations as to organization, even though it essentially depends on existence of the corporation.⁴⁰ In the extraordinary legal actions of quo warranto and mandamus, the corporation as respondent occupies a different position from that which it takes as relator. As relator it need not allege incorporation with more particularity than in other actions,⁴¹ while as against it and in the answer by it the essential facts must be pleaded and not stated as conclusions.⁴²

Whenever an allegation of the fact is required, it should be express and positive in the body of the complaint;⁴³ a necessary allegation

³⁵ See § 659, *supra*.

³⁶ Chapter 42, *supra*.

³⁷ Chapter on Stock and Stockholders, *infra*.

³⁸ Chapters on Quo Warranto; Mandamus; Forfeiture, Dissolution and Winding Up, *infra*.

³⁹ Chapter on Foreign Corporations, *infra*.

⁴⁰ In an action by the state for the corporation tax alleging incorporation under the act, the organization of defendant and other particulars of its existence need not be alleged, since the statute (Ky. St. 1903, §§ 554, 566) makes want of legal organization no defense. *Com. v. Licking Valley Bldg. Ass'n No. 3*, 118 Ky. 791, 26 Ky. L. Rep. 730, 82 S. W. 435.

⁴¹ In mandamus the facts of relator's organization need not be alleged. *State v. Stout*, 61 Ind. 143.

⁴² See generally chapters on Quo Warranto; Mandamus, *infra*.

There must be a positive allegation in quo warranto that respondent is a corporation. Calling it a "pretended" one was held bad. *State v. Minahan Bldg. Co.*, 141 Wis. 400, 123 N. W. 258.

The answer to quo warranto must not plead generally that the corporation is legally such, etc. That is a mere conclusion. *People v. Lowden*, 2 Cal. Unrep. Cas. 537, 8 Pac. 66.

⁴³ Mere description of plaintiff as a corporation is not sufficient. *Schilling Fire-Proof Cement & Asphalt Co. v. Arnott*, 14 N. Y. Supp. 326.

It should expressly state that defendant is a corporation. *Texas Mut. Life Ins. Co. v. Davidge*, 51 Tex. 244.

of incorporation cannot be satisfied by alleging that it is a "pretended corporation."⁴⁴ As already stated it may be drawn in by reference to a contract or other instrument attached and declared on by which the facts appear.⁴⁵ Generally the caption will not serve the office of such allegations, though it also may aid them by reference in the body of the complaint.⁴⁶

The allegation should ascribe existence to the corporation at the time of accrual of the cause of action and also at the time of the commencement of the action, though it may be sufficient to allege it as of an earlier time, leaving the presumption of continuance to supply such by implication;⁴⁷ and when the action is founded on the existence of the corporation the complaint must avoid allegation that it has become extinct.⁴⁸

⁴⁴ In a quo warranto proceeding to test a right to a lighting franchise, the allegation that respondent is "a pretended corporation" is bad under Stats. § 3205. *State v. Minahan Bldg. Co.*, 141 Wis. 400, 123 N. W. 258.

⁴⁵ See this section, "Iowa rule," *supra*.

⁴⁶ *Miller v. Pine Min. Co.*, 3 Hasb. (Idaho) 493, 35 Am. St. Rep. 289, 31 Pac. 803; *Schillinger Fire-Proof Cement & Asphalt Co. v. Arnott*, 14 N. Y. Supp. 326. See also *Iroquois Mfg. Co. v. Annan-Burg Milling Co.*, 179 Mo. App. 87, 161 S. W. 320, where description in the caption as "a corporation" was held surplusage.

The words "a corporation" after the name in the title are description and not allegation. *Boyce v. Augusta Camp No. 7429, Modern Woodmen of America*, 14 Okla. 642, 78 Pac. 322; *Leader Printing Co. v. Lowry*, 9 Okla. 89, 59 Pac. 242.

On the other hand it has been held that the designation of defendant in caption as a corporation is sufficient. *Board Education Walton Dist. Roane Co. v. Board Trustees Walton Lodge No. 132, I. O. O. F.*, — W. Va. —, 88 S. E. 1099.

Title stating name of defendant, "a corporation under the laws of the state of Iowa" and references in the

body of the complaint to "defendant," suffices. *Saunders v. Sioux City Nursery*, 6 Utah 431, 24 Pac. 532.

⁴⁷ Averment that a corporation aggregate existed in October, 1825, implies that it existed in February, 1826, when action was brought, immortality being an attribute of such a corporation. *Fuller v. Plainfield Academic School*, 6 Conn. 532.

Was at a certain date, "and ever since said date until the institution of this suit has been" a corporation, sufficiently alleges corporate existence when the suit was begun. *Bank of Sun City v. Neff*, 50 Kan. 506, 31 Pac. 1054.

Existence at time of injury held to have been alleged by implication. *Lockwood v. Charleston Bridge Co.*, 60 S. C. 492, 38 S. E. 112, 629.

Incorporation at time of injury is shown by allegation that defendant "is" a corporation and that for "a long time prior" to the day of injury plaintiff "was in the employ of said defendant." *Minter v. Union Pac. R. Co.*, 3 Utah 500, 24 Pac. 911.

⁴⁸ Petition for receiver and winding up held not to show *de facto* dissolution especially where defendants treated corporation as still subsisting. *Youree v. Home Town Mut. Ins. Co.*, 180 Mo. 153, 79 S. W. 175.

Assuming the necessity of an allegation of incorporation, it need only be made in the introduction to the complaint and need not be embraced in each separately pleaded cause of action and repeated in each one, if it is not a part of the causes of action needed to make them complete within themselves.⁴⁹ If it be pleaded in the first count it need not be repeated in those which followed.⁵⁰ There is a contrary statement that it must be repeated in every count, but it was made in a case where incorporation was a necessary fact in each of the causes of action so separately pleaded; and if limited to its own facts that case is not in conflict with the other cases.⁵¹

§ 3044. — Under special or private act. If the corporation was created by a private act, it must be pleaded in alleging incorporation, for the court cannot judicially know of such act.⁵² The same rule requires it to be pleaded to make out a defense of *ultra vires*.⁵³ At least the substance of that part of the act giving plaintiff the right to sue should be alleged⁵⁴ and as against the corporation the facts of incorporation, name and the substance of the act to common certainty is enough.⁵⁵ Declaring on a subscription which refers to the act of incorporation is not sufficient.⁵⁶ But the act may be special and public, and in that case it is judicially known as all other public statutes, and need not be set out.⁵⁷ Publicity may be given by subsequent enactment.⁵⁸

⁴⁹ An introductory allegation of defendant's corporate existence followed by two distinctly and separately stated causes of action does not make the complaint bad. *West v. Eureka Improvement Co.*, 40 Minn. 394, 42 N. W. 87.

⁵⁰ *Aull Sav. Bank v. Lexington*, 74 Mo. 104.

⁵¹ *People v. Central Pac. R. Co.*, 83 Cal. 393, 23 Pac. 303, citing *Loup v. California Southern R. Co.*, 63 Cal. 97.

⁵² Bill against stockholders for discovery and payment of individual liability for the corporate debts. *Middletown Bank v. Russ*, 3 Conn. 135, 8 Am. Dec. 164.

Suit on subscription. *Trenton City Bridge Co. v. Perdicaris*, 29 N. J. L. 367.

⁵³ *Charleston & J. Turnpike Co. v. Willey*, 16 Ind. 34.

⁵⁴ *Central Mfg. Co. v. Hartshorne*, 3 Conn. 199.

⁵⁵ *Goshen & S. Turnpike Co. v. Sears*, 7 Conn. 86.

⁵⁶ *Trenton City Bridge Co. v. Perdicaris*, 29 N. J. L. 367.

⁵⁷ *White Water Val. Canal Co. v. Boden*, 8 Blackf. (Ind.) 130.

A private charter with a clause declaring it to be a public act need not be pleaded. *Brookville Ins. Co. v. Records*, 5 Blackf. (Ind.) 170.

Judicial notice of such corporations, see § 428, supra, § 3088, infra.

⁵⁸ Hence when continued by mention in constitution at establishment of state it is made public. *Vance v. Farmers' & Mechanics' Bank*, 1 Blackf. 2nd Ed. (Ind.) 504; *Vance*

§ 3045. **Pleading change of name or succession.** A change of name involves no change in the corporation, while a succession displaces the old corporation with a new one. The requisites of pleading vary accordingly.⁵⁹ The new name should be used in suing rather than the old.⁶⁰ It may be convenient and proper for the pleadings to trace the change, but it is not necessary if the laws effecting the change are judicially known and if the corporation is identical in substance, differing only in the external form of a new organization.⁶¹ If it is not judicially known, and in the case of private business corporations it seldom is, the change of name must or should be averred as a fact in order to relate the cause of action to the new name, and to identify the corporation with both names.⁶² Another way of pleading is to allege that the contract was made to plaintiff by the old name.⁶³ No assignment or devolution of right upon the corporation should be alleged in pleading only a change of name.⁶⁴

v. Farmers' & Mechanics' Bank of Indiana, 1 Blackf. (Ind.) 80.

⁵⁹ If a consolidation bears the same name the suit proceeds under it, if a different name be chosen it proceeds under the new name. *Birmingham Railway, Light & Power Co. v. Ensten*, 144 Ala. 343, 39 So. 74.

⁶⁰ *Newlan v. Lombard University*, 62 Ill. 195.

In case of change of name of a town a writ of entry on a grant by it should be in the name of the original grantee and not in the changed name. *Sunapee v. Eastman*, 32 N. H. 470. This was held in conformity to established practice but the reason was not stated.

⁶¹ So held of a municipal corporation which had been rechartered. *Mobile Transp. Co. v. Mobile*, 128 Ala. 335, 64 L. R. A. 333, 86 Am. St. Rep. 143, 30 So. 645, aff'd 187 U. S. 479, 47 L. Ed. 266. And see *Dousman v. Milwaukee*, 1 Pinney (Wis.) 81 (municipal corporation).

⁶² *Cumberland College v. Ish*, 22 Cal. 641.

The new name is to be used with allegations identifying the corpora-

tion with the old name. *Gould v. Sub-Dist. No. 3 of Eagle Creek School Dist.*, 7 Minn. 203 (a public school corporation).

In declaring on a note made to it in the former name the fact of the change must be pleaded and proved alleging that the corporation is the same. *Madison College v. Burke*, 6 Ala. 494. See also *Ready v. Tuska-loosa*, 6 Ala. 327, where the corporation was a municipal one.

The rule applies to the receiver of the new corporation when suing on a note to it by its original name. *Hyatt v. McMahon*, 25 Barb. (N. Y.) 457.

Allegation that plaintiff is the same corporation as one by different name to which the bond in suit runs and that its name was changed as pleaded, is sufficient. *French, Finch & Co. v. Hicks* (Tex. Civ. App.), 92 S. W. 1034.

⁶³ *Northumberland County Bank v. Eyer*, 60 Pa. St. 436.

⁶⁴ Allegation of change of name and that no other change was made suffices. *Posey v. White House Lumber Co.*, — Tex. Civ. App., 142 S. W. 931.

In no case should a new name be alleged if it has not yet been adopted or accepted.⁶⁵

Where there is a complete succession under the same name, the new corporation suing under the original franchise purchased and passed to it need not allege the facts making the original a valid corporation. It need only plead that itself is a corporation, for which purpose its name alone would suffice.⁶⁶ If the new corporation has a different name from the old, it should be related in interest and succession to the cause of action which ordinarily will require allegations in brief form of the old corporation's existence, its right or liability, and the succession of the new one thereto.⁶⁷ Succession to a partnership must be pleaded in the same way.⁶⁸ Assumption of or other devolution of liability on a successor should be positively pleaded against it⁶⁹ and the facts must be such as to entail liability as a legal conclusion.⁷⁰ Succession may be pleaded by amendment or supplemental pleadings, and so may change of name,⁷¹ and when so amended the allegations will let in proof of instruments running in the old name.⁷²

§ 3046. Pleading authority or warrant to sue or defend. At common law the only way in which a corporation aggregate can appear

⁶⁵ *Water Lot Co. v. Bank of Brunswick*, 53 Ga. 30.

If a change of name was authorized but was rejected by the stockholders, that fact need not be pleaded to support action in the original name. *Beene v. Cahawba & M. R. Co.*, 3 Ala. 660.

⁶⁶ *Walker v. Shelbyville & R. Turnpike Co.*, 80 Ind. 452.

⁶⁷ A general averment of reorganization and change of name is enough. The evidence that the reorganization was had should not be pleaded. *Hyatt v. McMahon*, 25 Barb. (N. Y.) 457.

Succession should be pleaded with definiteness and certainty as to how it came about. *Kaulbach v. Knickerbocker Trust Co.*, 139 N. Y. App. Div. 566, 124 N. Y. Supp. 286.

Should be affirmatively alleged by party relying thereon. *Pinnix v. Lake Drummond Canal & Water Co.*, 132 N. C. 124, 43 S. E. 578.

A successor in a mechanic's lien suit must show the change of name

and all necessary facts to show succession. *Montello Brick Co. v. Pullman's Palace Car Co.*, 4 Pennew. (Del.) 90, 54 Atl. 687.

⁶⁸ *Candee & Smith v. Fordham Stone Renovating Co.*, 126 N. Y. App. Div. 15, 110 N. Y. Supp. 355, aff'd 195 N. Y. 602, 89 N. E. 1097 (mem. dec.).

⁶⁹ *Colorado Springs Rapid Transit R. Co. v. Albrecht*, 22 Colo. App. 201, 123 Pac. 957.

⁷⁰ An organic succession must be alleged, such as a consolidation and merger, or else a succession to assets with facts carrying a succession of liabilities, in order to charge a successor. It is not enough to allege a succession to property and that there were enough assets of the original company to have paid the debt sued on. *Swing v. Empire Lumber Co.*, 105 Minn. 356, 117 N. W. 467.

⁷¹ § 3080, *infra*.

⁷² § 3085, *infra*.

is by attorney, and therefore, at common law, a plea by a corporation aggregate must purport to be by attorney.⁷³ The practice of entering and pleading the warrant of attorney is obsolete in most or all jurisdictions. The usual signature and indorsement and the statement that the corporation appears by its attorney take the place of such practice.⁷⁴ No allegation that the suit was authorized by the governing body of the corporation is necessary,⁷⁵ or that the attorney was authorized to appear.⁷⁶ A bill in chancery is sufficiently vouched for by the signature of the solicitor, being in that respect unlike the answer, which must be signed and sealed with the corporate seal, according to the chancery practice.⁷⁷ The right of the corporation to sue or defend is sufficiently pleaded by alleging that it is a corporation, the right being incident thereto.⁷⁸ When receivers or liquidators use the name by authority of statute they should plead it.⁷⁹ Under the peculiar practice of Louisiana the president or the corporation may sue, but if he sues his authority must be alleged.⁸⁰ A practice of con-

⁷³ *Nixon, Ellison & Co. v. Southwestern Ins. Co. of Cairo, Illinois*, 47 Ill. 444; *Kankakee Drain. Dist. v. Commissioners Lake Fork Spec. Drain. Dist.*, 29 Ill. App. 86.

⁷⁴ A warrant under seal need not be produced by the attorney. *Osborn v. United States Bank*, 9 Wheat. (U. S.) 738, 6 L. Ed. 204.

It "has never prevailed in this state. All that has ever been done in practice was to add the usual memorandum at the bottom of the declaration." *Farmers' & Mechanics' Bank v. Troy City Bank*, 1 Dougl. (Mich.) 457, following *Osborn v. Bank of United States*, 9 Wheat. (U. S.) 738, 6 L. Ed. 204.

The appearance of an attorney of the court and his statement that he represents the corporation is sufficient without production of a warrant of attorney. *Penobscot Boom Corporation v. Lamson*, 16 Me. 224, 33 Am. Dec. 656.

The attorney's warrant need not be spread on the record. It is enough that the pleading states that the corporation appears by attorney and that he signs it. *State Bank v. Bell*, 5 Blackf. (Ind.) 127.

⁷⁵ *Goodale Phonograph Co. v. Valentine*, 69 Wash. 263, 124 Pac. 691. Or that it was ratified if unauthorized. *De Zavala v. Daughters of Republic of Texas*, 58 Tex. Civ. App. 19, 124 S. W. 160.

⁷⁶ Need not plead that attorney was authorized under seal to make appearance. *Vance v. Farmers' & Mechanics' Bank*, 1 Blackf. (Ind.), 2nd Ed., 504.

⁷⁷ *George's Creek Coal & Iron Co. v. Detmold*, 1 Md. Ch. 371.

Signature by an attorney at law shows authority. *State Bank v. Bell*, 5 Blackf. (Ind.) 127.

Signature of pleadings, see § 3093, *infra*.

⁷⁸ *California Steam Nav. Co. v. Wright*, 6 Cal. 258, 65 Am. Dec. 511.

See § 2926, *supra*.

⁷⁹ Where the statute empowers receivers to sue and to use the name of the defunct corporation, they only can use it and must plead their character when so suing. *Miami Exporting Co. v. Gazo*, 13 Ohio 269.

⁸⁰ The corporation may sue in its own name without intervention of its president and in such case no authority

venience prevails in Texas of naming and describing an agent of defendant on whom service may be made. This has nothing to do, apparently, with authority to represent the corporation otherwise in the suit.⁸¹ Such an allegation affords record evidence of the authority of the person served in case a default is taken.⁸²

§ 3047. Pleading in derivative action by stockholder or receiver, etc. A stockholders' suit, fully discussed elsewhere, presents a dual cause of action. The underlying one accrues to the corporation as such and must be pleaded accordingly, while the secondary one consists in the fact that plaintiff, alleging himself to be a stockholder with equities, has unavailingly requested the corporation to sue, or that it is prevented from so doing. All these facts must be well pleaded.⁸³ A statutory suit lies against officers in some states, the pleadings in which are discussed elsewhere.⁸⁴

§ 3048. Pleading compliance with statutory conditions. In applying the rule that all conditions precedent to a right of action must be pleaded, it must not be forgotten that a condition precedent to the right to be a corporation is not the same as one precedent to the contract on which it may sue. There may be no condition in the contract in suit, and yet one precedent to corporate existence; nevertheless the corporation, being at least a de facto one, could perhaps sue without regarding the condition on its existence, unless the state

need be pleaded. *New Orleans Terminal Co. v. Teller*, 113 La. 733, 2 Ann. Cas. 127, 37 So. 624. It then appears through its attorney whose authority is presumed. *Southern Sawmill Co. v. Ducote*, 120 La. 1052, 46 So. 20.

An action brought in its own name without designation of any officer is cured by proof on the merits that action was authorized. *Insurance Oil Tank Co. v. Scott*, 33 La. Ann. 946, 39 Am. Rep. 286.

Authority of president to bring suit must be alleged. *Pardee Co. v. H. Alfrey Heading Co.*, 129 La. 749, 56 So. 660.

An allegation in its complaint that the corporation "herein represented by its president [named] respectfully represents," etc., is bad for want of allegation that he was thereunto spe-

cially authorized. *Layne & Bowler Co. v. Town of Winnfield*, 134 La. 323, 64 So. 127.

⁸¹ See § 2986, *supra*.

It is better practice, but not essential, for the petition and citation to state the local agent or general manager who is to be served. *Galveston, H. & S. A. R. Co. v. Gage*, 63 Tex. 568; *El Paso & S. W. R. Co. v. Kelly* (Tex. Civ. App.), 83 S. W. 855, rev'd 99 Tex. 87, 87 S. W. 660. See also *Sun Mut. Ins. Co. v. Seeligson*, 59 Tex. 3; *Galveston & R. R. Ry. Co. v. Shepherd*, 21 Tex. 274.

⁸² See § 3118, *infra*.

⁸³ Chapter on Stock and Stockholders, subd. Remedies of Stockholders, etc., *infra*.

⁸⁴ Chapter 42, *supra*.

interfered or the suit involved that very fact.⁸⁵ According to a well-known rule, in any contract depending on conditions precedent the allegations must meet them. This is commonly met with, especially in the earlier cases, in actions on contracts of subscription where the statutory steps to form a corporation are conditions in a sense to the subscription.⁸⁶ In case of a foreign corporation allegations, dependent much on the phraseology of the statutes regulating their admission to do business, may be required to show compliance with conditions precedent to such admittance or to the right to sue or defend.⁸⁷ Compliance with statutes requiring filing of articles,⁸⁸ the payment of fees or licenses,⁸⁹ or the presentation of notices of claim,⁹⁰

⁸⁵ See Chaps. 10, 11, *supra*, as to de facto corporations and estoppel.

⁸⁶ As to such actions see Chap. 17, *supra*.

In an action on a subscription the condition precedent that the required amount has been subscribed must be alleged to have been fulfilled, also the filing of the articles. *Hain v. Northwestern Gravel Road Co.*, 41 Ind. 196.

As to necessity of showing notice of performance of condition precedent to subscription for stock, see *Heaston v. Cincinnati & Ft. W. R. Co.*, 16 Ind. 275, 79 Am. Dec. 430; *New Albany & S. R. Co. v. McCormick*, 10 Ind. 499, 71 Am. Dec. 337. Same rule applied in action for a drainage assessment, holding that filing of articles should have been averred. *McIntire v. McLain Ditching Ass'n*, 40 Ind. 104.

⁸⁷ See generally chapter on Foreign Corporations.

Its failure must be pleaded defensively. *Prussian Nat. Ins. Co. v. Eisenhardt*, 153 Mich. 198, 116 N. W. 1097, 15 Det. L. N. 398; *Brady v. Palmer*, 19 Ohio Cir. Ct. 687, 10 Ohio Cir. Dec. 27.

Need not aver in its complaint compliance with statute requiring appointment of a resident agent for service. *T. H. Rogers Lumber Co. v. McRea*, 7 Indian T. 468, 104 S. W. 803.

If the regulation relates only to a special business, like insurance, it

need not be met by allegations in a suit based on other lawful business. *Boulware v. Davis*, 90 Ala. 207, 9 L. R. A. 601, 8 So. 84.

⁸⁸ Previous filing of articles in the county (Civ. Code, § 299) need not be averred. *South Yuba Water Co. v. Rosa*, 80 Cal. 333, 22 Pac. 222; *Ontario State Bank v. Tibbits*, 80 Cal. 68, 22 Pac. 66; *Riverdale Min. Co. v. Wicks*, 14 Cal. App. 526, 112 Pac. 896.

⁸⁹ It need not affirm that plaintiff has obtained the certificate of the secretary of state that required payments have been made (Gen. St. 1901, § 1283); and unless want of it appears on the complaint it is not demurrable. *Northrup v. A. G. Wills Lumber Co.*, 65 Kan. 769, 70 Pac. 879. But see *Wilson Case Lumber Co. v. Mountain Timber Co.*, 200 Fed. 181.

⁹⁰ A provision for notice of claim need not be met by allegation that notice was given where such notice is not a precedent condition. *Bulkley v. Norwich & W. R. Co.*, 81 Conn. 284, 129 Am. St. Rep. 212, 70 Atl. 1021.

A statute requiring notice of claim to a railroad company within a fixed time does not impose a condition precedent. Hence the plaintiff need not anticipate a defense of failure to give such notice. *Bulkley v. Norwich & W. R. Co.*, 81 Conn. 284, 129 Am. St. Rep. 212, 70 Atl. 1021.

ordinarily need not be alleged in the complaint, being defensive matter in abatement.⁹¹ The allegation of payment of license need do no more than meet the terms of the statute.⁹²

§ 3049. Pleading jurisdictional facts and venue—In general. There are several aspects of the question of what facts to plead as bearing on jurisdiction and venue, and how to plead them: jurisdiction in courts of general jurisdiction, jurisdiction specially conferred or in inferior courts, venue including that venue which is jurisdictional in some states, and jurisdiction of federal courts. As to the first, it is obviously not necessary to allege that a court of general jurisdiction has jurisdiction, for that is presumed.⁹³ But the question arises in those states which deny jurisdiction of actions by or against foreign corporations.⁹⁴ In such actions if the facts and place of incorporation are fully alleged, the addition of the allegations necessary to state the cause of action in substance may reveal the foreign origin of the cause of action and the nonresidence of the parties or one of them. If all the facts thus appear to show that there is no jurisdiction, such allegations must be added as will make out a ground for jurisdiction over the cause of action because of its nature and thus overcome the prima facie want of jurisdiction.⁹⁵ If the complaint is silent as to any one of these ousting facts no such allegation is required, the presumption being effective to sustain the jurisdiction.⁹⁶

⁹¹ See § 3069 et seq., *infra*, and § 2949, *supra*.

⁹² Hence allegation of payment of the "last due" fee suffices, though made in an amended complaint which left no allegation as to payment of earlier years. *Wilson Case Lumber Co. v. Mountain Timber Co.*, 200 Fed. 181.

⁹³ As to this presumption, which is usually invoked only on appeal or in support of a judgment, see generally treatises on Appeal and Judgments.

Allegation of defendant's corporate existence is not essential to jurisdiction either of person or subject-matter. *Crouch v. H. L. Miller & Co.*, 169 Cal. 341, 146 Pac. 880.

⁹⁴ See § 2957 et seq., *supra*.

⁹⁵ For these facts, see the statutes of the state and see also § 2957 et seq.,

supra, and chapter on Foreign Corporations, *infra*.

An attachment affidavit should allege one of the statutory grounds of jurisdiction where it shows plaintiff a nonresident and defendant a foreign corporation. Otherwise no jurisdiction attaches. *Allison v. T. A. Snider Preserve Co.*, 20 N. Y. Misc. 367, 45 N. Y. Supp. 923.

⁹⁶ It is not necessary for a resident to set up his residence when suing a foreign corporation. It is matter of defense to show that he is not, and so to oust jurisdiction. *Brisbane v. Pennsylvania R. Co.*, 141 N. Y. App. Div. 366, 125 N. Y. Supp. 1042.

Demurrer for want of jurisdiction will not reach foreign corporation where place of contract is not stated or plaintiff's residence. *Carter v. Her-*

An untrue allegation that a corporation is one of a state may sustain a state judgment based thereon, although the case would have been removable on true allegations,⁹⁷ but it will not prevent removal if petition is filed.⁹⁸

As to courts of limited, special or inferior jurisdiction the necessary facts should be pleaded, if written pleadings are used or required, and among those facts are the residence or place of business of the party or parties.⁹⁹ In courts of this character such allegations are jurisdictional as distinguished from similar allegations in courts of general jurisdiction affecting the venue or place for trial.

In a very early case in which a corporation was defendant a pleaded venue was declared to be useless in a transitory action except as a matter of form.¹ Generally the venue need not be stated in the body of the pleading, the venue in the margin being understood to be the place until the contrary is shown,² and the filing in the clerk's office suffices.³ The want of it or error in it therefore must be assailed, if

bert Booth King & Bro. Pub. Co., 26 N. Y. Misc. 652, 56 N. Y. Supp. 382.

⁹⁷ Oregon Short Line & U. N. R. Co. v. Skottowe, 162 U. S. 490, 40 L. Ed. 1048.

⁹⁸ Texas & P. R. Co. v. Cody, 166 U. S. 606, 41 L. Ed. 1132, aff'g 67 Fed. 71.

⁹⁹ That a domestic corporation has an office in New York city must be pleaded in the municipal court. Consolidated Copalquin Mines Co. v. Broadway Realty Co., 31 N. Y. Misc. 783, 65 N. Y. Supp. 227.

Allegation that defendant foreign corporation has an office in New York is also essential. McKeever v. Supreme Court Independent Order of Foresters, 122 N. Y. App. Div. 465, 106 N. Y. Supp. 1041; Epstein v. S. Weisberger Co., 52 N. Y. Misc. 572, 102 N. Y. Supp. 488.

In the city court of New York the residence of plaintiff must be alleged if jurisdiction is based thereon, though the court refused to admit any difference between courts of limited and general jurisdiction. O'Reilly v. New Brunswick, A. & N. Y. Steamboat Co., 28 N. Y. Misc. 112, 59 N. Y. Supp. 261, rev'g 26 N. Y. Misc. 195, 55 N. Y. Supp. 1133.

In the New York city district court under Code Civ. Proc. § 3215, it need not be alleged in the complaint that defendant has an office in New York city. It must, however, be shown if challenged. Hilleary v. Skookum Root Hair Grower Co., 4 N. Y. Misc. 127, 23 N. Y. Supp. 1016.

While allegations of residence may be necessary, if challenged, to confer jurisdiction on the county court, it may be waived by going to the merits. Meyers v. American Locomotive Co., 201 N. Y. 163, 94 N. E. 605.

¹ Briggs v. Nantucket Bank, 5 Mass. 94.

Venue need not be pleaded in court of general jurisdiction. Eel River R. Co. v. State, 143 Ind. 231, 42 N. E. 617; Norfolk & W. R. Co. v. Ampey, 93 Va. 108, 25 S. E. 226.

In quo warranto want of a venue is cured by verdict, being transitory. Bank of Vincennes v. State, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234.

² Cocke v. Kendall (Ark. Terr.), Hempst. 236, Fed. Cas. No. 2929b; Slate v. Post, 9 Johns. (N. Y.) 81.

³ Baltimore & Y. Turnpike Co. v. Crowther, 63 Md. 558, 1 Atl. 279.

at all, by special demurrer, and will not be noticed *sua sponte* or on motion in arrest.⁴ Inasmuch as the venue is fixed primarily by the facts disclosed in the complaint, it should allege such facts, if any, as are essential to support such venue, or at least show a case not incompatible with it.⁵ It may be proper, even if not necessary, to allege the residence, domicile or place of business of the party or parties, or the place of origin or nature of the cause of action, or the location of properties or subject-matter of the action, in order to sustain one of the special venues permitted in actions by or against a corporation,⁶ and the allegations as to the character of the corporation and the stating part of the complaint taken together frequently supply them without any introductory allegations.⁷ The answer may supply them, too.⁸ Formal allegations and fictional ones will not

⁴ *Gilbert v. Nantucket Bank*, 5 Mass. 97; *Briggs v. Nantucket Bank*, 5 Mass. 94.

See also § 3069, *infra*, and see § 2984, *supra*, as to mode of claiming privilege of venue and change.

⁵ See § 2978 et seq., *supra*, as to those facts.

An exhibit showing a policy signed in J county does not show that it was not issued as alleged in the county where venue is laid. *Kentucky Mut. Security Fund Co. v. Logan's Adm'r*, 90 Ky. 364, 14 S. W. 337.

⁶ Thus a suit for breach of duty by carrier may be brought either where the contract was made or was to be performed, or, if *ex delicto*, where the cause of action originates, which would be at point of delivery in case of delay. *Wright v. Southern R. Co.*, 7 Ga. App. 542, 67 S. E. 272. But where complaint in an action against an incorporated carrier was ambiguous in this respect, and no demurrer was filed, the plaintiff could elect to treat it as whichever he chose. *Central R. Co. v. Pickett*, 87 Ga. 734, 13 S. E. 750. And where no allegations fix the facts which determine where the contract was made or performable or broken, it will be presumed against the pleader in fixing venue. *Ham-*

mond v. Ocean Shore Development Co., 22 Cal. App. 167, 133 Pac. 978.

It should show that cause of action arose in the county to support venue. *Hildebrand v. United Artisans*, 46 Ore. 134, 114 Am. St. Rep. 852, 79 Pac. 347.

It need not aver that defendant's railroad runs through the county. *Ohio Southern R. Co. v. Morey*, 47 Ohio St. 207, 7 L. R. A. 701, 24 N. E. 269.

⁷ An allegation that an act was done "at the city of Petersburg" and that the injury was thereby sustained is sufficient if it was needed. *Norfolk & W. R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226.

Where no venue is laid in the margin but the land where the injury was done was within the county the omission was technical and was cured by the statute (C. L. § 6051). *Grand Rapids & I. R. Co. v. Southwick*, 30 Mich. 444.

Allegation that defendant "was indebted" in a certain county is not an allegation that it became indebted there. *Hammond v. Ocean Shore Development Co.*, 22 Cal. App. 167, 133 Pac. 978.

⁸ Where venue was not pleaded in the complaint a denial that the wrong occurred in the county in question

support a special venue.⁹ If a corporation be such that a special venue is given by statute in certain actions, nevertheless in other kinds of actions the special venue need not be alleged.¹⁰ Where, as in Georgia, the venue of some actions is jurisdictional all facts necessary to support the venue claimed must be alleged,¹¹ but if enough to sustain it be alleged, additional facts sustaining it or affecting it need not be;¹² and a co-defendant's venue will not sustain the action unless a cause of action against him be pleaded.¹³

Jurisdictional averments should be pleaded as of the time of the action,¹⁴ although it must be remembered that in pleading venue some

cured the omission. *Evans v. Maysville & B. S. R. Co.*, 25 Ky. L. Rep. 1258, 77 S. W. 708.

An admission on the pleadings that defendant is "doing business" in S county implies that its office is there and sustains venue though the president was served elsewhere. *Collins v. Hazel Lumber Co.*, 54 Wash. 524, 103 Pac. 798.

⁹ The fiction in a complaint on implied promise that defendant "then and there promised," etc., will be disregarded as an allegation of venue. *Hammond v. Ocean Shore Development Co.*, 22 Cal. App. 167, 133 Pac. 978.

¹⁰ Where a special venue is given on a liability as carrier but the action is not on such a liability, such particular venue need not be alleged. *Atchison, T. & S. F. R. Co. v. Jordan Stock Food Co.*, 67 Kan. 86, 73 Pac. 533.

¹¹ Must state the nature of the cause of action. *White v. Atlanta, B. & A. R. Co.*, 5 Ga. App. 308, 63 S. E. 234.

Must allege that there was no agent where cause of action arose. *Jordan v. Georgia Southern & F. R. Co.*, 105 Ga. 274, 30 S. E. 748; *Gilbert v. Georgia Railroad & Banking Co.*, 104 Ga. 412, 130 S. E. 673.

If it is desired to gain jurisdiction of an owner or lessor of a railroad line operated by another corporation there must be an appropriate allegation that the line is so operated. *South-*

western R. Co. v. Vellines, 14 Ga. App. 674, 82 S. E. 166.

The making or obligation to perform the contract within the county must be pleaded to sustain venue elsewhere than at the principal place of business. *Corley & Dasset v. Georgia Railroad & Banking Co.*, 49 Ga. 626.

As to foreign torts it may be waived if no plea or demurrer be interposed. See *Central of Georgia R. Co. v. A. C. Dowe & Co.*, 6 Ga. App. 858, 65 S. E. 1091.

¹² Allegation of defendant corporation's residence is not essential to lay venue where timber cutting occurred by a corporation having an agent and office in the county, the action being for damages and for an injunction (Civ. Code, § 1900). *Gillis v. Hilton & Dodge Lumber Co.*, 113 Ga. 622, 38 S. E. 940.

¹³ In order to found jurisdiction on a venue laid in the residence of a co-defendant, but where the corporation could not be sued, there must be a cause of action stated against the co-defendant; if there is none, jurisdiction fails. *D. T. McClellan & Co. v. American Tie & Lumber Co.*, 135 Ga. 370, 69 S. E. 486.

¹⁴ Averment that "at all times herein mentioned" defendant's road ran in the county shows that it "now" runs there. *Johnson v. Manhattan & Queens Traction Corporation*, 162 N. Y. App. Div. 753, 147 N. Y. Supp. 965.

of the statutes fix it as of the place where the cause accrued, or the injury occurred, or where the party then resided, or on other past facts.¹⁵ Necessarily such facts should be pleaded, if at all, under a verb of the past tense.

§ 3050. — *In federal courts.* Inasmuch as there can be no giving of jurisdiction to the federal courts by consent, and as their jurisdiction is a limited, though not inferior one, restricted to certain causes of actions and subjects,¹⁶ the bill or complaint must show the jurisdiction consisting either in the fact that a federal question is involved, or that there is a diversity of citizenship, or that one of the other grounds mentioned in the statute exists; but only one is necessary. Of course, the complaint or bill must show the requisite amount in controversy, or if some special subject-matter gives the jurisdiction that must appear. In short, every element of support for the federal jurisdiction ought to be pleaded, even if there is more than one; if a federal question appears by reason of the federal incorporation of the party it does not matter that the allegations are deficient to make out jurisdiction by reason of diversity.¹⁷ There is very little about any of the grounds of jurisdiction that has anything to do with corporations except the fact of the citizenship of the corporation relatively to the parties on the other side of the controversy, and the possible fact that plaintiff sues as the holder or assignee of an instrument made by a corporation within the exception of the statute as to suits by assignees.¹⁸

Alleging a federal incorporation shows a federal question,¹⁹ but a bare allegation of a federal franchise owned by the corporation without any suggestion that it is being infringed does not suffice.²⁰ The

¹⁵ See § 2978 et seq., supra.

¹⁶ See § 2965 et seq., supra, and see the grounds of jurisdiction enumerated in Judicial Code, § 24.

¹⁷ *United States Freehold Land & Emigration Co. v. Gallegos*, 89 Fed. 769.

¹⁸ See Judicial Code, § 24.

¹⁹ *United States Freehold Land & Emigration Co. v. Gallegos*, 89 Fed. 769.

Averment of incorporation under act of congress applying Arkansas laws to Indian Territory shows a federal incorporation. *Canary Oil Co. v.*

Standard Asphalt & Rubber Co., 182 Fed. 663.

Allegation that C company "is a corporation operating in" a state shows enough where it is federally incorporated. *Scott v. Choctaw, O. & G. R. Co.*, 112 Fed. 180.

²⁰ Averment of a federal bridge franchise and an attempt to tax the bridge property by the state shows no federal question without further allegation that a federal exemption was granted. *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 659, 42 L. Ed. 315.

plaintiff must allege fully the requisite diversity of citizenship, to which end²¹ the domicile and citizenship of the other parties must be averred in good form and substance,²² and that they are of different states from the pleader's side of the controversy;²³ and it must be averred that the corporation is one formed and existing in a named state, a general allegation that it is a "citizen" thereof not being good pleading.²⁴ If the suit is by an alien, incorporation in and citizenship of a state must be ascribed to defendant corporation,²⁵ and the like is required when a state sues a corporation.²⁶

In a suit by assignee of a corporation it may be necessary to allege that the corporation could have sued if no assignment had been made,

²¹ *Thomas v. Ohio State University*, 195 U. S. 207, 49 L. Ed. 160.

When plaintiff founds any right to invoke federal jurisdiction on the citizenship of defendant corporation he must truly and properly plead it. *Texas & P. R. Co. v. Cody*, 166 U. S. 606, 41 L. Ed. 1132, aff'g 67 Fed. 71.

²² "Resident" held to import citizenship where defendant is alleged to be a corporation (in a removal petition). *Vestal v. Ducktown Sulphur, Copper & Iron Co., Ltd.*, 210 Fed. 375.

"An association of persons not incorporated, formed for [banking purposes] who were at the time the cause of action arose and still were engaged in said business at" a point in Nebraska shows individual domicile there. *United States Exp. Co. v. Kountze Bros.*, 8 Wall. (U. S.) 342, 19 L. Ed. 457.

²³ Averment of "a corporation * * * under and by virtue of the laws of Kansas and Nebraska" shows no diverse citizenship from a Kansas plaintiff. *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 659, 42 L. Ed. 315.

²⁴ The approved form is "that the defendant is a corporation organized and existing under the laws of" the named state. Averment simply that it is a "citizen" is bad. *Parker Washington Co. v. Cramer*, 201 Fed. 878.

General allegation of incorporation in given state shows citizenship.

Dodge v. Tulleys, 144 U. S. 451, 36 L. Ed. 501.

"Foreign corporation formed under and created by the laws of" New York is good. *United States Exp. Co. v. Kountze Bros.*, 8 Wall. (U. S.) 342, 19 L. Ed. 457.

"A body corporate by the act of" Maryland held good. *Marshall v. Baltimore & O. R. Co.*, 16 How. (U. S.) 314, 14 L. Ed. 953.

Citizenship in Mississippi is not averred by alleging that defendant is a New York corporation located in Mississippi and doing business there. *Germania Fire Ins. Co. v. Francis*, 11 Wall. (U. S.) 210, 20 L. Ed. 77.

Formerly the citizenship of the corporations must have been pleaded. *Breithaupt v. Bank of State of Georgia*, 1 Pet. (U. S.) 238, 7 L. Ed. 127. But this was based on the now exploded doctrine that citizenship was that of the stockholders rather than the domicile where it was created.

²⁵ *Piquignot v. Pennsylvania R. Co.*, 16 How. (U. S.) 104, 14 L. Ed. 863.

²⁶ Averment that defendant is "a body politic in the law of and doing business in California" does not show it to be a California corporation which the state could sue originally in the supreme court. *Pennsylvania v. Quicksilver Co.*, 10 Wall. (U. S.) 553, 19 L. Ed. 998.

and this must be well pleaded by stating the facts of citizenship and domicile;²⁷ but where the case comes under the exception an averment that the assignor could have sued is needless.²⁸

In the federal courts allegations of the inhabitancy of the corporation or of the residence of the parties also may be made for the place of fixing or choosing the district within a state where suit shall or may brought.²⁹

The jurisdictional averments must be made, usually in the introduction to the bill or declaration, but they suffice if anywhere in the pleadings³⁰ and the whole record may be looked to in aid of the allegations when they are questioned.³¹ The allegations will be fairly construed³² and an allegation of present existence in a state will be taken as one that the corporation was created there.³³ The judicial notice taken of the existence and name of the federal corporation will take the place of allegations of such facts or even overcome them if untrue.³⁴ The judicial notice that can be taken of a state corpo-

²⁷ Allegation that assignor was "doing business in" a state does not show that it was created there. *Brock v. Northwestern Fuel Co.*, 130 U. S. 341, 32 L. Ed. 905.

²⁸ *New Orleans v. Quinlan*, 173 U. S. 191, 43 L. Ed. 664.

²⁹ Judicial Code, § 51.

To aver that defendant is a "citizen" of Kentucky and a "resident" of the district does not entitle plaintiff, a nonresident, to sue it there under the Act of 1887. *Southern Pac. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 943. See also *Shaw v. Quincy Mfg. Co.*, 145 U. S. 444, 36 L. Ed. 768. The former act allowing suit where it was "found" was repealed by the act referred to.

³⁰ *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207.

Averment of "citizenship" only was cured by attachment of articles to the bill and references in the body of it to defendant as a corporation. *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207.

The original petition or complaint replaced by amendment is part of the record, and suffices to show jurisdic-

tion by diversity of citizenship therein alleged. *Mexican Cent. R. Co. v. Pinkney*, 149 U. S. 194, 37 L. Ed. 699.

Allegation that defendant is "a citizen of" a state without alleging that it is a corporation thereof is bad, but was cured by demurrer to a replication supplying such allegation. *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404, 15 L. Ed. 451.

³¹ "Resident of Delaware" does not import citizenship there, but aided by other parts of the record suffices. *Sun Prtg. & Pub. Ass'n v. Edwards*, 194 U. S. 377, 48 L. Ed. 1027.

³² Direct averments of citizenship will not be impeached by a forced construction of subsequent allegations. *Railroad Commission v. Louisville & N. R. Co.*, 225 U. S. 272, 56 L. Ed. 1087.

³³ "Is" a corporation of a state imports that it was originally created there, and when admitted by answer suffices. *Sun Prtg. & Pub. Ass'n v. Edwards*, 194 U. S. 377, 48 L. Ed. 1027.

³⁴ Judicial notice of incorporation and existence, see § 428, supra, § 3087, infra.

An untrue allegation that a federal

ration will supply what is lacking in a bare allegation of citizenship,³⁵ or an allegation of incorporation without stating of what place,³⁶ and the judicial notice of state laws taken by the federal courts may show an equivocal allegation to be bad.³⁷

§ 3051. Pleading substance of actionable right—In general. It follows from the capacity to sue and be sued like a natural person that a right of action either by or against the corporation will be pleaded according to the general law of pleading with only such adaptations as may be necessitated by its impersonal nature and by the relationship which may subsist between it and the adverse litigant, for example where it is sued by or sues its stockholder. The next few ensuing sections treat of some of the facts which are commonly alleged in adapting the pleadings to the rules of the general law. As to the substantive allegations in an action on a contract, or on a tort, or on an equitable right, appropriate general treatises will advise the reader.³⁸ To those causes of action which are peculiar to the internal relations of the corporation with its stockholders and officers, and those which are peculiar to the enforcement of the rights of corporate creditors, other parts of this treatise are particularly devoted.³⁹ The specific chapters herein on Injunction, Mandamus, Quo Warranto, and Mortgage are referred to in addition to the others.⁴⁰

corporation is a citizen of a state cannot prevail against the court's judicial knowledge of the contrary. *Texas & P. R. Co. v. Cody*, 166 U. S. 606, 41 L. Ed. 1132, aff'g 67 Fed. 71.

³⁵ Allegation by name and that it "is a citizen" suffices where judicially known to be a corporation. *Covington Drawbridge Co. v. Shepherd*, 20 How. (U. S.) 227, 15 L. Ed. 896.

³⁶ "The [C. Co.] of Covington is a corporation and citizen of the state of Indiana" is sufficient. *Covington Drawbridge Co. v. Shepherd*, 21 How. (U. S.) 112, 16 L. Ed. 38.

³⁷ Allegation that defendant Board of Trustees "was created by and exists under and by virtue of a law * * * of Ohio" and that it has certain attributes of a corporation, but not that it is one, does not suffice in view of the judicial notice of such statutes. *Thomas v. Ohio State*

University, 195 U. S. 207, 49 L. Ed. 160.

³⁸ See general works on pleading; contracts; torts; negligence; equity; real property; and the like.

Complaint for slander of plaintiff's merchandise by corporation held good. *Waters-Pierce Oil Co. v. Bridwell*, 103 Ark. 345, Ann. Cas. 1914B 837, 147 S. W. 64.

³⁹ Actions between corporation and stockholders, see Chapter 17, *supra*, and chapter on Stock and Stockholders, *infra*.

Actions and proceedings between corporation and officers or directors, see Chapter 42, *supra*.

Remedies of creditors, see chapters on Execution, etc., and Creditors' Bills; Insolvency; Bankruptcy; Receivers; Forfeiture, Dissolution and Winding Up, *infra*.

⁴⁰ See the chapters so entitled.

The allegations should, where the corporation is suing, ascribe the right to it ⁴¹ by its name, ⁴² or by succession or change of name, ⁴³ and where the suit is brought, as by some statutes it may be, in the name of the president or other officer, it should be alleged as the corporation's and not as "plaintiff's" cause of action. ⁴⁴ The title or right of the corporation need only be pleaded as good against the defendant, and when it sues as a trustee it need not plead a right good as against the other party to the trust. ⁴⁵ If the corporation is sued the liability should be ascribed to it, and for this purpose it may be described as "defendant" whenever that is capable of certain application. ⁴⁶ It should be sued by name or with allegations of succession or change of name. ⁴⁷ As already stated, the fact of incorporation and of corporate existence is not now regarded as a part of the cause of action, except those like subscriptions to stock, etc., which are predicated in part on that very fact; and it need not be alleged either by or against the corporation unless that is necessary to make out the cause of action, or unless statutes or the practice of the jurisdiction require it for the purpose of showing the capacity of the corporation to sue or for the purpose of jurisdiction. ⁴⁸ It may be assumed as a general working rule, however, that for one or the other reason such allegations will be needed. Statutory conditions on the right to sue need be pleaded only when the statute itself requires it or when they enter into the very cause of action sued on. ⁴⁹ In order to hold a corporation as a responsible co-party with other defendants, who bore no official relation to it, there must be some allegation imputing wrongdoing or complicity to it, and a general allegation that it is responsible will not suffice. ⁵⁰

⁴¹ Allegations where it sues on instrument running to its officer or agent by his name, see § 3056, *infra*.

⁴² § 3041, *supra*.

⁴³ § 3045, *supra*.

⁴⁴ *Pentz v. Sackett, Hill & D. Supp.* (N. Y.) 113.

⁴⁵ A corporation suing as one entitled by a trust created by the state need not allege that it is executing the trust. The state alone is concerned with that. *Conley v. Daughters of Republic of Texas*, — Tex. Civ. App. —, 151 S. W. 877.

⁴⁶ Averment that "the defendant" then and there did the act complained

of shows that the defendant corporation rather than its receiver or other person or other corporation is charged under a statute making either liable. *Cincinnati, H. & I. R. Co. v. McDougall*, 108 Ind. 179, 8 N. E. 571.

⁴⁷ §§ 3041, 3045, *supra*.

⁴⁸ §§ 3042-3044, 3049, *supra*.

⁴⁹ § 3048, *supra*.

⁵⁰ A bank may not be held as a co-defendant in a suit to charge a guardian and his sureties with waste on a bare allegation that there was an embezzlement by the guardian for which the bank was responsible. *Bank of Virginia v. Craig*, 6 Leigh (Va.) 399.

§ 3052. — **Charter and by-law provisions entering into right of action.** The charter and by-law provisions enter into causes of action only by virtue of their being impliedly or expressly a part of some contract with the corporation, or some limitation on power to contract or hold property, or some limitation on authority of officers or agents, or some basis of notice or other equity, etc. It is therefore necessary to plead them affirmatively only when they are an incident to the contract or right asserted.⁵¹ They are most frequently pleaded defensively.⁵² There are a great many decisions containing dicta or holding in round terms that "the" charter need not be pleaded, or should be pleaded, which only mean that corporate existence must be or need not be alleged; in other words, that "a" charter or incorporation must be alleged in some form. This allegation is for the purpose of naming and identifying the party primarily, though incidentally it may raise an implication of the requisite power.⁵³ In most cases, but not all, the manner and means by which or the agents through whom the corporation acted and was represented need not be alleged beyond a general allegation that it did the act or was responsible,⁵⁴ leaving it to the proofs to show binding action under the charter and by-laws if issue be made thereon.

If the pleaded right is based on a charter with a condition therein imposed, both the charter and the fact of performing the condition must be alleged.⁵⁵ It is sometimes necessary to plead the charter in order to show that an alleged wrong was a wrong.⁵⁶ On the other

⁵¹ Nearly all such cases will arise in suits between the corporation and its members or officers, and hence will not be within the scope of this chapter. See Chapters 17, 42, *supra*, and Stock and Stockholders, *infra*.

Sometimes the receiver will sue basing his rights on the charter or by-laws, and as to such actions see also chapter on Receivers, *infra*.

Actions for relief or for recovery of money or property received under ultra vires contract or transaction, see § 1604 et seq., *supra*.

See generally §§ 501-503, 511-519, *supra*, as to effect and subject-matter of by-laws. Compare also those portions of this work dealing with actions relating to the subject-matter of the particular by-law.

⁵² See § 3078, *infra*.

⁵³ See such cases §§ 3042-3044, *supra*.

⁵⁴ § 3055, *infra*.

⁵⁵ Under charter granting a toll franchise for making improvements which will facilitate a certain use of a river, it must be alleged in action for tolls that use was so facilitated. *Swift River & B. B. Improvement Co. v. Brown*, 77 Me. 40.

⁵⁶ In action for libel of a foreign corporation by ascribing a purpose to exercise a power granted by its charter, the charter must be pleaded to make out the cause of action. *Hahne-mannian Life Ins. Co. v. Beebe*, 48 Ill. 87, 95 Am. Dec. 519.

hand, if the charter is public, and therefore known to the court, it may be necessary to allege facts specially to show that the wrong was a wrong and was not an act justified by the grant in the charter.⁵⁷ A member suing the corporation and desiring to impeach its by-laws must make allegation showing their illegality by reason of statute or charter or constitution, or because in violation of terms of a prior contract.⁵⁸

Some charters are judicially noticed.⁵⁹ Since by-laws are not judicially known and must be proved whenever material,⁶⁰ they and all private charters must be pleaded to get them before the court, which may be done by setting out the particular portions verbatim or in substance; but the legal effect of them cannot be pleaded as a conclusion.⁶¹

§ 3053. — Statutes and facts entering into statutory rights of action. There is no distinctive rule for the pleading of statutes affecting corporate rights or liabilities. General public enabling statutes under which the corporation is formed, or a public act of incorporation, are judicially known to the court; but if incorporation was by private act or was in a foreign state it must be pleaded at least in general terms.⁶² These allegations when made are addressed to the issue of corporate existence.

In pleading a statutory cause of action all the elements of fact entering into it must be pleaded,⁶³ which is nothing more than a general law of pleading; a stock assessment,⁶⁴ an assessment on mem-

⁵⁷ Where a tort is alleged in the doing of an act authorized by a public charter some fact must be alleged taking the act out of and beyond the warrant of the charter. A bare allegation that an authorized bridge was "unlawfully" constructed does not show a wrong. *Stephen & C. Transp. Co. v. Central R. Co.*, 33 N. J. L. 229.

⁵⁸ The illegality of amendments of by-laws must be so pleaded. If the contract also be relied on enough of it must be set out to show that it was violated. *Crittenden v. Southern Home Building & Loan Ass'n*, 111 Ga. 266, 36 S. E. 643.

⁵⁹ See § 3088, *infra*.

⁶⁰ § 488, *supra*.

⁶¹ Mere allegations of the effect of a foreign charter and by-laws not ex-

hibited or set out are bad as conclusions. *Clark v. Mutual Reserve Fund Life Ass'n*, 14 App. Cas. (D. C.) 154, 43 L. R. A. 390.

In debt before a justice for a penalty for violation of plaintiff's by-laws, the by-law may be set out by reference to an attached printed copy. *White Water Valley Canal Co. v. Boden*, 8 Blackf. (Ind.) 130.

⁶² §§ 3042-3044, *supra*; chapter on Foreign Corporations, *infra*.

⁶³ E. g., that the duty imposed was wholly intrastate in the instant case. *Rixke v. Western U. Tel. Co.*, 96 Mo. App. 406, 70 S. W. 265.

⁶⁴ A statutory notice precedent to assessment of stock must be pleaded. *Mississippi, O. & R. R. Co. v. Gaster*, 20 Ark. 455. See other cases

bers for improvements,⁶⁵ or a statutory penalty for refusing inspection of books,⁶⁶ therefore require allegations of facts made a predicate for such actions by the statutes. Statutory actions against officers and stockholders are treated generally in other chapters.⁶⁷ Under the rule generally followed a statutory remedy available only for or against a corporation or bank may be invoked by suing in a name which imports that capacity or character.⁶⁸

§ 3054. — Corporate power or want of power. The power of the corporation to do a thing declared on as the basis of the action, and conversely the want of power relied on as making an actionable cause, needs to be pleaded or not according to the presumptions as to power which follow from the fact of incorporation together with other allegations showing the character of the corporation. Applying the general rule that things implied or presumed need not be pleaded⁶⁹ this question is thrown back to an inquiry what powers are implied or presumed and what are not. Generally speaking the power to sue and be sued, to take, receive, hold, purchase, grant, and convey property within the objects of its nature and creation, to make contracts within the same scope of its objects, and to control within limits its own internal regulation and relations, will be implied. And this statement may be augmented by the further one that if the general powers appear those will be implied which are reasonably incidental and accessory to the general powers, so that it may be said that they were contemplated as a part of them.⁷⁰ Such powers

Chapter 17, *supra*, chapter on Stock and Stockholders, *infra*.

⁶⁵ Where the statute requires the filing of a bond for proper application of money by a ditch company before enforcing or collecting any assessment, such filing must be alleged. *Cooper v. Arctic Ditchers*, 56 Ind. 233.

⁶⁶ In a penal action for refusal to allow inspection of stockbook, it must be averred that the right of the person demanding was known to the officer who refused. *Williams v. College Corner & R. Gravel Road Co.*, 45 Ind. 170. See other cases chapter on Inspection of Books, *supra*.

⁶⁷ See Chaps. 17, 42, *supra*, and chapter on Stock and Stockholders, *infra*.

⁶⁸ Suing by name of a bank sufficiently imports that plaintiff is a bank

to entitle it to a remedy given only to banks. There need be no express averment in the body of the pleading. *Lewis v. Bank of Kentucky*, 12 Ohio 132, 40 Am. Dec. 469.

In a statutory liability declared only against railroads and corporations, the corporate character of defendant must be alleged, but a name importing incorporation suffices (applying Employers' Liability Act which runs only against railroads and corporations). *Ft. Wayne Gas. Co. v. Nieman*, 33 Ind. App. 178, 71 N. E. 59.

⁶⁹ *Stephen on Pleading* (Tyler's Ed.) 317, 318.

⁷⁰ See generally Chapter 21, §§ 790-792, *supra*.

need not be pleaded,⁷¹ and the failure to plead them does not expose the complaint to a demurrer;⁷² but the issue must be raised, if at all, by an affirmative plea of *ultra vires*.⁷³ If the implication is against the power it must be pleaded.⁷⁴ Undoubtedly, if a power exists and is relied on, it will be better to plead it if there is any doubt as to the implication, for the burden of proof can be sustained by available proof, or the allegation will be regarded as unnecessary; though care must be taken not to limit the issues thereby and exclude proof that might sustain the case on some other power not so pleaded. But the sum of all this is that it is really a question of implications rather than one of pleading. The same reasoning will work out the question when it must or should be alleged that a lack of power exists, but in that aspect the implied or presumed powers must be negatived as if any other legal presumption was being negatived by pleading the facts. Lack of power is much more often pleaded defensively than

⁷¹ Howard v. Boorman, 17 Wis. 459.

Power to make a contract when presumed need not be pleaded. Commonwealth Title Insurance & Trust Co. v. Cummings, 83 Fed. 767.

Plaintiff need not allege its powers involved in the contract sued on. Marsalis v. Texas Cactus Hedge Co., 2 Tex. Unrep. Cas. 292.

Presumably *intra vires* title need not be so pleaded. Farmers' & Millers' Bank v. Detroit & M. R. Co., 17 Wis. 372.

Defendant insurance company need not be alleged to have insurance powers. Feeny v. People's Fire Ins. Co., 25 N. Y. Super. Ct. 599.

Bill to foreclose by a corporation need not aver power to loan money and take mortgage. Boulware v. Davis, 90 Ala. 207, 9 L. R. A. 601, 8 So. 84; United States Mortg. Co. v. McClure, 42 Ore. 190, 70 Pac. 543.

In a suit to quiet title the corporate plaintiff need not allege power to hold land; that is presumed. Touart v. Jett Bros. Contracting Co., 169 Ala. 638, 53 So. 751; Torrent Fire Engine Co. No. 5 v. Mobile, 101 Ala. 559, 14 So. 557; Martin v. Kentucky Lands Inv. Co., 146 Ky. 525, Ann. Cas. 1913 C 332, 142 S. W. 1038.

Incapacity to hold land is defensive matter. Young Men's Christian Ass'n v. Dubach, 82 Mo. 475.

See generally §§ 3068, 3078, *infra*, where this rule takes expression in the converse statement that want of power cannot be questioned by demurrer but must be pleaded as a defense.

⁷² § 3068, *infra*.

⁷³ § 3078, *infra*.

⁷⁴ Where the cause of action is one impliedly beyond corporate powers, e. g., a guaranty, the power to make it should be pleaded as a fact. Rhorer v. Middlesboro Town & Lands Co., 103 Ky. 146, 19 Ky. L. Rep. 1788, 44 S. W. 448.

Allegation that defendant and other corporations are partners must be accompanied with allegation of power to become such. White v. Pecos Land & Water Co., 18 Tex. Civ. App. 634, 45 S. W. 207.

Power to do the thing sued on must be averred if such power does not ordinarily belong to corporations (lending money). Frye v. Bank of Illinois, 10 Ill. 332.

affirmatively, to wit, as a plea of *ultra vires*; ⁷⁵ but whether affirmative or negative in form allegations in the complaint as to the corporate powers quickly verge into the doctrine of *ultra vires* and its concomitant doctrines of estoppel.⁷⁶ Therefore whenever the pleaded facts show the defendant estopped to question the power in question an allegation in the complaint is needless now and according to the old and general rule of pleading,⁷⁷ illustrating which is the rule that a corporation sued on a contract made by it, as alleged, need not be alleged to have had power to make such contract.⁷⁸ It will be necessary to plead the character of the corporation and the nature and objects of it, whenever a limited range of powers peculiar to that kind of a corporation is relied on,⁷⁹ or when it is desired to justify an act by charter power.⁸⁰

The foregoing rules are general. There are exceptional actions and causes of action wherein the particular power or nature of the corporation must be pleaded, or conversely the want of power. Thus in *quo warranto* for usurpation of powers or franchises the very power itself is the subject of the action and must be alleged with certainty,⁸¹ and in *mandamus* to compel performance of a duty it may be requisite to allege power to perform it, or at least a duty which presupposes such power.⁸² In *mandamus* by a corporation grounding

⁷⁵ Pleas of *ultra vires*, see § 3078, *infra*.

Complaint setting forth a contract which may be *intra vires* does not show want of power. *Jacobs v. Monaton Realty Investing Corporation*, 212 N. Y. 48, 105 N. E. 968, rev'g 160 N. Y. App. Div. 449, 145 N. Y. Supp. 611, which affirms 80 N. Y. Misc. 649, 141 N. Y. Supp. 1033.

⁷⁶ See generally Chapter 37, *supra*.

⁷⁷ *Stephen on Pleading* (Tyler's Ed.) 300, which lays down the rule as an exception to the necessity of alleging "title" or authority.

⁷⁸ "It would be an anomaly to hold that the complaint need not show that defendant company is a corporation, and at the same time require it to show that corporate powers had been conferred on the company." *Klemik v. Henricksen Jewelry Co.*, 122 Minn. 380, 142 N. W. 871. See also *Alabama Gold Life Ins. Co. v.*

Central Agricultural & Mechanical Ass'n, 54 Ala. 73; *Fuller v. Naugatuck R. Co.*, 21 Conn. 557 (corporation sued on contract of common carriage); *Montague v. Church School Dist. No. 3*, 34 N. J. L. 218 (school district sued on a note).

Need not allege character of defendant's business and its powers. *San Antonio Machine & Supply Co. v. Josey* (Tex. Civ. App.), 91 S. W. 598.

⁷⁹ *Jacobs v. Monaton Realty Investing Corporation*, 212 N. Y. 48, 105 N. E. 968, rev'g 160 N. Y. App. Div. 449, 145 N. Y. Supp. 611, which affirms judgment 80 N. Y. Misc. 649, 141 N. Y. Supp. 1033.

⁸⁰ It must be pleaded that it was done thereunder. *Crawfordsville & W. R. Co. v. Wright*, 5 Ind. 252.

⁸¹ See chapter on *Quo Warranto*, *infra*.

⁸² See chapter on *Mandamus*, *infra*.

its application on its right to have a thing done, it must show its capacity or power in order to make out a breach of duty by respondent, if the right claimed is not one implied.⁸³ Of course in the case of charters by public statute and as to all powers conferred by public statute on corporations of the party's class judicial notice of the powers removes all question of the necessity of pleading them. Identification of the corporation by the other allegations with the charter or the class suffices.⁸⁴

The formation and existence of the corporation properly pleaded⁸⁵ will afford in many if not most cases a sufficient basis for any implication of corporate power that may be necessary, when taken in connection with the cause of action alleged. An allegation that a contract was made and entered into implies that there was power in plaintiff to make it,⁸⁶ and it is implied that a contract was made in the regular course of business where the allegation is general that it was made.⁸⁷ When power in a consolidated corporation is alleged it should be so pleaded as to ascribe the power to either the original or the successor corporation, and an allegation of it where both were mentioned was treated as applying to the original one.⁸⁸

⁸³ An application by a corporation for a writ of mandamus to compel the state auditor to pay over to it certain moneys voted to it as trustee by the act of the legislature should set out its qualifications as a corporation to administer the trust. *Leatherwood v. Hill*, 10 Ariz. 16, 85 Pac. 405.

See also chapter on Mandamus, *infra*.

⁸⁴ See §§ 764-767, *supra*; § 3088, *infra*.

⁸⁵ The name of the corporation alone is enough in most jurisdictions to import incorporation and support this implication. See §§ 3042-3044, *supra*.

⁸⁶ *St. Paul Land Co. v. Dayton*, 37 Minn. 364, 34 N. W. 335; *Willow Springs Irrigation Dist. v. Wilson*, 74 Neb. 269, 104 N. W. 165.

Allegation that plaintiff, a corporation, and defendant "entered into" contract implies power to make it. *La Grange Mill Co. v. Bennewitz*, 28 Minn. 62, 9 N. W. 80.

In equity a general allegation of title by assignment is sufficient without pleading plaintiff's charter to show power to take it. *Camden & A. R. & Transp. Co. v. Remer*, 4 Barb. (N. Y.) 127.

Want of allegation of power to take assignments and sue thereon cannot be raised by demurrer. *Glen-dale Lumber Co. v. Beekman Lumber Co.*, 152 Mo. App. 386, 133 S. W. 384.

Power to take rate of interest agreed need not be averred. Want of such power, if a defense, must be pleaded. *Bennington Iron Co. v. Butherford*, 18 N. J. L. 467.

It is presumed that a contract made by a corporation was *intra vires* and not *ultra vires*. See § 922, *supra*.

⁸⁷ General allegation that corporation indorsed. *Mechanics' Banking Ass'n v. Spring Valley Shot & Lead Co.*, 25 Barb. (N. Y.) 419, *rev'g* 13 How. Pr. (N. Y.) 227.

⁸⁸ Allegation of power to contract implies power by the law of its cre-

§ 3055. — **Manner and means of corporate action or knowledge; meetings, resolutions or agents.** It need not ordinarily be alleged how or by whose agency the corporation made a contract or did an act which is the basis of the action.⁸⁹ That is usually a detail of the evidence,⁹⁰ and whether formal action was taken by meeting and resolution or the agent active in the transaction was formally authorized does not usually concern any outsider dealing with the corporation. It may be important when the adverse party is an officer or a stockholder, though not always then because of principles of estoppel, waiver, and many others affecting the internal rights of the parties.⁹¹ To some extent, but usually only as a matter of proof if issue be made thereon by answer, this involves the charter and by-law provisions and if they are essential fundamental facts they must be pleaded.⁹² A resolution may be pleaded as having been "duly adopted."⁹³ In pleading knowledge and estoppel against the corporation it suffices to allege knowledge by directors and a corporate record of the facts.⁹⁴ The rules for pleading an act done or contract made by any natural person as principal also apply when a corporation is principal, and general works on such subjects should be consulted.⁹⁵ It is sufficient to allege generally that the corporation made or executed an instrument,⁹⁶ or committed a tort, or did an act attributed to it⁹⁷ without

ation (Kansas) and not by the law of a subsequent merging corporation (United States). *Western U. Tel. Co. v. Union Pac. Ry. Co.*, 3 Fed. 1.

⁸⁹ See cases this section, *infra*.

⁹⁰ See §§ 3095-3106, *infra*.

⁹¹ As to modes of corporate action, execution of instruments, and authority of officers and agents, and liability for torts, see Chapters 35, 39, 40, 42, *supra*, and the chapter on Torts, *infra*.

A resolution to make a lawful *intra vires* contract need not be averred; want of it is defensive. *Arrington v. Savannah & W. R. Co.*, 95 Ala. 434, 11 So. 7.

General averment that the corporation "accepted" provisions of an act is sufficient to show acceptance in toto and without averment how it was accepted. *State v. Newark & N. Y. R. Co.*, 34 N. J. L. 301.

⁹² See § 3052, *supra*.

⁹³ *Maune v. Unity Press*, 143 N. Y.

App. Div. 94, 127 N. Y. Supp. 1002.

In a suit for assessment, allegation of a call by the "board of directors" need not aver that there was a board. *Mississippi, O. & R. R. Co. v. Gaster*, 20 Ark. 455.

⁹⁴ *Canadian Long Distance Tel. Co. v. Seiber*, — Tex. Civ. App. —, 159 S. W. 897.

⁹⁵ See *Meechem on Agency*; *Clark and Skyles on Agency*.

⁹⁶ *Topeka Capital Co. v. March*, 10 Kan. App. 40, 61 Pac. 876. Allegation of a contract made by the corporation with an attached copy signed by it by an agent is good. *Cooper v. Dixie Cotton Co.*, 144 Ga. 33, 86 S. E. 242.

⁹⁷ *Letts v. Hoboken Railroad, Warehouse & Steamship Connecting Co.*, 70 N. J. L. 358, 57 Atl. 392; *German Reformed Church v. Von Puechelstein*, 27 N. J. Eq. 30.

Allegation that defendant's act was

specifying the name of its officer or agent through whom it acted,⁹⁸ or even that an agent acted at all in the matter.⁹⁹ Indeed it is said to be better pleading to omit all reference to the agency through which the act was done,¹ though it is common practice to state generally that it was done by an officer or agent.² The commission of a trespass by the corporation may be alleged either by stating the manner in which it was done or simply that it was done or authorized by it.³ It

done "by" its agent, suffices. *Swift & Co. v. Bleise*, 63 Neb. 739, 57 L. R. A. 147, 89 N. W. 310.

Allegation that letter was "from the company" signed by its manager shows a corporate act. *King v. Livingston Mfg. Co.*, 180 Ala. 118, 60 So. 143.

"Said M as president of said company and acting for it did confirm said agreement" held sufficient. *Southern States Fire & Casualty Ins. Co. v. Lunsford*, 192 Ala. 76, 68 So. 273.

⁹⁸ *Georgia Engineering & Construction Co. v. Horton & Smith*, 135 Ga. 58, 68 S. E. 794.

Names of active agents in a tort need not be stated. *Southern Exp. Co. v. Platten*, 93 Fed. 936.

Allegation that an agent participating in a malicious civil suit was "the agent in charge of" its office sufficiently identifies the tort feasant agent. *Atlanta Ice & Coal Co. v. Reeves*, 136 Ga. 294, 36 L. R. A. (N. S.) 1112, 71 S. E. 421.

Agent's assault is to be alleged as done by the corporation. *Scibor v. Oregon-Washington R. & Nav. Co.*, 70 Ore. 116, 140 Pac. 629. Contra, the name of the agent by whom defendant contracted should be stated. *Gulf & I. Ry. Co. of Texas v. Campbell* (Tex. Civ. App.), 108 S. W. 972. But omission is not reversible if his name was mutually known.

⁹⁹ *St. Andrew's Bay Land Co. v. Mitchell*, 4 Fla. 192, 54 Am. Dec. 340.

An act done through agents may be charged as done by "defendant"

corporation. *Ohio & M. Ry. Co. v. Collarn*, 73 Ind. 261, 38 Am. Rep. 134.

May allege that it did or omitted the act complained of without mentioning the active agent. *McHolm v. Philadelphia & Reading Coal & Iron Co.*, 147 Wis. 381, 132 N. W. 585.

A rule of practice requiring an act done through an agent to be so pleaded but excepting corporations, is no ground for requiring such allegations against a corporation. *Vincent v. S. Alexander's Sons Co.*, 85 Conn. 512, 84 Atl. 84.

¹ Allegation that an act was done by the corporation "through" its secretary is good, but it would be better to omit all reference to the agency. *Sullivan v. Grass Valley Quartz Milling & Mining Co.*, 77 Cal. 418, 19 Pac. 757. See also to same effect *Malone v. Crescent City Mill & Transportation Co.*, 77 Cal. 38, 18 Pac. 858.

² Allegation, that malicious prosecution by defendant corporation by its president and officers, is good. *Feighner v. Delaney*, 21 Ind. App. 36, 51 N. E. 379.

Corporation by its note executed by its treasurer promised to pay, etc., suffices. *Commercial Bank v. Newport Mfg. Co.*, 40 Ky. 13, 35 Am. Dec. 171.

Held sufficient to allege that defendant "through its officer, agent, representative, and employee G," did the act complained of. *Lyons v. Davy-Pocahontas Coal Co.*, 75 W. Va. 739, 84 S. E. 744.

³ *Perkins v. Maysville Dist. Camp-Meeting Ass'n*, 10 Ky. L. Rep. 781, 10 S. W. 659.

need not be alleged in pleading negligence that it could have prevented the agent's neglect and failed to do so.⁴ A corporation sued for the fraud or duress of its officer must be implicated therein by the pleadings, and merely alleging his activity in the transaction sought to be annulled does not make a case against it as the ultimate holder of the title to the property involved.⁵ If specific name and description of the agent is desired it can be had on a motion for greater definiteness and certainty or obtained by special demurrer⁶ though this was denied in some courts.⁷ The agent's or officer's authority may have to be alleged, but this, too, is usually implied; and the want of it is a matter of defense.⁸ If the manner in which the right was created is too narrowly described the effect may be to exclude evidence of the actual facts. Thus, to allege that articles made a certain provision is not equivalent to stating that the pleaded contract was ratified

⁴ *Nelson v. Crescent City B. Co.*, 49 La. Ann. 491, 21 So. 635.

⁵ In a suit to cancel a deed to its grantor, the allegations must implicate it in the fraud or duress. It is not sufficient to state that its grantor is its "active agent" and that he procured a "deed for the purpose of putting into the list of the property of said corporation." *Pratt Land & Improvement Co. v. McClain*, 135 Ala. 452, 93 Am. St. Rep. 35, 33 So. 185.

⁶ Allegation that acts were done "through its proper officers" requires more specific description of them on special demurrer. *Georgia Engineering & Construction Co. v. Horton & Smith*, 135 Ga. 58, 68 S. E. 794; *Oherokee Mills v. Gate City Cotton Mills*, 122 Ga. 268, 50 S. E. 82.

In action on open account against a corporation it is entitled on special demurrer to have plaintiff allege which agent made the contract and the time, duration and price agreed on. *Southern Exp. Co. v. Cowan*, 12 Ga. App. 318, 77 S. E. 208. To same effect *Georgia, F. & A. R. Co. v. Parsons*, 12 Ga. App. 180, 76 S. E. 1063. But the account being attached no greater particularity is required against a corporation than against an

individual. The grounds of liability need not be set forth. *Southern B. Co. v. Grant*, 136 Ga. 303, Ann. Cas. 1912 C 472, 71 S. E. 422.

Pleading that defendant negligently operated an engine is sufficient. If a more specific allegation of the agencies of such negligence is desired, a motion is required. *Ohio & M. Ry. Co. v. Collarn*, 73 Ind. 261, 38 Am. Rep. 134.

Allegation of false representations by defendant "by its officers and agents" should on motion be made more definite by naming them. *Schellens v. Equitable Life Assur. Soc. of United States*, 32 Hun (N. Y.) 235.

⁷ A complaint alleging trespass by the corporation will not be required to be made more definite by stating names of the particular officers and agents in the trespass. *Commonwealth Co. v. Nunn*, 17 Colo. App. 117, 67 Pac. 342.

A complaint for malicious prosecution need not be made more definite by alleging the name, authority and capacity of the agent who was active in the tort. *Indiana Bicycle Co. v. Willis*, 18 Ind. App. 525, 48 N. E. 646.

⁸ §§ 3057, 3078, *infra*.

by the corporation on its being formed.⁹ An allegation that the corporation as a co-partner committed a tort jointly with another corporation may be sustained as a simple allegation of joint tort-feasance, disregarding the legally impossible allegation of partnership.¹⁰

§ 3056. — Declaring on instruments written or required to be written. The contract should be pleaded in the ordinary manner, preferably by setting it out in full.¹¹ Whether or not appropriate power to enter into it should be pleaded, or the charter or by-law provisions involved in it should be pleaded, or the manner by which or agent by whom it was made should be pleaded, have already been discussed.¹² A contract which the law requires to be written or sealed or executed, if by an agent, under sealed or written authority, must be pleaded according to the law which governs pleadings where the statute of frauds is involved, and that which governs pleading of specialties.¹³ Accordingly, where a contract for an interest in lands is set out without either a corporate seal or a written authority to the agent who also signed it, the complaint is bad.¹⁴ When the instrument is payable conditionally out of corporate funds, the existence of available funds must be pleaded.¹⁵

It has already been stated that the corporation may sue on a contract or be sued on one made by it but in the name of its officer or agent, the same rule applying as in agency.¹⁶ The contract should be alleged in the ordinary manner by substance or in precise words together with an allegation that the corporation made the contract

⁹ Ratification of a contract with promoters. *Park v. Modern Woodmen of America*, 181 Ill. 214, 54 N. E. 932.

¹⁰ Allegation that two corporate defendants employed plaintiff and were co-partners operating a railroad on which he was injured by their negligence. *El Paso & S. W. R. Co. v. Kelly* (Tex. Civ. App.), 83 S. W. 855, rev'd 99 Tex. 87, 87 S. W. 660.

¹¹ Consult standard works on Contracts.

A contract between plaintiff member and defendant corporation should be set forth (building association withdrawal contract). *Crittenden v. Southern Home Building & Loan Ass'n*, 111 Ga. 266, 36 S. E. 643.

¹² See §§ 3052, 3054, 3055, *supra*.

¹³ That the contract is not in writing must be pleaded defensively, see *Kenner & Greenfield v. Lexington Mfg. Co.*, 91 N. C. 421.

When the assumption of an agent's obligation is alleged it should allege a consideration and writing, it seems, to meet the statute of frauds. *Turnham v. Calumet & Oregon Min. Co.*, 58 Ore. 453, 112 Pac. 711, judgment modified 115 Pac. 157.

As to requirement of a seal, see Chapter 19, *supra*.

¹⁴ *Trust Co. of Georgia v. Wallace*, 143 Ga. 214, 84 S. E. 538.

¹⁵ *State Bank of Rock Island v. Pope*, 179 Ill. App. 282, which was a creditors' suit against directors.

¹⁶ § 3032, *supra*.

in that name which appears in it, or that the promise was made to or by it under that name,¹⁷ or other equivalent allegation to show that the corporation is the real party to the contract.¹⁸ It need not be alleged that defendant corporation's debt was the consideration for a note so given.¹⁹ A contract to assume the debt of an agent is a different matter, and entails the pleading of the original contract and also that by which it was assumed, which in turn involves a written contract to answer for the debt of another.²⁰

§ 3057. — Officer's or agent's character and authority, or rights and liabilities. In suits between the corporation and third persons the authority of the agent need not be stated, it being a matter of defense or of evidence,²¹ unless the presumption of authority is re-

¹⁷ It is better in suing on a note running to plaintiff's officer to allege that it was made payable to plaintiff by that name, but it is not essential to so plead. *Rutland & B. R. Co. v. Cole*, 24 Vt. 33.

Allegation that it was made to plaintiff by the name appearing in the contract, is good. *Culpeper Agricultural & Manufacturing Society v. Digges*, 6 Rand. (Va.) 165, 18 Am. Dec. 708.

When running to its officers but for it, the declaration should aver that a bond sued on was made to the corporation in that name. *Bayley v. Onondaga County Mut. Ins. Co.*, 6 Hill (N. Y.) 476, 41 Am. Dec. 759; *Thomas v. Dakin*, 22 Wend. (N. Y.) 9.

A bond to a committee to pay to the corporation should be sued on by alleging that it was made by the name in the bond and is to the corporation, but it is equivalent to aver a promise to plaintiff by such name. *New York African Society v. Varick*, 13 Johns. (N. Y.) 38.

¹⁸ Ownership of note sued on and of defendant's liability must be alleged. *Dillard v. A. G. McAdams Lumber Co.*, — Tex. Civ. App. —, 141 S. W. 1023.

When the corporation is sued as principal on a loan to the agent made

before incorporation, it may be alleged as made directly to the corporation; and proof of adoption by the corporation may be made under such allegation. *Schreyer v. Turner Flouring Mills Co.*, 29 Ore. 1, 43 Pac. 719.

¹⁹ Averments that the corporation used president's name in which to execute notes and did in that name "execute" the note in suit held sufficient against corporation as defendant without averment that it was for a corporate debt. *Midland Steel Co. v. Citizens' Nat. Bank*, 34 Ind. App. 107, 72 N. E. 290.

²⁰ It seems that a contract of assumption should be pleaded as having been in writing. *Turnham v. Calumet & O. Min. Co.*, 58 Ore. 453, 112 Pac. 711, modified in 115 Pac. 157.

²¹ Authority of officers to make a contract apparently valid and intra vires the corporation need not be pleaded against it; but want of such authority is defensive and must be pleaded by the corporation. *Perryman & Co. v. Farmers' Union Ginning & Manufacturing Co.*, 167 Ala. 414, 52 So. 644; *Willow Springs Irrigation Dist. v. Wilson*, 74 Neb. 269, 104 N. W. 165.

Bill for specific performance need not allege authority to make the contract, but plaintiff must prove it un-

pelled by the manner or form of the instrument or its signature.²² Authority does not involve the other party's belief that it did or did not exist, and no allegation about that is material;²³ and it need not be alleged that the officer having authority exhibited the evidence of it to the other party on demanding compliance with the principal's claim of right, denial of which is the cause of the action.²⁴ Allegation that the corporation "made" the instrument includes by implication the authority of the active agent to make it,²⁵ or a general

less admitted. *Black v. Hoopeston Gas & Electric Co.*, 250 Ill. 68, 95 N. E. 51.

In action on a note set out as that of corporation, want of valid execution is matter of defense, and the statute requiring articles to state what officers shall conduct corporate affairs does not apply to matters of administration. *Williamsburg Canning Co. v. De Laney*, 158 Ky. 649, 166 S. W. 192.

Assignee of corporation need not allege how title came to him or what authority the officers had. *Perkins v. Bradley*, 24 Vt. 66. But should aver officer's power to make the contract sued on. *Prairie Lodge, No. 87, A. F. & A. M. v. Smith*, 58 Miss. 301. Demurrer to the plea will not reach back to omission to aver it, when otherwise implied. *Id.*

²² When the signatory officer describes himself in a way that carries no presumptive power to bind the corporation, his authority should in some way be averred. So held of one signing as business manager. *Topeka Capital Co. v. Remington Paper Co.*, 61 Kan. 1, 57 Pac. 504, rev'd on rehearing 61 Kan. 6, 59 Pac. 1062.

An allegation that a president was authorized to do an act which by charter could only be done by consent of stockholders is insufficient to show that he had authority by consent as required. *In re Cape Sable Co.*, 3 Bland (Md.) 606.

²³ *Canadian Long Distance Tel. Co.*

v. Seiber, — Tex. Civ. App. —, 159 S. W. 897.

²⁴ An injunction complaint alleging that defendant city when requested in a legal manner refused to permit complainant to erect poles and wires need not allege that the officer making the request exhibited his authority to represent the corporation. *Brownwood v. Brown Telegraph & Telephone Co.*, — Tex. Civ. App. —, 152 S. W. 709.

²⁵ *Bank of Metropolis v. Gutschlick*, 14 Pet. (U. S.) 19, 10 L. Ed. 335; *Union Trust Co. of San Francisco v. Ensign-Baker Refining Co.*, 29 Cal. App. 641, 157 Pac. 613; *Compagnie Générale de Fourrures & Pelleteries, Anciens Etablissements Haendler & Fils v. Simon Herzig & Sons Co.*, 89 N. Y. Misc. 573, 153 N. Y. Supp. 717.

Allegation that corporation promised without stating authority of the officer making the promise, is good. *Hill v. Glasspoole*, 117 Minn. 537, 136 N. W. 261.

Averment of an acceptance of drafts by the treasurer implies authority. *Partridge v. Badger*, 25 Barb. (N. Y.) 146.

Alleging that the corporation "made" the note sufficiently alleges that the person who signed it with the description "business manager" was authorized thereto. *Topeka Capital Co. v. Remington Paper Co.*, 61 Kan. 6, 59 Pac. 1062 (rehearing), rev'g 61 Kan. 1, 57 Pac. 504.

Allegation that the contract was

allegation that he was "duly" authorized or any equivalent words will suffice.²⁶ Pleading that an agent made the contract does not make him a party to the suit, unless he be joined and impleaded.²⁷

When the officer or agent sues on a contract made for its benefit, it is not necessary for him to allege the character of his office or agency.²⁸

Suits by an officer or agent against the corporation, and vice versa, are treated in another chapter, which should be consulted as to the proper pleadings.²⁹ In some actions, for instance mandamus to compel admission to office, the character of the office is vital and it with all incidental facts ultimately supporting his right must be pleaded.³⁰ The chancery practice of anticipating a defense in order to compel a sworn answer from defendant, an accountable agent or officer, is not proper under the codes.³¹

made "with the plaintiff" is a sufficient allegation that the officer whose name appears on the pleaded copy had authority to make it. *St. Paul Land Co. v. Dayton*, 37 Minn. 364, 34 N. W. 335.

Allegation that contract was made "by C" in name of corporation need not set out his authority. *Johnson County v. Chamberlain Banking House*, 74 Neb. 549, 104 N. W. 1061.

²⁶ *Canadian Long Distance Tel. Co. v. Seiber*, — Tex. Civ. App. —, 159 S. W. 897.

"Acting by and through its duly authorized agents," held sufficient. *Southern States Fire & Casualty Ins. Co. v. Lunsford*, 192 Ala. 76, 68 So. 273.

"Who was thereto duly authorized," sufficient. *Duval Inv. Co. v. Stockton*, 54 Fla. 296, 45 So. 497.

Allegation that defendant made a contract "by and through" its superintendent which was ratified by "said defendant by its president," suffices, though ordinarily allegation that defendant contracted is enough. *Cushman v. Cloverland Coal & Mining Co.* (Ind. App.), 83 N. E. 390, rehearing denied 84 N. E. 25.

²⁷ *Burnett Cigar Co. v. Art Wall*

Paper Co., 164 Ala. 547, 51 So. 263.

Complaint against trustees of a French corporation and also against it on a contract held to state cause of action against it and them also, the law of France, where the contract was made imposing such liability. *Compagnie Générale de Fourrures & Pelletteries, Anciens Etablissements Haendler & Fils v. Simon Herzig & Sons Co.*, 89 N. Y. Misc. 573, 153 N. Y. Supp. 717.

²⁸ Manager of a corporation bringing suit on a contract made for its benefit. *McKee v. Needles*, 123 Iowa 195, 98 N. W. 618.

²⁹ See Chap. 42, *supra*, which also treats of suits by stockholders against officers.

³⁰ Averment of a corporation by name of "Trustees of the Academic School" and that plaintiff was one of the trustees, sufficiently avers in mandamus to reinstate plaintiff that there was such a corporate office as trustee. *Fuller v. Plainfield Academic School*, 6 Conn. 532. And alleging an expulsion of plaintiff alleges tenure and duration of his office sufficiently. *Id.*

³¹ *Judah v. Vincennes University*, 23 Ind. 272.

§ 3058. — Stockholder's or member's character and rights or liabilities. In actions between the corporation and third persons there can seldom be any issuable fact concerning the character of a person as a stockholder, except in those actions relating to stock and stock liabilities all of which, together with the actions between it and the stockholders, are hereafter separately treated.³² Generally it is necessary to allege the holding of stock or the right thereto in order to make out the liability.³³ It is especially necessary in a stockholders' suit brought in equity in right of the corporation that plaintiff qualify himself by allegations that he is a stockholder.³⁴

§ 3059. — Particular causes of action. The statement that the law of pleading is general³⁵ should be sufficient to dispose of any attempt to show here how particular causes should or must be pleaded. They should be pleaded, so far as the substance of the cause is concerned, just as they would be for or against natural persons; and therefore a work on corporations is not a place of search for precedents save in those actions which by their nature fall within the scope of corporation law. References to the principal ones of these follow. There are various remedies on the liability of the subscriber or stockholder to the corporation, or to its creditors, or to a receiver or other liquidator representing all interests; and the pleading must accord to the nature of the action. The ordinary remedy on the subscription is an action *ex contractu* in the nature of *assumpsit*, wherein the contract and the maturity of the liability thereon by formation of the corporation and fulfillment of conditions precedent must be alleged.³⁶ And there may be a remedy against the stockholder or subscriber for a deficiency resulting from forfeiture and sale of his shares, which action must be pleaded with additional facts establishing as a legal conclusion the liability for such deficiency.³⁷ When the action is brought by or for the benefit of creditors, or in order to wind up the corporation, or on assessments of full paid stock, further allegations will be necessary or desirable to set forth the essential facts com-

³² Chapter on Stock and Stockholders, *infra*.

³³ Complaint must show that fact at a time essential to the cause of action asserted (action for dividends). *Tepfer v. Ideal Gas & Electrical Fixtures Co.*, 58 N. Y. Misc. 396, 109 N. Y. Supp. 664.

And see many other cases in the

chapter on Stock and Stockholders.

³⁴ See chapter on Stock and Stockholders, subd. Remedies of Creditors, etc., *infra*.

³⁵ § 3038, *supra*.

³⁶ See § 657 et seq., *supra*, and chapter on Stock and Stockholders, *infra*.

³⁷ See cases cited § 665, *supra*.

posing the cause of action. They cannot be detailed here and will be found in other contexts.³⁸ On the stockholder's side the variety of actions which may be brought against the corporation is great, and the diversity of allegations requisite to them is corresponding; but in all of them a prime allegation will be the fact of incorporation and of the relation of plaintiff by contract of subscription or the holding of stock to the defendant corporation. To this must be added such other allegations as make out the particular cause of action or equity asserted, and in pleading it must be remembered that the stockholder stands towards the corporation in a relationship growing out of a contract each being a distinct entity from the other. Therefore the general law of pleading should be resorted to as between any other litigants to determine how and what matters of substance should be pleaded. For particular applications of the rules the reader is referred the respective portions of this work which treat of the rights of the stockholders against the corporation and its officers and fellow stockholders, or against the persons who liquidate or manage its affairs.³⁹

§ 3060. Pleading in extraordinary and special proceedings and equity. The pleadings and practice in quo warranto, mandamus, and injunction as far as dependent on principles of corporation law are discussed elsewhere.⁴⁰ As to special proceedings under the codes and by statutes no cases have been found susceptible of reduction to general rules applicable to corporations. Each proceeding must be studied according to the local statutes which provide it, adapting, it would seem, the general law of pleading. Various equitable actions are separately treated herein, and they should be consulted.⁴¹ In

³⁸ See chapter on Stock and Stockholders, *infra*.

³⁹ Fraud in inducing subscription, see §§ 627-629, *supra*.

Invalid forfeiture, see § 666, *supra*.

Right to stock or certificates, to dividends or distributive rights, or to damages for denial of rights or refusal to transfer, see chapter on Stock and Stockholders, *infra*.

Statutory and equitable remedies against corporation, its officers, or controlling majority, see chapter on Stock and Stockholders, *infra*, also Chap. 42, *supra*.

Remedies relating to voting and

elections, see §§ 1699-1704, *supra*.

Remedies relating to corporate books and records and right to inspect same, see chapters on Corporate Books and Records; Inspection of Corporate Books and Records, *supra*.

Suits for receiver or for dissolution, see chapters on Receivers; Forfeiture, Dissolution and Winding Up, *infra*.

For other and more detailed references consult the general index.

⁴⁰ See chapters bearing those titles, *infra*.

⁴¹ See chapters on Injunction; Receivers; Stock and Stockholders, *infra*.

many particulars the pleadings are substantially the same in equity and at law, requiring treatment together, and some of such matters are treated in previous sections.⁴² Beyond those resort should be had to the general law of equity pleading where the separate systems are still maintained.⁴³ In a bill joining a member for purpose of discovery only it is not necessary to allege that he possesses information not common to other members.⁴⁴

§ 3061. Pleading in justices' and other informal tribunals. The informal pleadings in certain inferior courts, especially before justices of the peace, and on appeals from them, present nothing distinctive in corporation actions. Plaintiff must prove all material facts, including corporate existence, precisely as if pleas were filed.⁴⁵ The summons or writ suffices to allege corporate name and existence,⁴⁶ or if alleged it need not be formally done.⁴⁷ Amendments may be allowed to show jurisdictional facts.⁴⁸

§ 3062. Joining and separating causes of action—In general. Except that involved in the distinction between the corporation and its members, there is nothing peculiar to corporation actions in the law regulating the joinder of causes and separation of counts.⁴⁹ The cases

⁴² See §§ 3038-3058, *supra*, and § 3065 et seq., *infra*.

⁴³ "Unless otherwise prescribed by statute or these rules the technical forms of pleadings in equity are abolished." New Equity Rule 18.

In federal equity practice the contents of the bill is now regulated by New Equity Rule 25 which states what the bill must contain. See the full text of this rule 226 U. S. App'x.

⁴⁴ *Wright v. Dame*, 1 Metc. (Mass.) 237.

⁴⁵ *Town of Lewiston v. Proctor*, 27 Ill. 414, where plaintiff was a municipality.

On appeal from a justice where the statement is sufficient to apprise defendant of the nature of the claim and specific enough to bar another it authorizes evidence an issue of incorporation. *Mitchell Furniture Co. v. Payton*, 4 Mo. App. 564.

⁴⁶ Summons in plaintiff's name from justice court sufficiently avers incorporation. *Wilson Sew. Mach. Co. v. Spears*, 50 Mich. 534, 15 N. W. 894.

In a police court, where written pleadings are not needed, the writ describing defendant as a corporation will establish it unless special demand for proof is made (Pub. St. c. 167, §§ 87, 89); and on appeal from it the issue so waived cannot be raised. *Cabana v. Holyoke Conclave*, No. 20, A. O. F., 160 Mass. 1, 34 N. E. 1135.

⁴⁷ "Company doing business in this state," etc., held sufficient. *Root v. Illinois Cent. R. Co.*, 29 Iowa 102.

⁴⁸ Justice may permit amendment to state where contract was made. *Central of Georgia R. Co. v. Crapps*, 4 Ga. App. 550, 61 S. E. 1126.

⁴⁹ Consult general treatises on pleading and practice, and the local statutes.

cited below illustrate how the general law as to joining causes⁵⁰ and separately stating counts or causes⁵¹ is applied. The form of an action under statute may tolerate a joinder which common-law forms would not.⁵²

§ 3063. — **In equity practice.** The equity practice is also general in these respects and in the code states has passed entirely into code regulations.⁵³ The question of multifariousness often arises in stock-

⁵⁰ It is improper to join actions on distinct contracts with distinct corporations merely because made through a common agent. *Clegg v. Aikens*, 5 Abb. N. Cas. (N. Y.) 95.

Causes on separate contracts one with each of two subsidiary corporations cannot be joined merely because a holding company named as defendant but not as a principal is interested and because both contracts had one object. *New York Air Brake Co. v. International Steam Pump Co.*, 64 N. Y. Misc. 347, 120 N. Y. Supp. 683, aff'd 136 N. Y. App. Div. 931, 120 N. Y. Supp. 1137.

An action on a note against a successor corporation substantially the same as the maker is not in tort but in contract as against new corporation as a novated promisor, and does not present two causes of action, tort and contract. *Friedenwald Co. v. Asheville Tobacco Works & Cigarette Co.*, 117 N. C. 544, 23 S. E. 490.

Original and supplemental assessment by a plaintiff drainage district may be united in one suit against landowner. *Swamp and Overflowed Land Dist. No. 110 v. Feck*, 60 Cal. 403.

The president cannot be joined on a cause for libel with the corporation sued on a cause for negligence as a carrier. *Brooks v. Galveston City Ry. Co.* (Tex. Civ. App.), 74 S. W. 330.

⁵¹ A suit for taxes, some due the state and some due to each of seventeen different counties, states separate causes which must be separated and numbered. *People v. Central Pac. R. Co.*, 83 Cal. 393, 23 Pac. 303.

⁵² Joining inconsistent allegations and causes, one for original nonexistence and one for original existence since lost in action to forfeit and dissolve, see *People v. Ravenswood H. C. & W. Turnpike & Bridge Co.*, 20 Barb. (N. Y.) 518; *People v. Rensselaer & S. R. Co.*, 15 Wend. (N. Y.) 113, 126, 30 Am. Dec. 33.

⁵³ Consult *Fletcher*, Eq. Pl. & Pr.; *Whitehouse*, Eq. Pl.

Causes joined for cancellation of deeds for fraud in reference to the same main subject-matter do not make the bill multifarious. *Frye v. Bank of Illinois*, 10 Ill. 332.

A bill by the proper public officer to enjoin the carrying on of the insurance business by numerous corporations and individuals without compliance with law is not multifarious if a common scheme is alleged against all of them. *North American Ins. Co. v. Yates*, 214 Ill. 272, 73 N. E. 423, aff'g 116 Ill. App. 217.

See also chapter on Injunctions, *infra*.

In action for cancellation of spurious certificates all holders may be joined. *New York & N. H. R. Co. v. Schuyler*, 7 Abb. Pr. (N. Y.) 41, rev'g 1 Abb. Pr. (N. Y.) 417. See also chapter on Stock and Stockholders, *infra*.

Creditors cannot join all stockholders to a bill where they are not equally liable or to the same creditors because of having been holders at different times. *Judson v. Rossie Galena Co.*, 9 Paige (N. Y.) 598, 38 Am. Dec. 569. See also chapter on Execution, etc., and Creditors' Bills, *infra*.

holders' suits, receivership suits, and winding-up suits.⁵⁴ There is no multifariousness by joining a badly pleaded with a well pleaded cause hence a bad prayer for relief against defendants joined only for discovery does not infect the bill.⁵⁵

§ 3064. Prayer of bill or complaint. Under the chancery practice it was essential to pray for process, for without it the defendants would not be made parties.⁵⁶ In the federal courts this has been dispensed with by rule except in certain cases.⁵⁷ If the bill is for relief against some and discovery against others, for example where it is for relief against the corporation and discovery against the officers or agents, the prayer must not only be for discovery against the persons defendant but also for relief against the corporation. The principal thing must be asked to warrant having the incident,⁵⁸ and if a case is not made for discovery as an incident there must be a prayer for relief against them to which the discovery would be an incident,⁵⁹ and they should be prayed for separately.⁶⁰ Unless an answer of defensive nature is invited from them the prayer as to those joined for purpose of discovery should be limited to that and should exclude relief.⁶¹ In actions at law or in equity or under the codes generally the ordinary rules seem to govern the prayer.

⁵⁴ See chapters on Receivers; Forefeiture, Dissolution and Winding Up; Stock and Stockholders, *infra*.

A suit by a stockholder of which the main object was recovery for himself may properly join a cause against the corporation and its officers for mismanagement with one against a confederating co-defendant for converting all assets to the plaintiff's detriment. *Oyster v. Iola Min. Co.*, 140 N. C. 135, 52 S. E. 198.

In a suit for the price of land and for incidental equitable relief against the promoters and the corporation, it was not a misjoinder to ask for adjudication of a lien, the setting aside of deeds and the receivership and winding up of the corporation. *Delgarno v. Middle West Portland Cement Co.*, 93 Kan. 654, 145 Pac. 823.

⁵⁵ *Many v. Beekman Iron Co.*, 9 Paige (N. Y.) 188.

⁵⁶ *McKim v. Odom*, 3 Bland (Md.)

407; and see *In re Binney*, 2 Bland 99.

⁵⁷ Under New Equity Rule 25 process need not be prayed for in the bill, or that defendant answer except as provided in Rule 40. The subpoena is provided for by Rule 12. *Pittsburgh Water Heater Co. v. Beler Water Heater Co.*, 222 Fed. 950.

⁵⁸ *Many v. Beekman Iron Co.*, 9 Paige (N. Y.) 188.

⁵⁹ They cannot be joined solely for purpose of discovery with no allegation of fraud, conspiracy or breach of trust and no prayer for relief against them. *Norwood v. Memphis & C. R. Co.*, 72 Ala. 563.

⁶⁰ To demand on a prayer against the corporation that they answer is bad. *French v. First Nat. Bank*, 7 Ben. 488, Fed. Cas. No. 5,099.

⁶¹ *McIntyre v. Union College*, 6 Paige (N. Y.) 239.

§ 3065. **Defensive and dilatory pleadings—In general.** The answer or other responsive pleading by a corporation should be made by its president or chief officer⁶² incumbent of office at the time of pleading,⁶³ on an appearance by the attorney,⁶⁴ and with a signature, seal and verification by the proper person.⁶⁵ It is of importance in corporation actions to have in mind the order and functions of the several responsive pleadings which might be put in. Even under the codes the logical order of taking up and disposing of the dilatory matters before the merits is not lost sight of, and the New Equity Rules for federal courts provide for bringing them on for hearing before the main issues. The proper order of pleas at common law and in equity is somewhat simplified by modern changes⁶⁶ but as always a plea to the jurisdiction is waived by one to the merits or even by a dilatory plea of later order; and the frequency with which pleas to the jurisdiction and in abatement occur make it specially important to present them in right order.⁶⁷ All dilatory pleas must be seasonably interposed according to the rules and codes of practice.⁶⁸ Among these are, that summons, service or return is bad and no jurisdiction was had, or that the corporation is not subject to the jurisdiction invoked at all, or that it was misnamed, or no longer exists, or that no such

⁶² An answer to a bill should be made by the president or principal officer who should be able to admit or deny the facts or show a want of knowledge affording a reason for not so doing. An answer of the secretary equivocating the facts was held bad. *Hale v. Continental Life Ins. Co.*, 16 Fed. 718.

⁶³ The officers at the time of pleading are the ones to answer a bill where there have been changes in office. *Mechanics' Nat. Bank v. H. C. Burnet Mfg. Co.*, 32 N. J. Eq. 236.

⁶⁴ §§ 2933, 2934, *supra*.

A plea must purport to be by the corporation appearing by attorney; and is demurrable if "in its own proper person." *Nispel v. Western U. R. Co.*, 64 Ill. 311, overruling *Mineral Point R. Co. v. Keep*, 22 Ill. 9, 74 Am. Dec. 124, and following *Nixon, Ellison & Co. v. Southwestern Ins. Co. of Cairo, Illinois*, 47 Ill. 444.

Plea in abatement that corporation

"by its president and secretary comes," etc., is demurrable as it does not purport to appear by attorney. *Nixon, Ellison & Co. v. Southwestern Ins. Co. of Cairo, Illinois*, 47 Ill. 444.

⁶⁵ § 3083, *infra*.

⁶⁶ Order of pleas at law, see *Stephen on Pleading* (Tyler's Ed.), 373; 3 Bl. Comm. 301.

Order of chancery demurrers, pleas or answers, see *Fletcher, Eq. Pl. & Pr.*; *Whitehouse, Equity Pl. & Pr.*

⁶⁷ See §§ 3066, 3068, 3069, 3073, *infra*.

⁶⁸ A suggestion of dissolution after rule day of the term is too late, if the fact existed before. *Whittington v. Farmers' Bank*, 5 Harr. & J. (Md.) 489.

Demurrer in abatement for variance in name between the writ and the declaration must be made at the same time as a plea in abatement, and not afterwards. *Pendleton v. Bank of Kentucky*, 1 T. B. Mon. (Ky.) 171.

corporation exists or ever existed.⁶⁹ Besides these are the motions and demurrers.⁷⁰ In the federal equity courts demurrers and pleas have been abolished and all defenses are now made by answer, subject to a provision that dilatory matters may be set down for hearing before trial on motion.⁷¹ A corporation defendant need not either demur or answer if it has no interest, but in that event may disclaim and be dismissed in equity and under the codes recognizing such a practice.⁷²

§ 3066. — Proper method of objection or defense; by whom made. Besides the familiar rule that a demurrer reaches defects apparent on the face of the pleadings and answer or plea—those defects which lie in the facts—there are numerous motions designed to raise particular objections.⁷³ One objection to jurisdiction previously considered may be reached by motion in some states, in others only by plea, and in some by both methods according to whether the objection requires the pleading of new matter or is apparent on the record; and that is the objection to service.⁷⁴ Another is the objection to venue and claim of privilege of change,⁷⁵ but in so far as allegations of venue or jurisdiction are attacked the matter is further considered hereafter.⁷⁶ Jurisdiction over the subject-matter of the suit, such as cannot be conferred by consent or waiver, may be challenged by motion at any time; and of this an instance is afforded in the federal courts,⁷⁷ while in Georgia the venue being jurisdictional in the same sense may be challenged by motion during trial without a plea or on motion to vacate default.⁷⁸ In a patent infringement case a motion at close

⁶⁹ See §§ 3069-3075, *infra*.

⁷⁰ §§ 3067, 3068, *infra*.

⁷¹ In federal equity practice "demurrers and pleas are abolished." All defenses formerly made by demurrer or plea are to be made "by motion to dismiss or in the answer." New Equity Rule 29, full text of which see in 226 U. S. app'x.

The contents and form of the answer are regulated by New Equity Rule 30, which see 226 U. S. app'x, and also § 3071, *infra*.

⁷² Defendant in foreclosure suit may disclaim and be dismissed. *Greenya v. Reliance Security Co.*, 161 Wis. 483, 154 N. W. 972.

⁷³ As to ordinary motions, demur-

ers and answers, see §§ 3067-3070, *infra*.

⁷⁴ See § 3014, *supra*.

⁷⁵ See §§ 2978, 2984, *supra*.

⁷⁶ §§ 3068, 3069, 3075, *infra*.

⁷⁷ See § 2965, *supra*, §§ 3069, 3075, *infra*.

⁷⁸ In Georgia, where the jurisdiction of the subject-matter in the particular county must be pleaded and proved, objection may be taken by motion to dismiss when proof reveals a want of jurisdiction. A plea to the jurisdiction is required. *Georgia Railroad & Banking Co. v. Seymour*, 53 Ga. 499; *White v. Atlanta, B. & A. R. Co.*, 5 Ga. App. 308, 63 S. E. 234.

See also § 3119, *infra*.

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as to recognize the corporation as adverse party,⁹¹ or by suffering a default.⁹² An objection that the contract sued on is not in the written form required by the statute for corporate contracts must be pleaded and not made by motion in arrest.⁹³ On a motion for leave to sue as a successor, the moving party's rights as a corporate successor cannot be tried but that must be left to the merits.⁹⁴

In answering as in complaining the corporation and its members are distinct, and it cannot make any defenses that pertain to them as co-defendants,⁹⁵ or in a form that pertains to other co-defendants.⁹⁶ Only that defendant which is affected may put in the demurrer⁹⁷ but an interpleaded defendant has the rights of an original party when substituted.⁹⁸

Its defenses are made by it and in its name, but a difficulty has been felt where it became necessary to make dilatory pleas and objections which required it to be in court, even specially appearing, for the purpose of averring that it was not before the court through want of jurisdiction,⁹⁹ or for the purpose of pleading its own nonexistence or dissolution. The better rule is that a plea of nonexistence or extinction may be made by the corporation itself, though this implies

ence cannot be saved for appeal on a plea of the general issue. (It appears that the name imported incorporation.) *Walker v. Mobile Marine Dock & Mutual Ins. Co.*, 31 Ala. 529. See also § 3086, *infra*; *German Ins. Co. of Freeport v. Frederick*, 57 Neb. 538, 77 N. W. 1106; *Exchange Nat. Bank v. Capps*, 32 Neb. 242, 29 Am. St. Rep. 433, 49 N. W. 223.

On appeal will be deemed amended. *John T. Noye Mfg. Co. v. Raymond*, 8 N. Y. Misc. 353, 28 N. Y. Supp. 693; *Tolmie v. Dean*, 1 Wash. T. 46.

See § 3068, *infra*, as to demurrer on this ground.

⁹¹ *Frost v. Ainslie Lumber Co.*, 3 Wash. St. 241, 28 Pac. 354, 915.

⁹² A failure to allege particularly the name, state and incorporation of plaintiff cannot be objected to after the bill is taken pro confesso. *Winnipeg Lake Co. v. Worster*, 29 N. H. 433.

⁹³ *Kenner & Greenfield v. Lexington Mfg. Co.*, 91 N. C. 421.

⁹⁴ The right of one corporation as

successor to enforce judgment for another cannot be tried on a motion for leave to sue on such judgment, but must be left to trial. *National Mechanics' Banking Ass'n v. Usher*, 31 N. Y. Super. Ct. 403.

⁹⁵ The corporation cannot complain of the joinder as defendants with it in a suit for nuisance of its officer and agent. It is for them, if any one, to complain. *Cedar Lake Hotel Co. v. Cedar Creek Hydraulic Co.*, 79 Wis. 297, 48 N. W. 371.

⁹⁶ One cannot demur that another is not alleged to exist as a corporation (school districts). *White Oak v. Oskaloosa*, 44 Iowa 512.

⁹⁷ One may not demur that another has no alleged corporate existence. *White Oak v. Oskaloosa*, 44 Iowa 512 (school districts).

⁹⁸ Interpleaded defendant may demur for failure to plead incorporation and domicile. *Chandler v. Erie Transfer Co.*, 19 N. Y. Civ. Proc. 385, 13 N. Y. Supp. 573.

⁹⁹ §§ 3014, 3019, *supra*.

its existence for the very purpose of pleading,¹ or even that it must be so made,² but some contrary opinion exists.³ Others admit such a plea by the persons served⁴ or by corporate officers⁵ or by a receiver⁶ or by an attorney of the court suggesting it⁷ or an amicus curiæ.⁸ When the corporation is not a party, and plaintiff sues as its assignee the plea nul tiel is inadmissible.⁹

¹ **United States.** *Habich v. Folger*, 20 Wall. 1, 22 L. Ed. 307; *McGoan v. Scales*, 9 Wall. 23, 19 L. Ed. 545.

Illinois. *Inman v. Allport*, 65 Ill. 540.

Maryland. *Boyce v. Methodist Episcopal Church*, 46 Md. 359.

Massachusetts. *Thornton v. Marginal Freight Ry. Co.*, 123 Mass. 32 (demurrer); *Gott v. Adams Exp. Co.*, 100 Mass. 320; *Dooley v. Cheshire Glass Co.*, 15 Gray 494; *Greenwood v. Lake Shore R. Co.*, 10 Gray 373.

Missouri. *Foster v. White Cloud City Co.*, 32 Mo. 505 (in which the court speaks of it as strange that a corporation should deny its own existence).

² *Townsend v. First Freewill Bapt. Church*, 6 Cush. (Mass.) 279, 281, in which, however, the court speaks of "defendants" in describing who should plead, thus inviting the inference that the trustees were meant.

³ *Oxford Iron Co. v. Spradley*, 46 Ala. 98. Unless in case of misnomer or dissolution. See *McCullough v. Talladega Ins. Co.*, 46 Ala. 376. Such plea is *felo de se*. *Western U. Tel. Co. v. Eyser*, 2 Colo. 141, dissenting opinion of Belford, J., to the contrary.

⁴ *Evarts v. Killingworth Mfg. Co.*, 20 Conn. 447; *Rand v. Proprietors of Upper Locks & Canals on Connecticut River*, 3 Day (Conn.) 441; in both which objection was only to process; *American Exp. Co. v. Haggard*, 37 Ill. 465, 87 Am. Dec. 257, where members pleaded that they were a partnership and not a corporation, but it was bad because it did not give a better writ.

In Tennessee the persons served

may put in a plea of dissolution. *Kelley v. Mississippi Cent. R. Co.*, 1 Fed. 564.

⁵ *McGoan v. Scales*, 9 Wall. (U. S.) 23, 19 L. Ed. 545; *Callender v. Painesville & H. R. Co.*, 11 Ohio St. 516, where the plea (by motion) embraced other objection to jurisdiction, and the court said that the "party" could always make such a motion.

The late secretary was allowed to intervene for the purpose of informing the court of the defendant's dissolution, in *Combes v. Keyes*, 89 Wis. 297, 27 L. R. A. 369, 46 Am. St. Rep. 839, 62 N. W. 89.

⁶ See chapter on Receivers, *infra*.

The proper practice for receivers, who have appeared specially to raise the objection of an abatement by dissolution before their appointment, is by suggestion of the fact and motion. *Morgan v. New York Nat. Building & Loan Ass'n*, 73 Conn. 151, 46 Atl. 877.

⁷ *National Bank v. Colby*, 21 Wall. (U. S.) 609, 22 L. Ed. 687; *Pomeroy's Lessee v. Bank of Indiana*, 1 Wall. (U. S.) 23, 17 L. Ed. 500 (before suing out error); *Mumma v. Potomac Co.*, 8 Pet. (U. S.) 281, 8 L. Ed. 945 (after judgment); *Greeley v. Smith*, 3 Story 657, Fed. Cas. No. 5,748 (after judgment).

⁸ *Welch v. Ste. Genevieve*, 1 Dill. (U. S.) 130, Fed. Cas. No. 17,372, in which it was made by an officer on return to mandamus.

See also § 3014, *supra*, as to this practice on objection to process and service.

⁹ *Nutting v. Hill*, 71 Ga. 557.

§ 3067. — **Motions on the pleadings.** In the preceding section motions for change of venue or to quash service or to dismiss have been mentioned. The various motions by which the pleadings are rectified and tested for sufficiency are here to be considered. A motion to make the complaint more definite and certain will reach allegations defective in form but not so lacking as to be demurrable.¹⁰ Some states allow such a motion to obtain greater certainty by stating the name of the agent in the transaction declared on, and others deny the right to such particulars,¹¹ but if more certainty be asked as to facts of incorporation which need not be pleaded, the motion is frivolous.¹² A motion to make more definite lies to a complaint in New York which alleges that the party is a corporation without stating whether it is foreign or domestic as the statute requires; but this is in some doubt because of the requirement that the complaint plead particulars of place if the corporation is foreign, without any similar requirement of the statute if it is domestic. It seems plain that a demurrer for want of legal capacity to sue would not lie if it was alleged simply that it was a corporation, for a corporation has such capacity. And it is settled there that a demurrer on no other ground will reach the objection.¹³ By statute in one state a misnomer may be corrected by either party's motion supported by affidavit.¹⁴ In the federal equity practice a motion for further and better particulars is now provided for by rule.¹⁵

A motion to strike out pleadings or parts thereof for irrelevancy,

¹⁰ In a number of states the special demurrer is the means of reaching such defects as uncertainty, ambiguity or unintelligibility. See § 3068, *infra*.

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¹² Motion to make definite and certain by stating the "traversable acts" constituting plaintiff a corporation calls for evidence and is frivolous. *Chillicothe Sav. Ass'n v. Ruegger*, 60 Mo. 218.

¹³ *Harmon v. Vanderbilt Hotel Co.*, 79 Hun (N. Y.) 392, 29 N. Y. Supp. 783; *Rothschild v. Grand Trunk Ry. Co.*, 10 N. Y. Supp. 36, judgment *aff'd* 60 Hun (N. Y.) 582, 14 N. Y. Supp. 807.

There are other cases in New York dealing with this same question where

the allegation was that the party was a foreign corporation, but as to it the statute requires more particulars. The propriety of a motion there is more debatable, but such cases belong in another place. See § 3068, *infra*, chapter on Foreign Corporations, *infra*.

¹⁴ *First Nat. Bank of Ceredo v. Huntington Distilling Co.*, 41 W. Va. 530, 56 Am. St. Rep. 878, 23 S. E. 792.

¹⁵ "A further and better statement of the nature of the claim or defense, or further and better particulars of any matter stated in any pleading may in any case be ordered, upon such terms as to costs and otherwise as may be just." New Equity Rule 20.

bad plea of misnomer may subject the case to judgment on the pleadings.²⁴

Under the chancery practice exceptions would not lie to an answer by a corporation for the reason that it was not a sworn answer, which might be exceptionable as such, and as a pure answer no exception would lie.²⁵

§ 3068. — Demurrer and effect thereof. The familiar principles of the law of demurrers may be taken for granted without restating them. Demurrers to the pleas or answer or replication for their sufficiency will be considered in connection with such answers or replies.²⁶ According to common-law principles the demurrer reaches only the pleadings. If there is a variance in name between the declaration and the process, objection should be taken by plea only and not by demurrer.²⁷

The jurisdiction need not ordinarily be pleaded²⁸ and for that reason demurrer cannot lie on such a ground unless the lack of jurisdiction affirmatively appears by the complaint,²⁹ but a federal case is outside of this rule because the jurisdiction must be pleaded in such an action, and a demurrer will therefore reach the defect.³⁰ It is not a proper method of urging that the action involves visitation of a foreign corporation for which reason a potential jurisdiction ought not to be accepted.³¹ A general demurrer being an appearance waives objection to the jurisdiction over the person, and therefore could not reach a bad service or summons;³² and a special demurrer is equally

²⁴ Judgment on the pleadings should be given where the answer not only does not deny the cause of action, but fails to deny that it had been doing business under the name sued by. *Wilhite v. Convent of Good Shepherd*, 117 Ky. 251, 25 Ky. L. Rep. 1375, 78 S. W. 138.

²⁵ Answer of a corporation in chancery under its seal. It is not evidence as a sworn answer, hence not exceptionable; and as a pleading is not open to exception. *Smith v. St. Louis Mut. Life Ins. Co.*, 2 Tenn. Ch. 599.

²⁶ Demurrer to plea or answer, see § 3079, *infra*.

²⁷ Variance in name between writ and declaration. *Pendleton v. Bank of Kentucky*, 1 T. B. Mon. (Ky.) 171.

²⁸ § 3049, *supra*.

²⁹ There is a distinction between jurisdiction "not appearing" on the complaint and its appearing not to exist thereby. Only the latter would be demurrable. *Reynolds v. La Crosse & M. Packet Co.*, 10 Minn. 178.

Demurrer is proper where the face of the complaint shows a cause of action against a foreign corporation not cognizable by the court. *Fry v. Denver & R. G. R. Co.*, 226 Fed. 893.

³⁰ *Southern Pac. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 943.

³¹ *Sauerbrunn v. Hartford Life Ins. Co.*, 159 N. Y. App. Div. 121, 143 N. Y. Supp. 1009.

³² §§ 3018, 3019, *supra*.

unavailing for that purpose, since it only reaches the question whether in any case the court could exercise jurisdiction assuming good process and service.³³ Ordinarily the venue is no part of the necessary allegations in a transitory action³⁴ and though they be bad or lacking, a demurrer will not avail,³⁵ but this statement must be qualified by calling attention to those states in which the venue is jurisdictional of the cause or of some causes of action³⁶ and if the practice admits of questioning the jurisdiction at all by demurrer, it would seem to be a proper mode in such a state of the pleadings. In any event the venue is a matter of form and not of substance, so that only a special demurrer would lie.³⁷

According to general principles demurrer will not reach the non-existence of the corporation unless it affirmatively appears that it has no existence³⁸ and if it sues by name importing a corporation³⁹ or alleges it informally or with uncertainty⁴⁰ the demurrer will be overruled. Conversely it will not raise the objection that individuals sued as such are in fact a corporation.⁴¹ A demurrer for want of allegation that plaintiff is a corporation is frivolous, where it is alleged that demurrant made the contract sued on with plaintiff as a corporation.⁴²

In those states which require an allegation of incorporation or, what is substantially equivalent, in lieu thereof a declaration on a contract or instrument running in the name of the alleged corporation, the question of the propriety of a demurrer is somewhat more difficult

³³ Reynolds v. La Crosse & M. Pack-et Co., 10 Minn. 178; Ogdensburgh & C. R. Co. v. Vermont & C. R. Co., 16 Abb. Pr. N. S. (N. Y.) 249, aff'd 4 Hun (N. Y.) 712.

³⁴ § 3049, *supra*.

³⁵ Glendale Lumber Co. v. Beekman Lumber Co., 152 Mo. App. 386, 133 S. W. 384.

³⁶ See §§ 2978, 3049, *supra*.

³⁷ Briggs v. Nantucket Bank, 5 Mass. 94.

³⁸ State v. Torinus, 22 Minn. 272; Leader Printing Co. v. Lowry, 90 Okla. 89, 59 Pac. 242; Cheraw & C. R. Co. v. Garland, 14 S. C. 63; Cheraw & C. R. Co. v. White, 14 S. C. 51.

³⁹ Seymour v. Thomas Harrow Co., 81 Ala. 250, 1 So. 45; Georgia, F. & A. R. Co. v. Blish Milling Co., 15 Ga. App. 142, 82 S. E. 784.

⁴⁰ Will not reach formal defects in allegation of corporate existence. German Reformed Church v. Von Puechelstein, 27 N. J. Eq. 30.

Demurrer will not raise the question of legal creation of plaintiff alleged to be incorporated as a swamp land district of the state. A defect in the creation of it must be pleaded. Swamp & Overflowed Land Dist. No. 110 v. Feck, 60 Cal. 403.

⁴¹ If a bill runs against individuals and avers that no legal incorporation was had, a demurrer for want of the corporation as a party is bad. It must be made by plea. Mayor, etc., of Wilmington v. Addicks, 8 Del. Ch. 310, 7 Del. Ch. 56, 43 Atl. 297.

⁴² National Ins. Co. v. Bowman, 60 Mo. 252.

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frivolousness, and other well-known grounds is in use in many jurisdictions. By it pleas of nul tiel corporation or the like may be stricken after they have been displaced or waived in whole¹⁶ or in part,¹⁷ or when irrelevant,¹⁸ and may be stricken as sham on a proper showing of falsity.¹⁹ Unnecessary allegations as to jurisdiction or venue may be stricken.²⁰ A complaint will not be stricken for want of jurisdiction appearing on its face.²¹

Motions on the pleadings ordinarily will try nothing but such matters as are apparent on the record, and affidavits are not admissible on a motion for judgment on the pleadings to try the corporate existence.²² The pleadings determine where the cause of action arose when attacked by motion or demurrer and affidavits on that issue are not receivable.²³ A failure to deny the cause of action coupled with a

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Where existence is admitted by general denial, paragraphs denying it may be stricken out. *Price v. Grand Rapids & I. R. Co.*, 18 Ind. 137.

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¹⁸ If the complaint against "St. Louis Bagging and Rope Co.," does

not, describe it as a corporation nor the record show that fact, a plea nul tiel corporation is properly stricken as irrelevant. *Ware v. St. Louis Bagging & Rope Co.*, 47 Ala. 667.

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²² *National Bank of Metropolis v. Orcutt*, 48 Barb. (N. Y.) 256.

Nonincorporation not apparent on the face of the complaint cannot be raised by moving for judgment on the pleadings. *Jantzen v. Emanuel German Bapt. Church*, 27 Okla. 473, Ann. Cas. 1912 C 659, 112 Pac. 1127.

²³ *Delaware, L. & W. R. Co. v. New York, S. & W. R. Co.*, 12 N. Y. Misc. 230, 33 N. Y. Supp. 1081.

either of these states or others the demurrer should plainly specify that the want of capacity appearing on the face of the complaint is the fault relied on, and it should not be laid to the want of facts.⁵¹ Where the code provides for a special demurrer for uncertainty or ambiguity in addition to the grounds for general demurrer for want of capacity, want of facts, etc., the special demurrer will not present want of capacity.⁵² In any event a general demurrer would be inadmissible for this purpose because it would amount to a general appearance admitting the fact omitted,⁵³ and though demurrer be sustained for want of the required allegations of the particulars of incorporation the bill or complaint will not be dismissed.⁵⁴

The failure to perform a condition, for example the filing of articles,⁵⁵ or obtaining a certificate,⁵⁶ or any other condition precedent

⁵¹ Demurrer must specially assign such ground. *Phoenix Bank v. Donnell*, 40 N. Y. 410, aff'g 41 Barb. (N. Y.) 571; *Fulton Fire Ins. Co. v. Baldwin*, 37 N. Y. 648; *Carter v. Herbert Booth King & Bro. Pub. Co.*, 26 N. Y. Misc. 652, 56 N. Y. Supp. 382; *Bank of Lowville v. Edwards*, 11 How. Pr. (N. Y.) 216.

See also cases holding that a general demurrer for want of facts will not lie, *supra*.

A specification that capacity to sue does not appear will be regarded as founding the demurrer on that ground though it states the ground to be want of facts to constitute a cause of action. *Connecticut Bank v. Smith*, 17 How. Pr. 487; 9 Abb. Pr. (N. Y.) 168.

⁵² A special demurrer that it does not appear how or where plaintiff, alleged to be a corporation, was incorporated, or what were its powers or purposes, or place of business, does not present an objection that it had no legal capacity to sue. The demurrer should specify the latter ground. *S. C. Herbst Importing Co. v. Hogan*, 16 Mont. 384, 41 Pac. 135.

⁵³ Even if allegation of incorporation was necessary, the corporation could not raise the question by de-

murrer, since its appearance would admit the capacity or entity ascribed to it. *Holden v. Great Western Elevator Co.*, 69 Minn. 527, 65 Am. St. Rep. 585, 72 N. W. 805.

⁵⁴ *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420.

⁵⁵ Failure to file articles in county pursuant to Code Civ. Proc. § 299 is not demurrable if not apparent on the face of the complaint. It must be specially pleaded in abatement. *South Yuba Water & Mining Co. v. Rosa*, 80 Cal. 333, 22 Pac. 222.

Failure to file a copy of articles with the declaration of a foreign corporation suing as such is not ground of abatement. If the allegation is to be traversed it must be by plea and not by demurrer. *C. J. L. Meyer & Sons Co. v. Black*, 4 Johnson (N. M.) 190, 16 Pac. 620.

See also §§ 2949, 3048, *supra*.

⁵⁶ Only when failure to obtain a certificate as a condition of power to maintain action appears from the complaint may such shortcoming be challenged by demurrer. *Northrup v. A. G. Wills Lumber Co.*, 65 Kan. 769, 70 Pac. 879.

See also chapter on Foreign Corporations, *infra*.

frivolousness, and other well-known grounds is in use in many jurisdictions. By it pleas of nul tiel corporation or the like may be stricken after they have been displaced or waived in whole¹⁶ or in part,¹⁷ or when irrelevant,¹⁸ and may be stricken as sham on a proper showing of falsity.¹⁹ Unnecessary allegations as to jurisdiction or venue may be stricken.²⁰ A complaint will not be stricken for want of jurisdiction appearing on its face.²¹

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murrer if apparent,⁶² but it will not be sustained if the nonjoined parties are merely proper and are not indispensable.⁶³ A complaint is not demurrable merely because it sets out a contract variant in name from the name of the corporation as pleaded.⁶⁴

In chancery the demurrer should be laid only to that part of the bill which is demurrable and other parts should be met by plea or answer. Hence a member may demur to relief and answer to discovery.⁶⁵

None but those things within the scope of the demurrer and its specifications will be reached. Thus it has been shown that a demurrer under the codes for want of legal capacity to sue will not test the complaint for want of facts to make a cause of action, and vice versa.⁶⁶ Articles of incorporation attached or exhibited with the complaint but not a part of the cause pleaded do not expose it to demurrer for facts revealed thereby.⁶⁷ Neither does a reference to the act in pleading existence vitiate the complaint by reason of judicial notice that organization is incomplete, and thus open it to demurrer.⁶⁸

The general rule that a demurrer searches the whole record and reaches the first defect does not apply to a demurrer to a plea in abatement, because such a plea is not addressed to the complaint,⁶⁹

⁶² For improper joinder of stockholders as plaintiffs. *Havana City Ry. Co. v. Ceballos*, 49 N. Y. App. Div. 263, 63 N. Y. Supp. 417.

⁶³ In a creditors' statutory action to avoid bonds the nonjoinder of all bondholders as defendants is not demurrable where they are not necessary but only proper parties. *Phoenix Nat. Bank v. A. B. Cleveland Co.*, 58 Hun (N. Y.) 606, 11 N. Y. Supp. 873.

⁶⁴ On demurrer a variance in plaintiff's name from that in the note it sues on by action of assumpsit without making proffer is not issuable, since the identity may appear from extrinsic facts or from the note when put in evidence. *Medway Cotton Manufactory v. Adams*, 10 Mass. 360.

⁶⁵ *Many v. Beekman Iron Co.*, 9 Paige (N. Y.) 188.

If a member be joined and both relief and discovery prayed against him, whereas discovery only can be granted, demurrer to the whole bill

by him is bad. He should answer to the discovery and demur to the relief. *Wright v. Dame*, 1 Metc. (Mass.) 237.

⁶⁶ See this section, cases dealing with allegations of corporate existence and place, *supra*.

⁶⁷ Making a copy of articles "a part of" the complaint filed therewith does not expose it to demurrer, the action being for recovery of an assessment for draining and the articles not being the instrument sued on. *Excelsior Draining Co. v. Brown*, 38 Ind. 384.

⁶⁸ It is not necessary to plead such facts or steps in organization. *Cheraw & C. R. Co. v. White*, 14 S. C. 51; *Cheraw & C. R. Co. v. Garland*, 14 S. C. 63.

⁶⁹ *Indiana, B. & W. Ry. Co. v. Foster*, 107 Ind. 430, 8 N. E. 264; *Price v. Grand Rapids & I. R. Co.*, 18 Ind. 137. See also *Stephen on Pleading* (Tyler's Ed.), 161, where this is stated

and it certainly could not be carried back through a bad plea to a good paragraph or count,⁷⁰ though a Kentucky case is authority for carrying a demurrer to the answer back to omission of the complaint to allege that plaintiff is a corporation;⁷¹ nor will formal defects in an answer raising among others the issue of corporate existence be reached by a demurrer generally to the reply.⁷² There are few cases on these points, and much would depend on whether the omitted particulars, such as those of corporate existence, were regarded as matters of substance or of form and whether essential or only requisite if seasonably questioned before answering.

A general demurrer admits well-pleaded facts that the corporation exists⁷³ and is rightly named⁷⁴ and has the power alleged or implied,⁷⁵ and the authority of officers and agents involved.⁷⁶ A demurrer which amounts to a general appearance admits both the corporate existence and the court's jurisdiction over it.⁷⁷ The admissions by the demurrer do not reach those facts which the court judicially knows to be otherwise,⁷⁸ and such admission does not supply evidence

as the common-law rule and the reasons for it are given.

⁷⁰ Demurrer to a plea in abatement will not be carried back to a paragraph of the complaint against which the plea is bad. *Shick v. Citizens' Enterprise Co.*, 15 Ind. App. 329, 57 Am. St. Rep. 230, 44 N. E. 48.

⁷¹ Where the complaint fails to allege that plaintiff is a corporation, it can be reached by special demurrer or a demurrer to the answer would reach back to the complaint and raise the question. *Pryse v. Three Forks Deposit Bank's Assignee*, 20 Ky. L. Rep. 1057, 48 S. W. 415.

⁷² A general demurrer to a reply on the issue of corporate existence will not reach back to formal defects in that part of the answer. *Stoddard v. Onondaga Annual Conference of Methodist Protestant Church*, 12 Barb. (N. Y.) 573. See this stated as the general rule in *Stephen on Pleading* (Tyler's Ed.), 161.

⁷³ A demurrer for insufficiency of pleaded facts to constitute a cause of action admits corporate existence and

capacity to sue. *Wiles v. Philippi Church*, 63 Ind. 206.

⁷⁴ Declaration in assumpsit on note that makers promised plaintiff corporation by a variant name, etc., is good pleading to explain the variance; hence demurrer will be taken as confessing it. *Medway Cotton Manufactory v. Adams*, 10 Mass. 360.

⁷⁵ An averment of foreign incorporation "duly authorized to" do the acts on which complaint is based is admitted by demurrer. *Farmers' Loan & Trust Co. v. Fisher*, 17 Wis. 114.

⁷⁶ Admits authority of agent to do alleged act. *Lyman v. White River Bridge Co.*, 2 Aik. (Vt.) 255, 16 Am. Dec. 705.

⁷⁷ *Holden v. Great Western Elevator Co.*, 69 Minn. 527, 65 Am. St. Rep. 585, 72 N. W. 805; *Reynolds v. La Crosse & M. Packet Co.*, 10 Minn. 178.

⁷⁸ Demurrer to an allegation setting out a public act of incorporation by a wrong title, does not admit that it is correctly entitled, as judicial notice informs the court that no such act exists. *Union Bank v. Dewey*, 3 N. Y.

on trial, e. g., of the corporate existence.⁷⁹ A demurrer to a replication admitted the fact therein pleaded that defendant was a corporation, and thereby supplied a lacking allegation of that fact necessary to make out federal jurisdiction.⁸⁰ Demurrer to the jurisdiction will lie only when it could under no circumstances be had, and accordingly an untenable special demurrer was held to be a general demurrer and thereby a general appearance.⁸¹

§ 3069. — Objections in abatement and to the jurisdiction. When and how the objections to the jurisdiction or matters of abatement are to be urged is now to be considered. Whether a plea is in abatement or in bar is considered in the next section.⁸² What the answers and pleas must or should contain and the sufficiency and effect of the denials and allegations therein will be discussed in ensuing sections.⁸³ It was a rule at common law that all pleas to the jurisdiction and in abatement must go in before pleading to the merits, and a plea to the merits waived them. The reason of the rule remains in the practice of treating all such pleas as preliminary to the main issues. If there is a general appearance in form⁸⁴ or by demurrer⁸⁵ or by answer, all objections to the jurisdiction over the person, that is to jurisdiction in personam over the corporation, are waived, which under the practice in the particular court might have been made at an earlier stage.⁸⁶ Under the codes the plea in abatement is made in the answer which does not constitute an appearance cutting off the right.⁸⁷

Super. Ct. 509. The soundness of this decision may well be questioned. While the judicial notice of all public acts would inform the court that no such public act exists, it might be an admission that some private act entitled as alleged was in existence. On the other hand if the court judicially knew the statute because it was public, the error in pleading the title would seem immaterial.

⁷⁹ Admission of corporate existence is only for purpose of demurrer, not as proof. *Jackson's Adm'x v. Bank of Marietta*, 9 Leigh (Va.) 240.

⁸⁰ *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404, 15 L. Ed. 451.

⁸¹ Demurrer for want of jurisdiction over the person of a foreign corporation, being untenable because demurrer only lies where jurisdiction could

under no circumstances be had, falls within the rule (Pub. St. p. 629, § 37, and p. 228, § 26) that demurrer is an appearance and that a corporation may appear to the jurisdiction. *Reynolds v. La Crosse & M. Packet Co.*, 10 Minn. 178.

⁸² § 3070, *infra*.

⁸³ See §§ 3071-3086, *infra*.

⁸⁴ Will not be allowed after appearance to an action of transitory nature brought where defendant's railroad line runs. *South Florida R. Co. v. Weese*, 32 Fla. 212, 13 So. 436.

⁸⁵ *Thompson v. Michigan Mut. Ben. Ass'n*, 52 Mich. 522, 18 N. W. 247.

⁸⁶ See also § 3019, *supra*.

⁸⁷ A general appearance by putting in an answer which presents the jurisdictional question, it not appearing on the face of the complaint, does not

demurrers.⁹⁷ A bare motion to dismiss for want of jurisdiction is improper practice, demurrer or answer under the codes being the regular mode of raising the question.⁹⁸ By making an untenable motion to dismiss for want of jurisdiction over the case, defective jurisdiction over the person may be waived.⁹⁹ Objection to the jurisdiction seasonably made in the proper way is not waived by pleading over after the objection is overruled.¹

There is a substantial difference between a plea in abatement proper and a plea that the person served did not competently represent defendant, or that the service was not legally had, and in some states this is also preserved in form and procedure.² Where common-law practice at all remains, some difficulty is presented whether a plea in abatement will lie where a corporation merely claims improper service. If the plea that the court has not any jurisdiction be found true, it would entail dismissal of the suit or action, or of the defendant, notwithstanding the court would have jurisdiction if it could get defendant into court; and such dismissal might stand as a bar. Either a bar or a dismissal would work injustice. In this situation the proper chancery practice, concludes the New Jersey court, on a defective service of the corporation is by motion under a conditional appearance assailing the service on the ground that it was not properly made, or if defendant was a foreign corporation on the ground that it was not subject to be served.³ And in that state it has been established by

⁹⁷ *Fry v. Denver & R. G. R. Co.*, 226 Fed. 893.

⁹⁸ *Delaware, L. & W. R. Co. v. New York, S. & W. R. Co.*, 12 N. Y. Misc. 230, 33 N. Y. Supp. 1081.

⁹⁹ Motion to dismiss on ground that court had "no jurisdiction of the case, it appearing * * * that said defendant is a foreign insurance company and that no part of the alleged cause of action arose in this state" goes to the jurisdiction of subject-matter and therefore waives jurisdiction of the person. *Handy v. Insurance Co.*, 37 Ohio St. 366. See also to same effect, *Cleveland, C., C. & I. Ry. Co. v. McLean*, 1 Ohio Cir. Ct. 112, 10 Ohio Cir. Dec. 67.

¹ *Mt. Olive Coal Co. v. Hughes*, 45 Ill. App. 566, pointing out the practice and showing that waiver takes

place by plea to merits while plea in abatement is pending or before it is made.

² A plea that the person served was not an officer or agent of the corporation is a plea to the jurisdiction in the nature of a plea in abatement. *American Spirits Mfg. Co. v. Peoria Belt Ry. Co.*, 154 Ill. App. 330; *Beck v. Pauli Lithographing Co. v. Monarch Brewing Co.*, 131 Ill. App. 645.

³ *Ewald v. Ortynsky*, 77 N. J. Eq. 76, 75 Atl. 577, citing *Daniell's Chancery Pl. & Pr.* * 536 and note.

At common law no such plea could have been made in an action, because the return of service was conclusive. In chancery the better practice was by motion addressed to irregularity of process, which was followed in federal courts in analogous cases. Early prac-

rule of court that on a plea its validity when proved is not admitted, but that it shall avail defendant only so far as in law and equity it ought to avail.⁴ It was previously stated that a defective service or return should usually be attacked by motion to quash, with some exceptions in states where plea or answer was still in use for that purpose, especially where the facts were extraneous to the record.⁵

An objection to the venue is usually made by a motion and claim of the privilege of a change, and otherwise is waived,⁶ but if the practice allows it to be made on the pleadings it is necessary to do so by the pleadings at the proper time and order of pleading.⁷ No plea or answer to the venue will lie where the objection has previously been made and waived.⁸

The want of the jurisdictional facts of residence or a local office or place of business to give jurisdiction to a court of limited or inferior

tice explained in *Ewald v. Ortynsky*, 77 N. J. Eq. 76, 75 Atl. 577, distinguishing between want of jurisdiction and failure to acquire it.

⁴ See rule No. 209a, quoted in *Ewald v. Ortynsky*, 77 N. J. Eq. 76, 75 Atl. 577, with the observation that under such rule a plea would accomplish the same result as a motion. Accordingly the process was set aside as improperly served.

⁵ § 3014, *supra*.

If the person served is not agent advantage may be taken by plea in abatement. Motion is not allowable. *Mineral Point R. Co. v. Keep*, 22 Ill. 9, 74 Am. Dec. 124.

Plea in abatement lies to a bad writ but not to a bad service, and such a plea was properly stricken. *Protection Life Ins. Co. v. Palmer*, 81 Ill. 88.

The want of jurisdiction due to the fact that the person served was not an agent may be made by plea averring the facts when they do not appear on the complaint. It might also be made by motion to quash. *Chesapeake, O. & S. W. R. Co. v. Heath's Adm'r*, 87 Ky. 651, 9 S. W. 832.

Plea should be filed to attack service where it cannot be said as matter of law that person returned served was

not qualified. *Harriman v. Reading & L. St. Ry. Co.*, 173 Mass. 28, 53 N. E. 156.

Withdrawal from state and revocation of auditor's authority to accept service must be pleaded in abatement. *S. M. Smith Ins. Agency v. Hamilton Fire Ins. Co.*, 69 W. Va. 129, 71 S. E. 194.

⁶ See §§ 2978, 2983, 2984, *supra*.

Going to the merits waives defective allegation of residence necessary for jurisdiction of county court. *Meyers v. American Locomotive Co.*, 201 N. Y. 163, 94 N. E. 605.

⁷ Wrong venue of forfeiture suit is waived if not questioned by answer, it not appearing on the complaint. *Eel River R. Co. v. State*, 143 Ind. 231, 42 N. E. 617.

Jurisdictional allegations if sufficient must be traversed in fact by answer (wrong venue laid). *Glen-dale Lumber Co. v. Beekman Lumber Co.*, 152 Mo. App. 386, 133 S. W. 384.

⁸ If the motion be not ruled on or, if ruled on, not excepted to, the jurisdiction cannot be attacked by answer (Code, § 2589). *Knott v. Dubuque & S. C. Ry. Co.*, 84 Iowa 462, 51 N. W. 57.

jurisdiction may be raised by answer.⁹ If the court might otherwise have jurisdiction it will be waived unless so done.¹⁰

The same question previously considered, who should move to question the service in order to avoid the inconsistency of a corporation appearing to object that it was not in court, reappears in the form of a question who should plead the facts in abatement. One state holds that the member unauthorizedly served may do so.¹¹ In another state creditors were allowed to plead that a dissolution suit was in the wrong venue, whence there was no jurisdiction, though it was assumed that the corporation also had the right.¹² In other states the corporation takes the objection by its attorney and not by its officers, or itself¹³ but this involves the technical difficulty of an appearance by it.¹⁴

The rule is long settled that misnomer must be pleaded as such or else will be waived, as for instance where defendant goes to the merits under the name alleged in the complaint,¹⁵ and this rule applies where

⁹ In the New York municipal court failure to allege jurisdictionally that the defendant foreign corporation had an office in the city may be urged by answer. *Epstein v. S. Weisberger Co.*, 52 N. Y. Misc. 572, 102 N. Y. Supp. 488.

¹⁰ Though allegation was insufficient to show that the place of business alleged in a county was the principal one, the defect is waived by failure to object. *Meyers v. American Locomotive Co.*, 201 N. Y. 163, 94 N. E. 605, aff'g 124 N. Y. Supp. 1122.

¹¹ *Rand v. Upper Locks & Canals on Connecticut River*, 3 Day (Conn.) 441.

¹² Where there are creditors who are parties they may object that a suit praying among other things a receivership and sale of land to satisfy a lien is in the wrong venue and that there is no jurisdiction. The corporation has not the sole right to plead it. *Emmons v. Lexington & C. County Min. Co.*, 112 Ky. 91, 23 Ky. L. Rep. 1445, 65 S. W. 593.

¹³ Not by commissioners of the corporations, a drainage district. *Kankakee Drain. Dist. v. Commissioners Lake Fork Spec. Drain. Dist.*, 29 Ill.

App. 86, rev'd 130 Ill. 261, 22 N. E. 607.

A plea in abatement to the jurisdiction must be filed in the name of its attorney and not that of the corporation. *Culpeper Nat. Bank v. Tidewater Improvement Co.*, 119 Va. 73, 89 S. E. 118.

¹⁴ Technically at common law a plea to the jurisdiction must have been in person, and not by attorney, for that would have admitted the jurisdiction. *Mineral Point R. Co. v. Keep*, 22 Ill. 9, 74 Am. Dec. 124.

¹⁵ *United States. Baltimore & P. R. Co. v. Fifth Bapt. Church*, 137 U. S. 568, 34 L. Ed. 784; *Virginia & M. Steam Nav. Co. v. United States*, Taney 418, Fed. Cas. No. 16,973.

Illinois. Pennsylvania Co. v. Sloan, 125 Ill. 72, 8 Am. St. Rep. 337, 17 N. E. 37, where an operating company and a lessor company were involved, both being proper parties. *Riemann v. Tyroler & Vorarlberger Verein*, 104 Ill. App. 413.

Indiana. Richwine v. Presbyterian Church of Noblesville, 135 Ind. 80, 34 N. E. 737.

Iowa. Wilson v. Baker, 52 Iowa 423, 3 N. W. 481.

to defend the merits after occurrence of the fact²³ or who plead to the complaint thereafter²⁴ and not by those who then cease to so defend.²⁵ Failure to file articles in the county, as a condition to "maintaining" suit relating to land there held, must be pleaded in abatement²⁶ and is waived by answer admitting due incorporation.²⁷

If stockholders be not joined when necessary co-plaintiffs it is ground for abatement by plea of defendants or by the court²⁸ but an objection in a salvage suit begun by monition that not all salvors were joined with their master, the corporation, sounds in abatement and comes too late on appeal by the claimants.²⁹ One defendant officer cannot object that another one was improperly joined.³⁰

Since an appearance admits the defendant's existence³¹ it cannot thereafter plead that it is not a corporation³² unless the plea is made in bar so as to escape the rule that matters in abatement are so waived.³³ Furthermore it is waived by pleading generally to the merits³⁴ in equity as well as in law, unless the right to plead it is

²³ Those who knowingly defend on the merits will be estopped to suggest an abatement by dissolution. *Sturges v. Vanderbilt*, 73 N. Y. 384.

²⁴ Abatement by dissolution pending the action is waived by answering to the complaint. *Pyro-Gravure Co. v. Staber*, 30 N. Y. Misc. 658, 64 N. Y. Supp. 520.

²⁵ Objection that the action abated is not waived by a party who did not take part in a defense to the merits after the fact. *Sturges v. Vanderbilt*, 73 N. Y. 384.

²⁶ *California Savings & Loan Society v. Harris*, 111 Cal. 133, 43 Pac. 525; *Labory v. Los Angeles Orphan Asylum*, 97 Cal. 270, 32 Pac. 231.

²⁷ Failure to file copy of by-laws with county clerk cannot be raised to abate action by defendant who answered admitting plaintiff's due incorporation. *California Raisin Growers' Ass'n v. Abbott*, 160 Cal. 601, 117 Pac. 767.

²⁸ *Lawson v. Alabama Warehouse Co.*, 73 Ala. 289.

²⁹ *The Camanche*, 8 Wall. (U. S.) 448, 19 L. Ed. 397.

³⁰ When officers are improperly

joined but do not object, the other defendants cannot. *Norwood v. Memphis & C. R. Co.*, 72 Ala. 563.

³¹ § 3019, *supra*.

³² *Oxford Iron Co. v. Spradley*, 46 Ala. 98.

³³ When in bar and when in abatement, see § 3070, *infra*.

Nul tiel when pleaded in abatement is waived by appearance, but not if pleaded in bar. *Keokuk & H. Bridge Co. v. Wetzel*, 228 Ill. 253, 81 N. E. 864, *aff'g* 130 Ill. App. 81.

³⁴ *United States Society for the Propagation of Gospel v. Pawlett*, 4 Pet. 480, 7 L. Ed. 927; *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 7 L. Ed. 189.

Maine. Penobscot Boom Corporation v. Lamson, 16 Me. 224, 33 Am. Dec. 656.

New Mexico. Butterfield's Overland Dispatch Co. v. Wedeles, 1 N. M. 528.

Vermont. Aetna Ins. Co. v. Wires, 28 Vt. 93.

Washington. Hale v. Crown Columbia Pulp & Paper Co., 56 Wash. 236, 105 Pac. 480.

Must be pleaded by demurrer or answer, or is waived. *Young Men's*

reserved by leave.³⁶ Consequently it has been repeatedly held that the question is not presented on the general issue or by general denial.³⁷ After suffering judgment it cannot be questioned.³⁸

Where common-law pleading is still followed, dilatory pleas and pleas in abatement cannot be combined with the general issue, for it destroys them.³⁹ Hence the pleas must be separate from it and in due time and order.⁴⁰ Under the code practice where all defenses of fact are made by answer, the matter of abatement is pleaded as part of the answer which also contains such defenses to the merits as the pleader may be advised to make. Objections merely to the writ or the service may be made by motion to quash,⁴¹ but it does not follow that

Christian Ass'n v. Dubach, 82 Mo. 475.

³⁶ *Emerson Co. of West Virginia v. Nimocks*, 88 Fed. 280, citing 1 *Daniell Chan. Prac.* 654.

The plea *nul tiel* in bar is not waived by answer to the merits where leave is expressly granted to plead it afterwards. *Michigan Ins. Bank v. Eldred*, 143 U. S. 293, 36 L. Ed. 162.

³⁷ See § 3086, *infra*, where it will be seen that the same principle is involved as in the cases here cited.

³⁸ See §§ 3119, 3125, *infra*.

The plea *nul tiel* comes too late in an action on a policy after a statutory arbitration and appeal therefrom. *Union Type Foundry v. Kittanning Ins. Co.*, 138 Pa. St. 137, 20 Atl. 841.

Nul tiel should be pleaded seasonably before judgment. *Hunneman & Co. v. Fire Dist. No. 1 in Jamaica*, 37 Vt. 40 (public corporation).

³⁹ See §§ 3072-3075, *infra*, and *Carpenter v. Mercantile Bank*, 17 Ind. 253.

⁴⁰ See §§ 3065, 3068, *supra*.

Plea denying that plaintiff is or ever was a corporation is in bar and not in abatement. Hence it is in time even after application for change of venue. But a similar plea by a corporate defendant is in abatement, and is bad when coupled with plea. *Keokuk & H. Bridge Co. v. Wetzel*, 228 Ill. 253, 81 N. E. 864, to the merits,

aff'g judgment 130 Ill. App. 81.

Nul tiel is in abatement and must precede answers to the merits. *Heaston v. Cincinnati & Ft. W. R. Co.*, 16 Ind. 275, 79 Am. Dec. 430.

Subsequent paragraph of answer denying capacity of plaintiff is bad. *Jones v. Cincinnati Type Foundry Co.*, 14 Ind. 89.

⁴¹ Under the Missouri practice total want of jurisdiction over the person of the corporation should, like want of jurisdiction over subject-matter, be pleaded in abatement as a part of the answer to the merits; but defective summons or service should be attacked by a motion to quash made under special appearance. *Thomasson v. Mercantile Town Mut. Ins. Co.*, 217 Mo. 485, 116 S. W. 1092, *Newcomb v. New York Cent. & H. River R. Co.*, 182 Mo. 687, 81 S. W. 1069; *Curfman v. Fidelity & Deposit Co. of Maryland*, 167 Mo. App. 507, 152 S. W. 126. To same effect is *Meyer v. Phoenix Ins. Co.*, 184 Mo. 481, 83 S. W. 479, where a dictum that a plea to the jurisdiction of the person could be united with one to the merits was made but was written with respect to a total want of jurisdiction over the person of the corporation and not of a mere defect in summons and service.

A plea to the venue as a matter of privilege is not waived by uniting it with one to the merits, no defect in

the right to make them separately is lost because they might also be made under the general denials, according to code practice.⁴²

After a plea in abatement is made, it may be waived by stipulation, for example, to allow filing pendente lite of articles to the want of which the plea is made.⁴³ Merely taking continuances pending the plea does not do so.⁴⁴

§ 3070. — Answers to the merits and pleas in bar. Because of the requirements of orderly and sequential pleading⁴⁵ it is important to know what pleas or issues are in bar and what are in abatement or dilatory.⁴⁶ The sufficiency of the denials or defenses and their effect as pleadings are treated in the sections following.⁴⁷

A plea to the jurisdiction of the cause may be either in abatement or in bar.⁴⁸

A plea of nul tiel corporation totally denying that there is or ever was such a corporation is generally considered to be in bar,⁴⁹ while if

process being relied on. *Barnett, Haynes & Barnett v. Colonial Hotel Building Co.*, 137 Mo. App. 636, 119 S. W. 471. See also *Davis v. Nebraska Nat. Bank*, 51 Neb. 401, 70 N. W. 963, where it is said that whether a plea is in bar or abatement is immaterial.

⁴² General and special pleas if nul tiel should not be stricken out on the theory that general denials will present the same issue. *Indianapolis Furnace & Mining Co. v. Herkimer*, 46 Ind. 142.

⁴³ *Riverdale Min. Co. v. Wicks*, 14 Cal. App. 526, 112 Pac. 896.

⁴⁴ Taking continuance pending plea in abatement does not waive it. *Simpson v. East Tennessee, V. & G. R. Co.*, 89 Tenn. 304, 15 S. W. 735.

⁴⁵ §§ 3065-3069, *supra*.

⁴⁶ Thus a plea of nul tiel made in abatement must be made before taking any action tantamount to an appearance, but if made in bar, as it may be, it is proper to plead it afterwards. *Keokuk & H. Bridge Co. v. Wetzel*, 228 Ill. 253, 81 N. E. 864, *aff'g* 130 Ill. App. 81.

⁴⁷ §§ 3071-3086, *infra*.

⁴⁸ Plea to the venue being jurisdictional may be in bar or in abatement.

Great Western Life Assur. Co. v. State, 181 Ind. 28, 102 N. E. 849, rehearing denied 103 N. E. 843.

⁴⁹ Express denial of corporate existence sounds in bar. *Michigan Ins. Bank v. Eldred*, 143 U. S. 293, 36 L. Ed. 162.

By the English rule the plea is in bar if it be that there is no such corporation; but in abatement if it be that the corporation is misnamed. *Water Lot Co. v. Bank of Brunswick*, 53 Ga. 30.

A plea of nul tiel to action by the [municipal] corporation is in bar, and evidence may be received thereon at the trial. *Town of Lewiston v. Proctor*, 27 Ill. 414, citing 1 William's *Saunders* 340a, note 2.

A plea nul tiel that plaintiff has no existence is in bar. *Guaga Iron Co. v. Dawson*, 4 Blackf. (Ind.) 202.

Plea that at and before commencement of suit there was no such corporation as plaintiff is in bar. *Excelsior Draining Co. v. Brown*, 47 Ind. 19.

Nul tiel is in bar if such as precludes plaintiff forever (*dictum*). *Whiton v. Balch*, 203 Mass. 576, 89 N. E. 1045.

existence only at the time is denied,⁵⁰ or if it is in effect one for misnomer it is a plea in abatement⁵¹ but it may be so pleaded, according to good opinion, that it may be one or the other.⁵² A plea to the corporate existence will be considered as in bar, which it may be, and not in abatement unless specially pleaded as such.⁵³ In Illinois the rule takes the form of a rule that if it is denied that plaintiff is a corporation, the plea is in bar, but if it be denied that there is such a corpora-

In bar when it avers no such corporation in existence. *School Dist. No. 3 v. Aldrich*, 13 N. H. 139.

Nul tiel is in bar when existence is totally negatived. *Belvidere Water Co. v. Town of Belvidere*, 82 N. J. L. 601, 83 Atl. 241.

Nul tiel is in bar. *Law Guarantee & Trust Soc. of London v. Hogue*, 37 Ore. 544, 62 Pac. 380, rehearing denied 63 Pac. 690.

Total denial of any corporation at any time is in bar though it appeared in evidence that plaintiff had originally had another name. *Northumberland County Bank v. Eyer*, 60 Pa. St. 436. An answer to an expropriation suit averring failure to comply with conditions of organization and purpose was held not to be a plea in abatement to validity of the corporation, and hence improper, but to present a defense that plaintiff was not a real public utility. *New Orleans Terminal Co. v. Teller*, 113 La. 733, 2 Ann. Cas. 127, 37 So. 624.

⁵⁰ Pleadable in abatement but not in bar that corporation was not such when it sued. *Meikel v. German Sav. Fund Society*, 16 Ind. 181.

⁵¹ When a plea nul tiel is not to a misnomer it is in bar. *Hoereth v. Franklin Mill Co.*, 30 Ill. 151.

Nul tiel is in bar, but mere misnomer is matter of abatement. *Christian Society v. Macomber*, 3 Metc. (Mass.) 235.

A plea of no such corporation is in bar, but a plea of misnomer is only in

abatement. *Sunapee v. Eastman*, 32 N. H. 470.

⁵² On authority of 1 Chitty Pl. 446, the Arkansas court held nul tiel could be pleaded either in abatement or in bar. *Gaines v. Bank of Mississippi*, 12 Ark. 769; *Mahony v. Bank of State*, 4 Ark. 620.

Of foreign corporation should be pleaded in abatement or specially in bar. *Savage Mfg. Co. v. Armstrong*, 17 Me. 34, 35 Am. Dec. 227.

By statute nul tiel may be pleaded in bar or abatement of plaintiff's action. *Trustees of M. E. Church v. Tryon*, 1 Den. 451.

Must be pleaded in abatement or special bar. *Rheem v. Naugatuck Wheel Co.*, 33 Pa. St. 358; *Zion Church v. St. Peter's Church*, 5 Watts & S. (Pa.) 215.

Nul tiel is in bar or in abatement. *Boston Type & Stereotype Foundry v. Spooner*, 5 Vt. 93.

A plea of nul tiel corporation may be in abatement or in bar, but if its capacity to sue in a particular case is challenged, the plea should be in abatement. The capacity to sue is not all that is involved in a denial of corporate existence. *Oregonian Ry. Co., Ltd. v. Oregon Ry. & Nav. Co.*, 23 Fed. 232, citing *Society for Propagation of Gospel v. Pawlet*, 4 Pet. (U. S.) 480, 501, 7 L. Ed. 927.

⁵³ *Oregonian Ry. Co., Ltd. v. Oregon Ry. & Nav. Co.*, 23 Fed. 232; *Oregonian Ry. Co., Ltd. v. Oregon Ry. & Nav. Co.*, 22 Fed. 245.

tion as defendant, it is abatement.⁵⁴ Whether allegations or denials amount to a plea of no corporation or something else may depend on the proper construction of the issues so joined.⁵⁵ Thus a denial that a contract was valid, based on denials of corporate existence, was held to be an issue of nul tiel and not one of ultra vires.⁵⁶ The plea or issue of nul tiel corporation is a special bar and not a general issue.⁵⁷ It is said that it is immaterial under the codes, where all defenses are made in one answer, whether nul tiel is in abatement or in bar,⁵⁸ though this probably means only that for certain purposes of pleading it is immaterial, since by going to the merits without seasonably and properly tendering the issue it is waived.⁵⁹

Pleas to the competency to sue⁶⁰ and pleas of dissolution before suit⁶¹ are not in bar but in abatement.

§ 3071. Mode and sufficiency of answers, denials and pleas—In general. Again the predicate that the law of pleading is general must be laid for all that is said in this and the subsections which follow it. Except as the matters and methods hereinafter mentioned qualify or specialize them, the general rules for pleading or answering to the complaint or bill apply as with natural persons as parties, and it is always assumed that the reader will consult them and be guided by them as well as by the precedents herein collected. A corporation may make its denials on information and belief, or may disavow information and belief as to the facts alleged in the complaint the same as a natural person might do.⁶² But as it knows what its officers know and what its records show, it cannot deny information and belief as to

⁵⁴ A plea denying that plaintiff is a corporation is in bar, but one denying that there is such a corporation as defendant is in abatement. *Gilmer Creamery Ass'n v. Quentin*, 142 Ill. App. 448; *Keokuk & H. Bridge Co. v. Wetzel*, 130 Ill. App. 81, aff'd 228 Ill. 253, 81 N. E. 864.

⁵⁵ See generally §§ 3084-3086, *infra*.

⁵⁶ *Rialto Co. v. Miner*, 183 Mo. App. 119, 166 S. W. 629.

⁵⁷ *Guaga Iron Co. v. Dawson*, 4 Blackf. (Ind.) 202.

⁵⁸ *Davis v. Nebraska Nat. Bank*, 51 Neb. 401, 70 N. W. 963.

⁵⁹ See §§ 3065, 3068, 3069, *supra*.

⁶⁰ Plea to the competency to sue is in abatement. *Oregonian Ry. Co., Ltd. v. Oregon Ry. & Nav. Co.*, 23

Fed. 232; *Jones v. Cincinnati Type Foundry Co.*, 14 Ind. 89.

An answer in form of abatement pleading that defendant is a foreign corporation which has not come within the jurisdiction and has not been served therein on any qualified person, is in abatement and not in bar. *Young v. Providence & S. S. S. Co.*, 150 Mass. 550, 23 N. E. 579.

⁶¹ *Hartsville University v. Hamilton*, 34 Ind. 506; *Jones v. Bank of Tennessee*, 8 B. Mon. (Ky.) 122, 46 Am. Dec. 540.

⁶² *McAuley v. Bromell & Barkley Printing Co.*, 5 N. Y. Civ. Proc. 431, 14 Abb. N. Cas. 316, distinguishing *Shearman v. New York Cent. Mills*, 1 Abb. Pr. (N. Y.) 187; *Thorn & May-*

them; and such a denial will be regarded as evasive, presenting no issue,⁶³ or frivolous.⁶⁴

In chancery courts, including the federal equity courts, an express denial or an admission is requisite, or else a proper averment of a lack of information and belief as to the matters alleged.⁶⁵ Even where oath is waived it should not plead mere ignorance contrary to the rule of chancery, though ignorance or knowledge as a fact may be stated.⁶⁶ Its answer should comprehensively state its knowledge and belief and their sources by alleging the facts "to be made according to the knowledge and information and belief of its officers ascertained from all proper sources of information."⁶⁷ In this connection the simplification of federal equity practice under the New Equity Rules must be noted. Thereby the substance of the foregoing rules appears not to have been substantially changed.⁶⁸ If discovery against officers is prayed the corporation answers in the usual way, leaving each to make his separate answer so that its admissions, offers and concessions shall not be ascribed to him.⁶⁹

nard v. New York Cent. Mills, 10 How. Pr. 19, aff'd sub nom. *Shearman v. New York Cent. Mills*, 1 Abb. Pr. (N. Y.) 187.

⁶³ *Mills v. Jefferson*, 20 Wis. 50.

The corporation cannot deny on information and belief what some one of its officers must know, even though the one verifying may be ignorant of such facts. *Sloane v. Southern California Ry. Co.*, 111 Cal. 688, 32 L. E. A. 193, 44 Pac. 320.

It cannot deny on information and belief where its railroad line is situated. Such a denial makes no issue, and the objection is not waived by going to trial without objection to form of denial. *Chicago, R. I. & E. P. R. Co. v. Wertheim*, 15 N. M. 505, 30 L. E. A. (N. S.) 771, Ann. Cas. 1912 C 148, 110 Pac. 573.

⁶⁴ A denial on information and belief that defendant corporation made the alleged contract is frivolous. *Thorn & Maynard v. New York Cent. Mills*, 10 How. Pr. (N. Y.) 19, aff'd sub. nom. *Shearman v. New York Cent. Mills*, 1 Abb. Pr. (N. Y.) 187.

⁶⁵ The state practice in this regard

is not followed on the equity side. *Commonwealth Title Insurance & Trust Co. v. Cummings*, 83 Fed. 767.

⁶⁶ Anything material to its defense may be put in, hence ignorance of a fact essential to want of notice may be put in. *Balcom v. New York Life Insurance & Trust Co.*, 11 Paige (N. Y.) 454.

⁶⁷ So held of a corporate answer under seal. *French v. First Nat. Bank*, 7 Ben. 488, Fed. Cas. No. 5,099.

⁶⁸ In federal equity practice "the defendant in his answer shall in short and simple terms set out his defense to each claim asserted by the bill, omitting any mere statement of evidence and avoiding any general denial of the averments of the bill, but specifically admitting or denying or explaining the facts upon which plaintiff relies, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial." New Equity Rule 30. See the full text of the remainder of this rule, 226 U. S. app'x.

⁶⁹ *Vermilyea v. Fulton Bank*, 1 Paige (N. Y.) 37.

§ 3072. — **Pleading misnomer.** The necessity of pleading misnomer specially in abatement and the general rules respecting materiality of misnomer have been hitherto stated.⁷⁰ The proper method of pleading misnomer is to negative the name alleged or the fact that the corporation was called by it or known by it, and the true name should be pleaded,⁷¹ and where there has been a new corporation formed, leaving the old one in existence, their identity should be denied or negated.⁷² The motion papers, where motion to correct misnomer by amendment is allowed, should also show the true name.⁷³ A plea of misnomer for trivial variance is frivolous.⁷⁴

§ 3073. — **Pleading nonexistence or nul tiel corporation.** Although there may be a technical or etymological distinction between a plea of nul tiel corporation and one that the party is not a corporation, it is not observed in the cases and is not herein observed. The terms are used interchangeably and if the distinction is made in particular cases the results of the distinction will appear. Akin to the plea that no such corporation exists is the plea that it has been dissolved or succeeded by some other; and pleas nul tiel in name which are really pleas of dissolution have been regarded as such.⁷⁵ For reasons already stated the plea must either be made as one in abatement, or if in bar, as a special one accompanying the answer or general plea, or by demurrer (if that is allowable by the practice and under the state of

⁷⁰ § 3069, *supra*.

⁷¹ Misnomer of plaintiff is not well pleaded by answer alleging that plaintiff is not a corporation and that plaintiff's correct name is as stated in a certain deed. *Associate Presbyterian Congregation of Hebron v. Hanna*, 113 N. Y. App. Div. 12, 98 N. Y. Supp. 1082.

Plea held sufficient but overruling it on demurrer held harmless because complaint was amended to state name correctly. *Savannah, A. & M. Ry. v. Buford*, 106 Ala. 303, 17 So. 395.

It should deny that it has been known or was doing business under the name alleged. *Wilhite v. Convent of Good Shepherd*, 117 Ky. 251, 25 Ky. L. Rep. 1375, 78 S. W. 138.

⁷² If there has been a change of name, and the former name is sued

on, the answer must negative identity of the new and old corporations. *Wilhite v. Convent of Good Shepherd*, 117 Ky. 251, 25 Ky. L. Rep. 1375, 78 S. W. 138.

⁷³ Under the statute misnomer is challenged by motion of either party for an amendment correcting the name on the showing of the right one by affidavit. *First Nat. Bank of Ceredo v. Huntington Distilling Co.*, 41 W. Va. 530, 56 Am. St. Rep. 878, 23 S. E. 792.

⁷⁴ A plea of misnomer consisting only in use or omission of "the" before an otherwise correct name is frivolous and technical. *Southern Ry. Co. v. Hayes*, 183 Ala. 465, 62 So. 874.

⁷⁵ See § 3074, *infra*.

the complaint);⁷⁶ and it cannot be pleaded as supplemental bar after the answer, without being regularly made a part thereof.⁷⁷ As herein-after shown it may now be made by denial in those states which have the code procedure.⁷⁸

Nonexistence of the corporation is an affirmative or special defense and must be pleaded as such according to the now general doctrine. In New York, and perhaps other states, at one time an erroneous doctrine was laid down that corporate existence was a part of the cause of action which the plaintiff must establish, and accordingly the issue was presented by a general issue or general traverse without affirmative pleading. This was abandoned many years ago.⁷⁹ The facts of non-existence must be pleaded affirmatively with precision and certainty and without ambiguity.⁸⁰ Pleas must not equivocate or be pregnant

⁷⁶ See §§ 3065, 3068, 3069, *supra*, as to the order of the pleadings.

⁷⁷ If not made in bar in the original answer it cannot be made by notice of that defense, not made an amendment in form, and by pleading it supplementally. *Dental Vulcanite Co. v. Wetherbee*, 2 Cliff. 555, Fed. Cas. No. 3,810.

⁷⁸ See this section, *infra*.

⁷⁹ See this section, *infra*.

⁸⁰ *United States*. Want of corporate existence and capacity must be pleaded. *Society for Propagation of Gospel v. Pawlet*, 4 Pet. (U. S.) 480, 7 L. Ed. 927.

Alabama. "Not a corporation duly authorized by law to maintain this suit" held sufficient. *Johnson v. Hanover Nat. Bank*, 88 Ala. 271, 6 So. 909.

Georgia. Vague and general allegations are insufficient. *Bell v. Americus, P. & L. R. R.*, 76 Ga. 754.

Indiana. *Beatty v. Bartholomew County Agr. Society*, 76 Ind. 91; *Excelsior Draining Co. v. Brown*, 47 Ind. 19.

New Hampshire. Matter not apparent of record must be raised by plea. *Educational Soc. of Denomination Called Christians v. Varney*, 54 N. H. 376.

New York. Defendants must specially allege nonincorporation. *Lighte v. Everett Fire Ins. Co.*, 18 N. Y. Super. Ct. 716; *Union Mut. Ins. Co. v. Osgood*, 8 N. Y. Super. Ct. 707; *Park Bank v. Tilton*, 15 Abb. Pr. 384; *Bengston v. Thingvalla Steamship Co.*, 3 Civ. Proc. 263. Affirmative allegation and verification are required to take issue on allegation of incorporation (Code Civ. Proc. § 1776) and averment of want of information and belief is not enough. *Concordia Savings & Aid Ass'n v. Read*, 93 N. Y. 474; *Erie & J. R. Co. v. Brown*, 57 Misc. 164, 107 N. Y. Supp. 983; *Platt & Washburn Refining Co. v. Hepworth*, 13 Civ. Proc. 122.

North Carolina. *Stanly v. Richmond & D. R. Co.*, 89 N. C. 331.

Ohio. *Brady v. National Supply Co.*, 64 Ohio St. 267, 83 Am. St. Rep. 753, 60 N. E. 218; *Methodist Episcopal Church of Cincinnati v. John Wood*, 5 Ohio 283, Wright 12; *Brady v. Palmer*, 19 Ohio Cir. Ct. 687, 10 Ohio Cir. Dec. 27.

Oklahoma. *Jantzen v. Emanuel German Bapt. Church*, 27 Okla. 473, Ann. Cas. 1912 C 659, 112 Pac. 1127; *Leader Printing Co. v. Lowry*, 9 Okla. 89, 59 Pac. 242.

South Carolina. If plea substan-

with an implication that the corporation does or may exist otherwise than in the manner alleged,⁸¹ and a denial must be equally certain and unambiguous to join issue on the allegations of existence in the complaint.⁸² An answer affirming nothing but merely objecting that the complaint is defective is not good as an answer though it may be as a demurrer;⁸³ but a later decision of the same state sustained an answer which was in direct violation of this rule⁸⁴ as against an objection that it was frivolous.⁸⁵ Whether it be a sound decision or not matters little, for it is certainly not to be regarded as a model of pleading nor followed as such. A common-law plea must contain enough to give the plaintiff "a better writ"; hence in denying incorporation and averring an association or partnership under the name alleged, all the members should be described.⁸⁶ But a better writ is not required as to matters that cannot exist or be known.⁸⁷ It is not necessary to go beyond a traverse of corporate existence into the particulars which made an organization abortive.⁸⁸ When the complaint is in counts or

tially denies incorporation it is not demurrable. *Bank of Savannah v. Garrett*, 2 Brev. 148.

Demurrer to the plea or other mode of testing pleas see § 3079, *infra*.

⁸¹ Alleging on information and belief that "there is no such corporation as the [plaintiff's name]" does not affirmatively allege that plaintiff is not a corporation. *First Nat. Bank of Saratoga Springs v. Slattery*, 4 N. Y. App. Div. 421, 38 N. Y. Supp. 859.

Allegation that plaintiff "is not duly organized" is bad. *Oregon Cent. R. Co. v. Seoggin*, 3 Ore. 161.

A plea in abatement purporting to be by a name different from the one sued by, and averring that "[name different from defendant's] was not a corporation" is too uncertain. *Grand Lodge Brotherhood of Locomotive Firemen v. Cramer*, 164 Ill. 9, 45 N. E. 165. Same plea also held argumentative. *Id.*

⁸² See this section as to denials, *infra*.

⁸³ An answer couched in the phrasing of a demurrer for failure to plead incorporation will be treated as such.

Bank of Waterville v. Belster, 13 How. Pr. (N. Y.) 270.

⁸⁴ Where there is no allegation that plaintiff is a corporation objection may be made by answer, without positive averment, merely praying whether defendant shall be required to answer. *Second Nat. Bank v. Wells*, 53 How. Pr. (N. Y.) 242.

⁸⁵ *Second Nat. Bank v. Wells*, 53 How. Pr. (N. Y.) 242.

⁸⁶ A plea in abatement that defendant named is not a corporation as alleged and that the individuals who make the plea and who are sued by that name "together with others" do business by that name, is bad because it does not give a better writ by naming such others. *American Exp. Co. v. Haggard*, 37 Ill. 465, 87 Am. Dec. 257.

⁸⁷ Need not give a better writ if facts cannot exist or be known, as on plea nul tiel in abatement. *Boston Type & Stereotype Foundry v. Spooner*, 5 Vt. 93.

⁸⁸ Plea that defendant never was a corporation, etc., held sufficient without averring defects in organization as required by Code, § 2717. *Folsom*

paragraphs, the plea must be framed accordingly; and hence it was held that a plea to the whole complaint was bad if one of the paragraphs was such that corporate existence was one of the issues involved in the cause and therefore at issue generally.⁸⁰ Where common-law forms are preserved, the conclusion of a plea of this kind should not be "to the country," for the reason that it tenders no affirmative issue of fact.⁸¹ Such affidavit or verification as the statute requires must be made and it must not refute the plea.⁸² Judicial knowledge of existence will make the plea untenable,⁸³ but the statute must do more than to contemplate the formation of a corporation if it is to exclude a plea on this ground.⁸⁴

Under the old system of pleading dilatory issues separately, the doctrine became established in accordance with common-law principles that the plea of nul tiel was inadmissible where the same matter could be presented as a part of the general issue as made.⁸⁵ Neither could it be combined in or with the general issue, if it was separate matter of abatement, for pleas in abatement so made were out of time.⁸⁶ If the action was such that the general issue did not involve the fact of incorporation, as in the case cited below, then there was no inconsistency between it and a special plea of nul tiel,⁸⁷ this last principle

v. *Star Union Line Fast Freight Line*, 54 Iowa 490, 6 N. W. 702.

⁸⁰ A plea in abatement to the entire complaint is bad where its second paragraph pleads a preliminary subscription to a proposed corporation, and, in order to meet the requirements of such a case, then alleges the steps to a complete organization. The paragraph thereby makes corporate existence an issue on the merits issuable generally. *Shick v. Citizens' Enterprise Co.*, 15 Ind. App. 329, 57 Am. St. Rep. 230, 44 N. E. 48.

⁸¹ Plea nul tiel involves no affirmation of fact. *Henssler v. A. G. Wiese Drug Co.*, 133 Ill. App. 539.

⁸² See § 3083, *infra*.

⁸³ Nul tiel will not lie to a domestic corporation created ipso facto by a public law judicially noticed. *Hammett v. Little Rock & N. R. Co.*, 20 Ark. 204.

⁸⁴ Such a plea was held good where the statute merely declared that the

Bank of the State "shall be established," though it was a state controlled bank. *Hay v. Bank of State*, 5 Ark. 250; *Mahony v. Bank of State*, 4 Ark. 620.

⁸⁵ *Wert v. Crawfordsville & A. Turnpike Co.*, 19 Ind. 242; *Wood v. Jefferson County Bank*, 9 Cow. (N. Y.) 194; *Bank of Auburn v. Weed*, 19 Johns. (N. Y.) 300.

⁸⁶ *Carpenter v. Mercantile Bank*, 17 Ind. 253; *Woodson v. Bank of Gallipolis*, 4 B. Mon. (Ky.) 203; *School Dist. No. 6 v. Aetna Ins. Co.*, 66 Me. 370.

Denial of existence of corporation suing on official bond of its officer is in abatement, and when included in a plea in bar is nothing. *Wood v. Friendship Lodge, No. 5, I. O. O. F., of Lexington*, 106 Ky. 424, 20 Ky. L. Rep. 2002, 50 S. W. 836.

⁸⁷ In an action on a subscription made before incorporation nonassumpsit and nul tiel corporation are con-

being applicable only where nul tiel was pleaded as a bar and not where it was pleaded as abatement; for as already explained such a plea if regarded as one in abatement must be made before taking any action tantamount to an appearance, but if in bar can be made later.⁹⁷ In the early New York cases these principles, added to the erroneous doctrine that the corporate existence of the corporation was a part of the substance of the cause of action, resulted in making the issue part of the general issue in every or nearly every case. So it followed that nul tiel corporation was not an admissible plea in that state.⁹⁸ The statutes of that state later abrogated the rule as to suits by the corporation leaving the rule stand as to suits against a corporation.⁹⁹ The code afterward adopted did not essentially change the former rules except as to matters pleadable in bar which might formerly have been proved under the general issue. A general denial will reach corporate existence which plaintiff must have proved under the general issue, and only new matter need be answered to avail of it defensively.¹ In an early New York case under the code it was held that suit against the corporation by name importing incorporation but with no affirmative allegation did not tender a material allegation to be denied. An answer by denial was therefore unnecessary, and an answer averring want of incorporation was regarded as not setting up new matter of defense, and was also unnecessary.² From the foregoing it can be better understood how the modern practice has been arrived at.

The general issue was not adapted to make this issue, for the reason

sistent because one makes issue of the subscribing and the other to the existence of the corporation. *Hoereth v. Franklin Mill Co.*, 30 Ill. 151. But under Practice Act, § 14, they might be pleaded though inconsistent. *Id.*

⁹⁷ *Keokuk & H. Bridge Co. v. Wetzel*, 228 Ill. 253, 81 N. E. 864, aff'g 130 Ill. App. 81.

⁹⁸ *Dorman v. Long*, 2 Barb. (N. Y.) 214; *Wood v. Jefferson County Bank*, 9 Cow. (N. Y.) 194; *Bank of Utica v. Smalley*, 2 Cow. (N. Y.) 770, 14 Am. Dec. 526, aff'd 8 Cow. (N. Y.) 398; *Bank of Auburn v. Weed*, 19 Johns. (N. Y.) 300; *Farmers' & Mechanics' Bank v. Rayner*, 2 N. Y. Super. Ct. 195. *Contra*, *Bank of Auburn v. Aikin*, 18 Johns. (N. Y.) 137.

⁹⁹ *Stoddard v. Onondaga Annual Conference of Methodist Protestant Church*, 12 Barb. (N. Y.) 573.

¹ *Stoddard v. Onondaga Annual Conference of Methodist Protestant Church*, 12 Barb. (N. Y.) 573.

The code, by saving existing statutes "relating to actions, not inconsistent with" it, did not abrogate the rule that a special plea was necessary to put existence in issue. *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309.

² *Stoddard v. Onondaga Annual Conference of Methodist Protestant Church*, 12 Barb. (N. Y.) 573.

pregnant with an inference or admission that the corporation exists in some other manner than alleged,¹¹ will not present the issue. The answer should either admit or deny incorporation and not evade the issue by refusing for alleged want of information to do either.¹² A denial on information and belief, or an averment that defendant is without information and belief, is not sufficient¹³ especially in a state where denials are required to be specific and not general.¹⁴ Even the general denial, though permissible ordinarily, has in one state been held not sufficient to join this issue positively.¹⁵ Exceptions have

¹¹ Denial that defendant "is a corporation owning and operating a railroad" as alleged, is ambiguous. *Chicago, R. I. & P. Ry. Co. v. State*, 84 Ark. 409, 106 S. W. 199.

Denial that plaintiff as alleged "is a corporation duly organized under the laws of New York" is pregnant with an admission that it was organized irregularly. *State v. Board Com'rs Cass Co.*, 53 Neb. 767, 74 N. W. 254.

Denial of existence of a corporation as misnamed is bad where in other parts of the papers it is correctly entitled. *Canandarqua Academy v. McKechnie*, 19 Hun (N. Y.) 62.

Denial that defendant is a corporation of England is pregnant with admission that it is incorporated elsewhere. *Wright v. Fire Ins. Ass'n of London*, 12 Mont. 474, 19 L.-R. A. 211, 31 Pac. 87.

Denial of incorporation in alleged state is negative pregnant. *McCormick Harvesting Mach. Co. v. Hovey*, 36 Ore. 259, 59 Pac. 189.

General denial of complaint (which alleged incorporation), except as "admitted or qualified" followed by allegations that defendant did certain acts, but without any allegation of the capacity in which it did them, is qualified by them and incorporation of defendant is thereby admitted. *St. Anthony Falls Water-Power Co. v. King Wrought Iron Bridge Co.*, 23 Minn. 186, 23 Am. Rep. 682.

¹² *Gaynor v. Travelers' Ins. Co.*, 12 Ga. App. 601, 77 S. E. 1072.

¹³ *First Nat. Bank of Rock Island v. Loyhed*, 28 Minn. 396, 10 N. W. 421.

Denial for want of information and belief is not sufficient on a complaint alleging incorporation under existing laws. *Iowa Savings & Loan Ass'n v. Selby*, 111 Iowa 402, 82 N. W. 968.

Denial on information and belief that defendant is a foreign corporation of Denmark is bad. *Bengston v. Thingvalla S. S. Co.*, 31 Hun (N. Y.) 96, 4 N. Y. Civ. Proc. 260.

¹⁴ Averment of want of information and belief is not sufficient under a statute admitting only of specific denials. Incorporation should also be positively denied. *Law Guarantee & Trust Soc. of London v. Hogue*, 37 Ore. 544, 62 Pac. 380 (Moore, J., dissenting as to this point), rehearing denied 63 Pac. 690.

A denial of information and belief as to plaintiff's incorporation is frivolous. It must be specific under the statute to raise an issue. *Crane Bros. Mfg. Co. v. Morse*, 49 Wis. 368, 5 N. W. 815.

¹⁵ Must be specifically denied when alleged. *Fletcher v. Co-operative Pub. Co.*, 58 Neb. 511, 78 N. W. 1070; *Davis v. Nebraska Nat. Bank*, 51 Neb. 401, 70 N. W. 963; *Herron v. Cole Bros.*, 25 Neb. 692, 41 N. W. 765; *Dietrichs v. Lincoln & N. W. R. R.*, 13 Neb. 43, 13 N. W. 13; *National Life Ins. Co. v. Robinson*, 8 Neb. 452, 1 N. W. 124; *Chamberlain Banking House v. Kemper, Hundley & McDonald Dry Goods*

been made allowing defendant to deny plaintiff's incorporation on information and belief¹⁶ the requisites of specifiveness being otherwise met.¹⁷ And a defendant cannot be debarred in a proper case from denying on information because of the existence of supposed public records of the corporate formation with which defendant has had nothing to do and no opportunity to inspect.¹⁸ A denial of the existence of the statute under which a foreign corporation pleads its existence, is a sufficient denial.¹⁹ A de facto existence may be denied as well as a de jure one.²⁰ New matter additional to the denials must be alleged if they do not fully present the issue desired.²¹ In federal patent cases the issue of incorporation may arise on the question of jurisdiction where the corporation has a place of business; and the denial of the jurisdictional allegations must be made to call for proof.²²

The facts are to be pleaded in time corresponding to that when the action was brought²³ through one case intimates that it is better pleading to negative that there ever was such a corporation.²⁴ And this seems sound in view of the distinction between this plea and that of

Co., 3 Neb. (Unoff.) 549, 92 N. W. 175.

¹⁶ A denial on information and belief that plaintiff is a corporation (as necessarily alleged) puts that fact in issue. *Milwaukee Gold Extraction Co. v. Gordon*, 37 Mont. 209, 95 Pac. 995.

¹⁷ Express denial though on information and belief is sufficient under Wisconsin statutes requiring a "specific denial" verified. *Michigan Ins. Bank v. Eldred*, 143 U. S. 293, 36 L. Ed. 162.

¹⁸ The fact that the corporate existence is a matter of record does not entail on a defendant who had no connection with the transaction evinced by such record, the duty of knowing it actually. The constructive notice of such a record does not prevent a denial of information and belief respecting plaintiff's existence. *Oregonian Ry. Co., Ltd. v. Oregon Ry. & Nav. Co.*, 22 Fed. 245, in which it was alleged that plaintiff as a corporation of England.

¹⁹ A plea denying existence of the

statute under which a foreign corporation pleads existence is a plea nul tiel. *Guaga Iron Co. v. Dawson*, 4 Blackf. (Ind.) 202.

²⁰ *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368.

²¹ A mere denial of incorporation will not plead an attempted incorporation since a given constitution was in force, and that it was void for non-compliance therewith. *Ridenour v. Mayo*, 29 Ohio St. 138.

²² *Fox v. Knickerbocker Engraving Co.*, 140 Fed. 714.

²³ *Coates v. Galena & C. U. R. Co.*, 18 Iowa 277.

Plea that plaintiff was not a corporation when suit was begun is good. *Morgan v. Lawrenceburgh Ins. Co.*, 3 Ind. 285.

²⁴ It seems that good pleading requires allegation that there never was at any time such a corporation as alleged, and not merely that there was none at the day the writ issued or since. *Northumberland County Bank v. Eyer*, 60 Pa. St. 436.

dissolution, which presupposes a former existence.²⁵ The contrary reasoning seems to pervade a decision founded on the law of California, for it holds that a denial by defendant that it ever existed is bad pleading.²⁶ It is not inconsistent at any rate to allege non-existence at a time certain and to admit that it existed at another time.²⁷

The Massachusetts statute abolishing special pleas in bar and special demurrers provided for making the defenses by giving notice of them specifically, and a defense that plaintiff is not a corporation being in bar, may be so made.²⁸ In Mississippi the same practice is established,²⁹ but this practice does not apply to this plea in Illinois.³⁰

In condemnation and other special proceedings the usual rules have been applied respecting the joining of this plea with a general one obnoxious to it,³¹ and respecting the requisites of a denial.³²

When the question of corporate existence arises on a motion, it

²⁵ See § 3074, *infra*.

²⁶ A specific denial by defendant that it ever existed is bad; it should state that it has ceased to exist or has been dissolved. *Perris Irrigation Dist. v. Thompson*, 116 Fed. 832.

The inconsistency of a corporation denying its own existence is met in some states by making the plea under another name as that of the officers or others. See § 3066, *supra*.

²⁷ A plea of nonexistence at a time certain is consistent with an admission of existence at another time. *Guaga Iron Co. v. Dawson*, 4 Blackf. (Ind.) 202.

²⁸ *Townsend v. First Freewill Bapt. Church*, 6 Cush. (Mass.) 279, 281; *Christian Society v. Macomber*, 3 Metc. (Mass.) 235.

Defendant after appearance and filing of affidavit of merits may plead that it is not a corporation. Appearance waives only defects in service. *Greenwood v. Lake Shore R. Co.*, 10 Gray (Mass.) 373.

²⁹ With the general issue in assumption a special affidavit denying plaintiff's existence may be given, though formerly nul tiel was regarded as included in the general issue to action

by the corporation. *Vicksburg Waterworks & Banking Co. v. Washington*, 9 Miss. 536.

The general issue is sufficient to raise the issue when accompanied by the defendant's affidavit denying plaintiff's existence. *Vicksburg Waterworks & Banking Co. v. Washington*, 9 Miss. 536.

³⁰ An issue of nul tiel cannot be raised by notice of defenses under the general issue. *H. Bailey & Co. v. Valley Nat. Bank*, 21 Ill. App. 642, *aff'd* 127 Ill. 332, 19 N. E. 695.

³¹ In a condemnation proceeding nul tiel corporation cannot be pleaded in the same answer with a defense in bar that the land is not subject to appropriation or with a plea of the value of the land. *Oregon Cascade R. Co. v. Baily*, 3 Ore. 164; *Oregon Cent. R. Co. v. Wait*, 3 Ore. 91.

³² Under the rule that condemnation and other special proceedings shall conform as near as possible to actions, the corporate existence of petitioner must be denied positively (Code Civ. Proc. § 1776) and a denial on information and belief is not enough. *Long Island R. Co. v. Jones*, 151 N. Y. App. Div. 407, 135 N. Y. Supp. 954.

may either be tried without pleadings or a plea may be put in to be tried on an issue made up.³³

§ 3074. — Pleading dissolution, extinction, change or suspension. Subject to the exception of those cases wherein the corporate existence is prolonged after expiration or dissolution for such time as may be given to wind up, the corporation cannot sue or defend if it has been dissolved or become extinct. This is an obstacle to any suit.³⁴ The same sometimes follows as a result of suspension by a receivership or insolvency³⁵ or as a penalty or condition under some statute, such as those which require payment of a license tax or the filing of articles. Corporate succession or change has similar effects according to its nature.³⁶

Dissolution may be pleaded in general terms, at least in the absence of demurrer,³⁷ but it is requisite, if challenged, to plead the various facts leading to it as a legal conclusion;³⁸ and therefore allegations of nothing more than nonuser or cessation of business,³⁹ or insolvency and liquidation,⁴⁰ or of a resolution or consent to dissolve without sur-

³³ On a motion by a corporation, the corporate existence may be tried without pleadings, since there are no formal pleadings on a motion; or a formal plea may be filed to be tried by the court or a jury as it is advised. *Central Land Co. v. Calhoun*, 16 W. Va. 361.

³⁴ Chapter on Forfeiture, Dissolution and Winding Up, *infra*.

³⁵ Chapters on Insolvency; Receivers, *infra*.

³⁶ Chapters on Consolidation and Merger; Reorganization, *infra*.

³⁷ *Merritt v. Gate City Nat. Bank*, 100 Ga. 147, 38 L. R. A. 749, 27 S. E. 979; *Herkimer County Bank v. Furman*, 17 Barb. (N. Y.) 116.

³⁸ *Brookville & G. Turnpike Co. v. McCarty*, 8 Ind. 392, 65 Am. Dec. 768.

The plea must not only aver expiration of the charter but also a completed winding up of its business, else it is demurrable because inferentially the corporation continued *de facto*. *Miller v. Newburg Orrel Coal Co.*, 31 W. Va. 836, 13 Am. St. Rep. 903, 8 S.

E. 600, where cause accrued after expiration of term.

³⁹ *John v. Farmers' & Mechanics' Bank*, 2 Blackf. (Ind.) 367, 20 Am. Dec. 119.

In addition to nonuser a judicial forfeiture must be averred. *West v. Carolina Life Ins. Co.*, 31 Ark. 476.

Averment that it has ceased to transact business is insufficient (action against bank and stockholders to charge them). *Valley Bank & Savings Inst. v. Ladies' Congregational Sewing Society*, 28 Kan. 423.

The facts determining its existence should be alleged. Allegation that it has ceased to continue its organization is bad. *Sutherland v. Largo & M. Plank Road Co.*, 19 Ind. 192.

⁴⁰ A plea null tiel to an action by a bank in liquidation but not extinguished by the liquidating act is bad. *Conway v. Bank of State*, 15 Ark. 51; *Ferguson v. State Bank*, 8 Ark. 416; *Murphy v. Bank of State*, 7 Ark. 57; *Underhill v. State Bank*, 6 Ark. 135.

render and acceptance of the charter,⁴¹ or of forfeiture,⁴² will be held insufficient. A plea of dissolution must allege that it was, not that it might have been, dissolved.⁴³ A continuance de facto after expiration de jure should be negatived.⁴⁴ Consolidation and merger must also be pleaded according to the facts.⁴⁵ A merger pendente lite must be pleaded or will be waived,⁴⁶ and it should be pleaded supplementally or by amendment.⁴⁷

Nonpayment of license tax working suspension of the right to sue must be specially pleaded,⁴⁸ or the failure to file articles as a condition of the right to sue⁴⁹ must be specially pleaded unless the statute requires allegation of the payment, in which case denial suffices.⁵⁰

The plea cannot be made on information and belief of a fact or an

⁴¹ *Harris v. Muskingum Mfg. Co.*, 4 Blackf. (Ind.) 267, 29 Am. Dec. 372.

Must state how and by what act. A resolution to dissolve is not enough. *Hartsville University v. Hamilton*, 34 Ind. 506; *Beaver v. Hartsville University*, 34 Ind. 245; *Portland Dry Dock & Insurance Co. v. Portland*, 51 Ky. 77.

⁴² Allegation of forfeiture held insufficient. *Jones v. Bank of Tennessee*, 47 Ky. 122, 46 Am. Dec. 540.

Allegations sustained as sufficient to plead forfeiture for nonpayment of license tax, though loose and inartificial. *Kehrlein-Swinerton Const. Co. v. Rapken*, 30 Cal. App. 11, 156 Pac. 972.

Where the plea is grounded on failure to file its annual report or designate an agent and on the resultant forfeiture, it must show that no reinstatement had taken place, that the forfeiture was judicially declared in a direct proceeding, and that more than the two years of continued existence have elapsed since expiration. *St. Louis Stearns Auto Co. v. Singers*, 179 Ill. App. 556; *Henssler v. A. G. Wiese Drug Co.*, 133 Ill. App. 539.

⁴³ *Brookville & G. Turnpike Co. v. McCarty*, 8 Ind. 392, 65 Am. Dec. 768.

⁴⁴ The plea must contain allegations in addition to those of expiration that it wound up and ceased both de

facto and de jure. *Miller v. Newburg Orrel Coal Co.*, 31 W. Va. 836, 13 Am. St. Rep. 903, 8 S. E. 600.

⁴⁵ The facts of a consolidation and adoption of a new name must be pleaded. *Hubbard v. Chappel*, 14 Ind. 601, but in this *Quit* the corporation apparently was not a party.

⁴⁶ *Logan v. Pennsylvania Tel. Co.*, 40 Pa. Super. Ct. 644.

⁴⁷ § 3080, *infra*.

⁴⁸ An admission of incorporation of plaintiff includes its capacity to sue. If it is desired to plead loss of such capacity by nonpayment of license tax that must be specially pleaded. *Alaska Salmon Co. v. Standard Box Co.*, 158 Cal. 567, 112 Pac. 454.

⁴⁹ A denial of corporate existence does not present the defense. *Ontario State Bank v. Tibbits*, 80 Cal. 68, 22 Pac. 66; *Southern Pac. R. Co. v. Pursell*, 77 Cal. 69, 18 Pac. 886.

Objection for failure to file articles cannot be first made on motion for new trial. *Labory v. Los Angeles Orphan Asylum*, 97 Cal. 270, 32 Pac. 231.

⁵⁰ Nonpayment of license fee must be denied by answer when alleged or no issue is made. *Mary M. Miller & Sons v. Simmons*, 67 Wash. 294, 121 Pac. 462.

omission, whereof a public record affords certain knowledge.⁵¹ When the dissolution or other matter of abatement occurs *pendente lite*, it should be pleaded or suggested supplementally.⁵²

§ 3075. — Pleading want of jurisdiction — In general. A technical distinction exists between a plea in abatement to test whether jurisdiction has been obtained and a plea to the jurisdiction proper, which is a total bar to the hearing by the court.⁵³ Demurrer to the jurisdiction⁵⁴ and objection by motion to the service have been discussed in earlier sections.⁵⁵ The plea should be certain to every intent, not argumentative, and should be direct, positive, accurate and precise.⁵⁶ If it equivocates between two grounds it is bad for duplicity.⁵⁷

⁵¹ A denial of corporate existence on information and belief cannot be predicated on a forfeiture for nonpayment of license tax, since that must pass into a public record before corporate existence ceases. Neither can it be based on a surmise that it may not have been paid, official action being necessary to a forfeiture. *William Wilson Co. v. Trainor*, 27 Cal. App. 43, 148 Pac. 954.

⁵² § 3080, *infra*.

⁵³ A plea to the jurisdiction in the nature of a plea in abatement, merely to test whether jurisdiction has been obtained, does not need to show a complete bar forever to such jurisdiction or give a better writ, though it commences and concludes like a plea to the jurisdiction. And it need not be verified. *American Spirits Mfg. Co. v. Peoria Belt Ry. Co.*, 154 Ill. App. 330; *Beck & Pauli Lithographing Co. v. Monarch Brewing Co.*, 131 Ill. App. 645.

The return of service may be traversed by a plea in abatement for not serving the president. *Chicago Sectional Elec. Underground Co. v. Congdon Brake Shoe Mfg. Co.*, 111 Ill. 309.

⁵⁴ § 3068, *supra*.

⁵⁵ § 3014, *supra*.

⁵⁶ A plea in abatement that the president was not served should aver that the sheriff was able to find him,

or it will be stricken as immaterial. *Chicago Sectional Elec. Underground Co. v. Congdon Brake Shoe Mfg. Co.*, 111 Ill. 309.

A plea in abatement for service on an incompetent person should allege that he was so when service was made. *Ohio Oil Co. v. Griest*, 30 Ind. App. 84, 65 N. E. 534.

It must be alleged what the service was which is attacked and aver that there was no other service. Averment that "it appears" that the only service was, etc., is bad. *Perry v. New Brunswick Ry. Co.*, 71 Me. 359.

A plea to the service returned as made on an agent should traverse the fact of agency and not merely plead the place of the principal office, where service might have been made on an agent elsewhere than at such office. *Galveston, H. & S. A. R. Co. v. Gage*, 63 Tex. 568.

General denial does not suffice. *National Life Ins. Co. v. Robinson*, 8 Neb. 452, 1 N. W. 124.

Must be positive and certain. *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582.

⁵⁷ A plea to the writ is bad for duplicity if it presents equally well the invalidity of the process by reason of nonaccrual of the cause within the jurisdiction, or by reason of want of residence of a co-defendant there,

When the plea is to the venue, every inference must be excluded that the one chosen might be allowable,⁵⁸ the facts being specially pleaded and a demurrer not being efficient to question the facts as alleged.⁵⁹ Matters of record such as the designation of an agent for service cannot be pleaded on information and belief.⁶⁰ The plea must show what was the proper jurisdiction.⁶¹ Judgment must be prayed with a conclusion whether the court will take cognizance of the action.⁶²

§ 3076. — In federal courts. Little besides the allegation of citizenship as an element in federal jurisdiction has any peculiar application to corporations; and as the jurisdictional facts must be alleged,⁶³ the allegation of the want of such jurisdiction will necessarily either by demurrer or answer traversing such allegations according to the practice in the district court following that of the state on the law side, and according to the rules of equity on that side. Ever since *Louisville, C. & C. R. Co. v. Letson* was decided it has been necessary to traverse the corporation's alleged place of incorporation and location rather than that of its members.⁶⁴ In a patent infringement case

either being one of the essential grounds for suit against the pleader, a foreign corporation. *Guarantee Co. of North America v. First Nat. Bank*, 95 Va. 480, 28 S. E. 909.

⁵⁸ *Southern R. Co. v. Harrington*, 166 Ala. 630, 139 Am. St. Rep. 59, 52 So. 57; *Alabama Western R. Co. v. Wilson*, 1 Ala. App. 306, 55 So. 932.

A plea of privilege of venue should, in addition to setting out defendant's domicile, allege that it had no agent in the county where sued. *Gulf, C. & S. F. Ry. Co. v. Pickens* (Tex. Civ. App.), 58 S. W. 156.

⁵⁹ An allegation laying the accrual of the cause of action and the making of the contracts sued on in the county where action is brought gives the court jurisdiction, and if untrue it must be traversed by affirmative pleading and not by demurrer. *Glen-dale Lumber Co. v. Beekman Lumber Co.*, 152 Mo. App. 386, 133 S. W. 384.

⁶⁰ Denial on information and belief that an agent had been designated for service and statutory conditions com-

plied with is bad, where all such facts were ascertainable of record. *Nelson Bennett Co. v. Twin Falls Land & Water Co.*, 14 Idaho 5, 93 Pac. 789.

⁶¹ *Guarantee Co. of North America v. First Nat. Bank*, 95 Va. 480, 28 S. E. 909.

⁶² A plea to the jurisdiction is strictly regarded. *Guarantee Co. of North America v. First Nat. Bank*, 95 Va. 480, 28 S. E. 909.

It should conclude, "whether the court can or will take further cognizance of the action," not "that the suit abate and be dismissed." *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582.

⁶³ § 3050, *supra*.

⁶⁴ A plea that defendant "is not a corporation whose members are citizens of" a state is insufficient to overcome diversity alleged in the complaint or declaration. *Louisville, C. & C. R. Co. v. Letson*, 2 How. (U. S.) 497, 11 L. Ed. 353, a leading case on citizenship of corporations."

jurisdiction founded on the incorporation and doing of business where the infringement occurred, must be denied and thus put in issue.⁶⁵

§ 3077. — Pleading want of authority to represent or appear for corporation. There appears to be no way of questioning the authority of the attorney to appear for the corporation different from that applying to natural persons. Reference should therefore be had to treatises on attorneys and clients and to the local statutes. The authority of the agent and even the fact that an agent acted, not being a necessary fact to be pleaded in the complaint against a corporation,⁶⁶ it follows that a *défense* of want of authority, as in the case of a natural principal, must be specially pleaded,⁶⁷ unless by alleging such facts the defense is opened to a denial.⁶⁸ The facts making an election illegal must be pleaded in the answer,⁶⁹ and a denial of authority must not admit inferentially that there was a ratification.⁷⁰ A plea of *non est factum* to the instrument is not sufficient if other allegations invite the inference that there was authority,⁷¹ or if on the apparent facts the want of authority was extrinsic to the factum of the instrument.⁷²

⁶⁵ *Fox v. Knickerbocker Engraving Co.*, 140 Fed. 714.

⁶⁶ §§ 3055, 3057, *supra*.

⁶⁷ *Simon v. Calfee*, 80 Ark. 65, 95 S. W. 1011; *Malone v. Crescent City Mill & Transportation Co.*, 77 Cal. 38, 18 Pac. 858. Answer held sufficient in *City Elec. St. Ry. Co. v. First Nat. Bank*, 62 Ark. 33, 31 L. R. A. 535, 34 Am. St. Rep. 282, 34 S. W. 89, cited in *Western Development & Investment Co. v. Caplinger*, 86 Ark. 287, 110 S. W. 1039, to point that such defense must be pleaded.

Want of authority to make contract sued on must be affirmatively alleged when averred in the complaint. *Wilcox v. Durham & C. R. Co.*, 152 N. C. 316, 67 S. E. 758.

⁶⁸ Question, whether the agent's want of authority to execute note sued on must be specially denied. *Dewey v. Toledo, A. A. & N. M. Ry. Co.*, 91 Mich. 351, 51 N. W. 1063.

⁶⁹ An answer pleading defensively

that the board was not legally elected and did not legally elect defendant's successor, held insufficient in facts to show illegality. *Jones v. Hilldale Cemetery Society*, 23 Ky. L. Rep. 1486, 65 S. W. 838.

⁷⁰ Denial of authority held pregnant with admission of ratification by use of fruits of contract. *Agle v. Standard Drug Co.*, 29 Mont. 111, 74 Pac. 135.

⁷¹ A plea of *non est factum* to a note based on want of authority in the signing officer, is bad where it is also averred in substance that the note was given by the president's authority pursuant to a contract. *J. L. Phillips & Co. v. Hudson*, 9 Ga. App. 779, 72 S. E. 178.

⁷² Authority to execute and deliver authorized bonds cannot be raised by a sworn plea of *non est factum*. *McCormick v. Unity Co.*, 239 Ill. 306, 87 N. E. 924, *aff'd* judgment 142 Ill. App. 159.

§ 3078. — **Pleading particular defenses of substance.** The word “defenses” is often used loosely and imprecisely in the law of pleading and procedure. In actions where a corporation is a party “defenses” are of great variety, while the questions of pleading are nearly all reducible to well-known general rules of pleading. Far the most frequent of the defenses urged in actions by or against a corporation, which are distinctively of pertinency to corporations and corporation law, is that of *ultra vires* or want of corporate power. Next to that and akin to it is that of illegality because of some law denying corporate power. Another frequent defense is that of want of authority of the agent or officer to bind the corporation. There are others of a savor peculiar to corporations, among which, as an example, may be mentioned the defense in an action on a subscription for stock that the precedent conditions of complete or legal organization have not been performed.

This enumeration is made as a premise for the statement, which the cases will bear out, that these and other defenses are all pleadable according to the general law of pleading. The defenses like the causes of action consist of the substantive law relating to the facts pleaded, and belong to other chapters of this work, as a rule, even where they are peculiar to corporations. Thus, returning to *ultra vires*, the question whether the lack of power or the illegality is a defense belongs to the chapters treating thereof, and the cognate question whether a given contract is within the powers belongs in other chapters.⁷³ The pleading therefore takes on only the general question in actions *ex contractu* of how the defenses of invalidity or illegality, incapacity of the party, or *non est factum* (no such contract) shall be pleaded, or of how any of the other ordinary defenses such as performance, release or discharge shall be pleaded. Even *ultra vires*, though not generally pleadable by a stranger, may be urged in many actions outside of the scope of this chapter,⁷⁴ and by the common forms of pleading. All that can properly be done here in view of the foregoing is to collect enough illustrative cases to afford a guide to the pleading of defenses, leaving the reader with the admonition to found all that is said on the general law of pleading as an assumed predicate.

The rule is general and settled that the defense of *ultra vires* is an affirmative one and must be specially pleaded as such, either by or against the corporation.⁷⁵ This is said to be especially necessary if the

⁷³ See Chaps. 21-38 inclusive, *supra*, and especially Chaps. 37 and 38 on *Ultra Vires* and *Illegal Contracts*.

⁷⁴ See §§ 1523-1529, *supra*.

⁷⁵ *United States. Breakwater Co. v. Donovan*, 218 Fed. 340.

corporation is foreign.⁷⁶ Pleading in general terms that the power was lacking may suffice as a special allegation, if not challenged for uncertainty and want of particulars.⁷⁷ A plea to the whole of a bill which alleged a contract out of the "usual and necessary" course of business is therefore bad.⁷⁸ If the charter is by private act it must be

Alabama. *Southern States Fire & Casualty Ins. Co. v. Lunsford*, 192 Ala. 76, 68 So. 273; *National Guarantee Loan & Trust Co. v. Yeatman*, 121 Ala. 594, 25 So. 1003. Want of power in plaintiff to hold land must be pleaded to an action by it of trespass to try title. *Healey v. Branch Bank*, 16 Ala. 552.

Arizona. *Arizona Life Ins. Co. v. Lindell*, 15 Ariz. 471, 140 Pac. 60.

Idaho. *Meholin v. Carlson*, 17 Idaho 742, 134 Am. St. Rep. 286, 107 Pac. 755.

Illinois. *Weigel v. W. C. Reebe & Bro. Co.*, 192 Ill. App. 283; *Chicago Pneumatic Tool Co. v. Munsell*, 107 Ill. App. 344.

Iowa. *Iowa Business Men's Building & Loan Ass'n v. Berlau*, 125 Iowa 22, 98 N. W. 766. So by statute, *Commercial Bank v. King*, 47 Iowa 64.

Kentucky. *Martin v. Kentucky Lands Inv. Co.*, 146 Ky. 525, Ann. Cas. 1913 C 332, 142 S. W. 1038; *Louisville Tobacco Warehouse Co. v. Stewart*, 24 Ky. L. Rep. 934, 70 S. W. 285; *Greene v. Middlesborough Town & Lands Co.*, 22 Ky. L. Rep. 1715, 61 S. W. 288.

Louisiana. *New Iberia Rice-Milling Co. v. Romero*, 105 La. 439, 29 So. 876.

Maryland. *Conowingo Land Co. of Cecil County v. McGaw*, 124 Md. 643, 93 Atl. 222; *Hagerstown Brewing Co. v. Gates*, 117 Md. 348, 83 Atl. 570.

Massachusetts. *Nashua & L. R. Corporation v. Boston & L. R. Corporation*, 157 Mass. 268, 31 N. E. 1060.

Missouri. *Richard Hanlon Millinery Co. v. Mississippi Valley Trust Co.*, 251 Mo. 553, 158 S. W. 359; *German Sav. Inst. v. Jacoby*, 97 Mo. 617, 11

S. W. 256; *Hough v. St. Louis Car Co.*, 182 Mo. App. 718, 165 S. W. 1161; *Williams v. Verity*, 98 Mo. App. 654, 73 S. W. 732.

Nebraska. *Citizens' State Bank v. Pence*, 59 Neb. 579, 81 N. W. 623.

New York. *Strodl v. Farish-Stafford Co.*, 145 App. Div. 406, 130 N. Y. Supp. 35, rev'g 67 Misc. 402, 122 N. Y. Supp. 609; *Stanton v. Erie R. Co.*, 131 App. Div. 879, 116 N. Y. Supp. 375; *Bacon v. Montauk Brewing Co.*, 130 App. Div. 737, 115 N. Y. Supp. 617; *Karsch v. Pottier & Stymus Manufacturing & Improvement Co.*, 82 App. Div. 230, 81 N. Y. Supp. 782; *Hess v. W. & J. Sloane*, 66 App. Div. 522, 73 N. Y. Supp. 313, aff'd 173 N. Y. 616, 66 N. E. 1110 (mem. dec.); *Keating v. American Brewing Co.*, 62 App. Div. 501, 71 N. Y. Supp. 95.

⁷⁶ *Griesa v. Massachusetts Ben. Ass'n*, 60 Hun (N. Y.) 581, 15 N. Y. Supp. 71.

Want of power in a foreign corporation to take above a certain rate of interest must be pleaded as a defense. *Bennington Iron Co. v. Rutherford*, 18 N. J. L. 158.

⁷⁷ "Was ultra vires the corporation," sufficiently pleads the defense and is not a bare conclusion. *Marengo Abstract Co. v. C. W. Hooper & Co.*, 174 Ala. 497, 56 So. 580.

A general allegation will not be good against a special demurrer. *Hart v. Phenix Ins. Co.*, 113 Ga. 859, 39 S. E. 304.

⁷⁸ Held insufficient to question the power to make the particular contract. *Madison, W. & M. Plank Road Co. v. Watertown & P. Plank Road Co.*, 5 Wis. 173.

pleaded to make out the want of power,⁷⁹ and similarly the law of a foreign corporation should be pleaded.⁸⁰ When power is alleged defensively as conferred by amendment it must plead the amendment as having been in time to give the power and justify the act.⁸¹ Legal incapacity of a corporate petitioner in probate to take a legacy must be raised by plea to the petition.⁸² If the defense is to be made, according to local practice, under an answer with notice of special defenses, the notice must be duly given.⁸³

Want of authority in officers or agents to bind the corporation is a different thing from "ultra vires," though sometimes inaccurately used in that sense,⁸⁴ and yet the rule is the same as to the necessity of specially pleading it both in contract⁸⁵ and tort actions based on an officer's acts,⁸⁶ unless authority to execute the instrument sued on is alleged, when the defense may be made by denial of that authority.⁸⁷ Denial of the factum of a contract includes denial of the officer's authority to make it.⁸⁸ This is nothing but the general law of pleading applied to the substantive law of agency.⁸⁹ If the officer be joined with the corporation, it may be requisite for him to plead his powers and functions as a defense or response on his part.⁹⁰

⁷⁹ *Charleston & J. Turnpike Co. v. Willey*, 16 Ind. 34. Rule as to pleading in complaint, see §§ 3044, 3054, *supra*.

⁸⁰ In case of a foreign corporation the foreign law should be pleaded which determines its powers. *Mason v. Standard Distilling & Distributing Co.*, 85 N. Y. App. Div. 520, 83 N. Y. Supp. 343, 13 N. Y. Ann. Cas. 264.

See also chapter on Foreign Corporations, *infra*.

⁸¹ Must exclude the inference that the amendment came too late to justify the act alleged. *Greene v. Aurora Rys. Co.*, 158 Fed. 909.

⁸² A plea to petition in probate that petitioner corporation is "not a legal legatee" is a conclusion of law, and will not raise an issue of corporate capacity. *Alabama Conference M. E. Church v. Price*, 42 Ala. 39.

⁸³ *Blackwood v. Lansing Chamber of Commerce*, 178 Mich. 321, 144 N. W. 823; *Niles v. Benton Harbor-St. Joe Ry. & Light Co.*, 154 Mich. 378, 117 N. W. 937, 15 Det. L. N. 757.

⁸⁴ § 1513, *supra*.

⁸⁵ It must be specially pleaded that the officer had no power to make the contract sued on. *United States v. West Side Irrigating Co.*, 230 Fed. 284; *Thomas Gordon Malting Co. v. Bartels Brewing Co.*, 206 N. Y. 528, 100 N. E. 457, 461.

⁸⁶ Want of authority of officer to institute an action, if relied on as a defense in a suit for false imprisonment growing out of such action, must be specially pleaded. *Wachsmuth v. Merchants' Nat. Bank*, 96 Mich. 426, 21 L. R. A. 278, 56 N. W. 9.

⁸⁷ *Rock Island Lumber & Manufacturing Co. v. Fairmount Town Co.*, 51 Kan. 394, 32 Pac. 1100.

⁸⁸ Denial of indorsement denies that defendant's officer had authority to indorse. *Wahlig v. Standard Pump Mfg. Co.*, 25 N. Y. St. Rep. 864, 5 N. Y. Supp. 420.

⁸⁹ See Chap. 42, *supra* and see also *Mechem on Agency*; *Clark & Skyles on Agency*.

⁹⁰ On return to a mandamus to keep

Want of the requisite written form for the contract must be pleaded affirmatively.⁹¹

The defense must be pleaded with such intendment of certainty as to be good on its face against the corporation and the action. Thus, in addition to the other cases cited in this section are the following examples: Any affirmative act ascribed to the corporation as a defense must be pleaded as done by or emanating from it or by its authority.⁹² For this reason a plea of release by a stockholder is bad.⁹³ Conditions precedent are to be pleaded as unfulfilled at the time of suing.⁹⁴ In an action on a note given to the corporation for stock it is not enough to make a defense that defendant was not a subscriber, since he might have been a purchaser.⁹⁵

In the case of suits by foreign corporations any defense is material which tends to show that the contract sued on was unenforceable because the corporation was not admitted to do business in the state.⁹⁶ Hence it is material to allege where the sale was to be made.⁹⁷

§ 3079. Reply and replication, and demurrer to plea or answer. Replications and also replies under the codes are in much diminished use in modern practice.⁹⁸ The matter of the reply to a plea of ultra

books within the state, the president joined with the corporation as respondent must not only aver that they are not in his possession but also that they are not within his power or control. *State v. Bay State Gas Co.*, 4 Pennw. (Del.) 214, 57 Atl. 291.

⁹¹ So held under a statute requiring corporate contracts to be in writing of a certain form (Bat. Rev. c. 26, § 23), also holding that motion in arrest for want of allegation in the complaint would not be entertained. *Kenner & Greenfield v. Lexington Mfg. Co.*, 91 N. C. 421. See also appropriate general treatises dealing with necessity of specially pleading the statute of frauds.

⁹² For a similar rule applied in pleading the cause of action, see § 3055, *supra*.

⁹³ *Harris v. Muskingum Mfg. Co.*, 4 Blackf. (Ind.) 267, 29 Am. Dec. 372.

⁹⁴ *Anderson v. Newcastle & B. R. Co.*, 12 Ind. 376, 74 Am. Dec. 218.

⁹⁵ In an action on a note given to the corporation for stocks, a defense that the maker was not a subscriber, and that he had rescinded and tendered them back is bad because it does not exclude the purchase of them from the corporation. *German Mercantile Co. v. Metz*, 21 N. D. 230, 130 N. W. 221.

⁹⁶ See chapter on Foreign Corporations, *infra*.

⁹⁷ A defense that goods in suit were to be sold within the state is material in connection with further allegations that plaintiff's assignor and plaintiff are foreign corporations not admitted or entitled to do business within the state. *La Moine Lumber & Trading Co. v. Kesterson*, 171 Fed. 980.

⁹⁸ See the local statutes under many of which the answer is considered to stand denied without reply except as to new matter introduced by it. No reply is now required in federal equity practice except to meet a set-off or counterclaim. New Equity Rule 31.

vires must be consistent with the complaint; and a reply of estoppel to such a plea is good,⁹⁹ but former pleadings will not constitute such an estoppel.¹ It must also be a legal objection to the making of the defense; hence a replication *de injuria* to a plea of *ultra vires* is bad.² The replication or reply must responsively traverse or deny, or confess and legally avoid the facts of the plea or answer, according to the regular rules for such pleadings. Therefore a negation of corporate existence³ or of existence of corporate debts⁴ or of an agency within a county⁵ should affirm positively the fact so denied or negated in the previous pleading. The reply may plead this traversing fact in general terms, and need not go into other parts of the answer.⁶ Dissolution pleaded in reply to answer alleging nonpayment of license tax must allege the requisite steps of a dissolution, else the cessation of the duty to pay will not appear.⁷ A public act of incorporation pleaded in reply must be correctly described by title, or the replica-

⁹⁹ *Horst v. Lewis*, 71 Neb. 365, 103 N. W. 460, 98 N. W. 1046.

The doctrine of estoppel to deny incorporation or corporate existence may be invoked as a substantial bar to such a plea. See that doctrine discussed, Chap. 11, *supra*.

¹ Pleadings to the contrary in a former action with different parties do not estop the plaintiff to deny that one of defendants is incorporated. *Wall v. Mines*, 130 Cal. 27, 62 Pac. 386.

² *Metropolitan Stock Exchange v. Lyndonville Nat. Bank*, 76 Vt. 303, 57 Atl. 101.

³ A replication that the corporation did not exist only in Massachusetts to a plea in abatement that it existed there only and not in Connecticut is demurrable. *Rand v. Proprietors of Upper Locks & Canals on Connecticut River*, 3 Day (Conn.) 441.

⁴ A plea to an action on "stock notes" that there were no debts requiring resort to the notes should be met by a replication affirming that there were such debts. A negative cannot be traversed by a negative.

Ryan v. Vanlandingham, 25 Ill. 128.

⁵ Reply held a sufficient traverse of a plea in abatement that the agent was not such within county when suit was brought. *Indiana Ins. Co. v. Capehart*, 108 Ind. 270, 8 N. E. 285.

⁶ A general allegation of incorporation suffices in a reply to defendant corporation's denial thereof. And it is not necessary that the reply go to other parts of the answer. *Stoddard v. Onondaga Annual Conference of Methodist Protestant Church*, 12 Barb. (N. Y.) 573.

If incorporation be alleged as a defense to an action sounding on an association, the reply need not do more than deny that the contract belonged to the corporation. *Ridenour v. Mayo*, 29 Ohio St. 138.

⁷ A reply alleging dissolution and that the action is one in course of winding up, when made in confession and avoidance of a plea of nonpayment of annual license fee and of failure to file reports should allege particularly the steps in dissolution and not plead a mere conclusion. *Klamath Lumber Co. v. Bamber*, 74 Ore. 287, 145 Pac. 650, 142 Pac. 359.

tion is bad according to the common law.⁸ Argumentativeness in the reply is a vice but must be challenged by special demurrer or other means of correcting informalities.⁹ Under the common-law rules a replication to a plea in abatement must have concluded with a verification and not to the country.¹⁰

For any deficiency in the facts to make out the pleaded defense a demurrer will lie, for example to a plea of dissolution.¹¹ And it will lie to a plea *nul tiel* which is covered by the general issue.¹² Special demurrer lies to answer pleading *ultra vires* in general terms.¹³ The special demurrer is proper where the corporate existence is traversed by affirmative allegations instead of being denied according to the allegations of the complaint.¹⁴ It should also be resorted to where the plea *nul tiel* is refuted by exhibiting a contract which estops the plea.¹⁵ Where demurrer is interposed to matter of abatement, it must go in at the time for pleas in abatement and not afterwards.¹⁶

§ 3080. Amendments and supplemental pleadings. Amendments are quite liberally allowed in all matters affecting form, including the corporate name and existence, the general rules and statutes being applicable for that purpose.¹⁷ It may be stated as a general

⁸ When the act of incorporation, being public, is replied to a plea of *nul tiel*, a variance in the title by which the act is pleaded is fatal on demurrer. *Union Bank v. Dewey*, 3 N. Y. Super. Ct. 509.

⁹ A reply to averment of a resolution, which is argumentative because it states why the record of a purported resolution is false and came to be on the record is nevertheless good against demurrer. *Judah v. Vincennes University*, 23 Ind. 272.

¹⁰ Replication pleading title of act to a plea of *nul tiel* and concluding to the country is bad; it should conclude with a verification. *Onondaga County Bank v. Carr*, 17 Wend. (N. Y.) 443.

¹¹ Lies to answer pleading facts on which dissolution might have been decreed but not pleading that it was. *Brookville & G. Turnpike Co. v. McCarty*, 8 Ind. 392, 65 Am. Dec. 768.

¹² *Wert v. Crawfordsville & A. Turnpike Co.*, 19 Ind. 242.

¹³ *Hart v. Phenix Ins. Co.*, 113 Ga. 859, 39 S. E. 304.

¹⁴ Special demurrer only will reach formal impropriety of an affirmative denial or traverse of the fact of corporate existence when a general denial is proper pleading. *Stoddard v. Onondaga Annual Conference of Methodist Protestant Church*, 12 Barb. (N. Y.) 573.

¹⁵ An estoppel to deny plaintiff's incorporation should be pleaded by special demurrer to a plea of *nul tiel* where the contract working the estoppel is set forth in the complaint; otherwise it should be made by replication. *Oregonian Ry. Co., Ltd. v. Oregon Ry. & Nav. Co.*, 22 Fed. 245.

¹⁶ *Pendleton v. Bank of Kentucky*, 17 Ky. 171.

¹⁷ A statute for amending on motion *instanter* all misnomers in writs, etc., "whether in Christian or surname" means in given or surname,

rule that a misnomer may be so amended, whether the corporation be plaintiff or defendant,¹⁸ provided that it accomplishes nothing but a correction of the name of the corporate party and does not substitute a new party. Therefore an amendment is not allowable which substitutes a partnership¹⁹ although there is authority saying that it is proper where they appeared,²⁰ but this might well have been put on the ground that they could not thereafter object. A rather extreme case in New York allowed a complaint by one "as president of" an association (in that state an association not incorporated may sue in the president's name) to be amended by striking out all but the aggregate name, so as to leave it stand as a suit by a corporation so named,²¹ and where the suit was by several described as "President and Directors of" (corporate name) the amendment by striking out all but that name was allowed.²² Another instance about which less question might be made was by striking out the name of an individual defendant described as "president for the time being of the" corporation, which was served and a corporate liability declared on.²³ If the corporate name be used by trustee plaintiffs under authority of statute, no new cause of action is made by adding allegations of their authority to sue by that name.²⁴ Amendment may be by striking improper

and applies to corporations. *Johnson v. Central R. R.*, 74 Ga. 397.

¹⁸ *Alabama*. *Savannah, A. & M. Ry. v. Buford*, 106 Ala. 303, 17 So. 395.

Georgia. A complaint against the right railroad company but by wrong name, with service on it, and it defending, may be amended by stating the correct name and the necessary explanatory matter. *Nashville, C. & St. L. Ry. Co. v. Edwards*, 91 Ga. 24, 16 S. E. 347.

Kansas. *American Surety Co. of New York v. Maryland Casualty Co.*, 97 Kan. 275, 155 Pac. 59.

Maryland. *In re Binney*, 2 Bland 99.

New Jersey. *Hoboken Bldg. Ass'n v. Martin*, 13 N. J. Eq. 427.

New York. *Roberts v. National Ice Co.*, 6 Daly 426.

¹⁹ *Dodge v. Chambers*, 43 Colo. 366, 96 Pac. 178.

On the other hand it has been held

that where the name imports a corporation, and has the suffix "a corporation," these words may be stricken out and amended to describe defendant as a partnership. *C. H. Perkins Co. v. Shewmake & Murphey*, 119 Ga. 617, 46 S. E. 832.

²⁰ *Haggarty v. Strong*, 10 S. D. 585, 74 N. W. 1037.

²¹ Such is not a change of parties. *Dean v. Gilbert*, 92 Hun (N. Y.) 427, 36 N. Y. Supp. 1004.

²² *Brittain v. Newland*, 19 N. C. 363.

²³ *Kimball & Austin Mfg. Co. v. Vroman*, 35 Mich. 310, 24 Am. Rep. 558.

²⁴ A statutory proceeding to recover a debt in the name of a dissolved bank, but really and in law by its liquidating trustees, may be amended to add a necessary allegation of their authority. It is not an amendment to introduce a new party, but to plead

or unnecessary words²⁵ or adding omitted parts of the name²⁶ or by substituting proper for improper ones.²⁷ A change of name may be covered by amendment where the new one differs from the old.²⁸

Words or allegations showing corporate existence may be supplied by amendment,²⁹ and a domicile, if necessary, may be so added.³⁰ Amendments changing the description of the defendant corporation from a domestic to a foreign, and vice versa, are allowed by what seems to be the better doctrine, but there is a division of authority,³¹

an authority to sue in the party's name. *Jemison v. Planters' & Merchants' Bank*, 23 Ala. 168.

²⁵ Striking out "of Missouri" as part of pleaded name. *Maher v. Interstate Switch Co.*, 58 Kan. 817, 51 Pac. 286 (mem. dec.).

Word "Railway" not belonging to the corporate name may be stricken out. *Southern Pac. Co. v. Graham*, 12 Tex. Civ. App. 565, 34 S. W. 135.

Striking out "Trustees of" so as to leave standing corporate name only. *Edinboro' Academy v. Robinson*, 37 Pa. St. 210, 78 Am. Dec. 421. And see also cases cited supra where "president," etc., was held properly stricken out.

²⁶ Adding words "of Georgia" to name, *Central Railroad and Banking Company*, is proper. *Johnson v. Central R. R.*, 74 Ga. 397.

Mere omission of the word "Incorporated" as part of defendant's name may be corrected. *Arminius Chemical Co. v. White's Adm'r*, 112 Va. 250, 71 S. E. 637.

Addition of word "Chewelah" to name held proper where the right corporation was served. *Freeborn v. Chewelah Copper King Min. Co.*, 89 Wash. 519, 154 Pac. 1095.

²⁷ *Wright v. Eureka Tempered Copper Co.*, 206 Pa. 274, 55 Atl. 978.

Changing "Singer Sewing Machine Co." to "Singer Manufacturing Co." *Singer Mfg. Co. v. Greenleaf*, 100 Ala. 272, 14 So. 109.

²⁸ *Atlantic Coast Line R. Co. v.*

Waycross Elec. Light & Power Co., 123 Ga. 613, 51 S. E. 621.

Name of defendant actually served and intended may be corrected in writ and in return thereto by striking out "Company" as in former name and inserting "Works" as in new name. *Wright v. Eureka Tempered Copper Co.*, 206 Pa. 274, 55 Atl. 978.

²⁹ Allegation of incorporation may be added. *Tolmie v. Dean*, 1 Wash. T. 46; *Krell Piano Co. v. Kent*, 39 W. Va. 294, 19 S. E. 409.

Petition by "Adas Yeshurun Society" may be amended to plead incorporation. *Adas Yeshurun Society v. Fish*, 117 Ga. 345, 43 S. E. 715.

Amendment to aver that persons sued as trustees of a lodge were a corporation is proper. *Prairie Lodge, No. 87, A. F. & A. M. v. Smith*, 58 Miss. 301.

Matter not part of the cause of action, e. g., allegation of incorporation and domicile, may be added on retrial. *Fox v. Erie Preserving Co.*, 93 N. Y. 54.

Allegation that defendant was an "organization" can be amended to state that it is a corporation without introducing a new action against a new party. *Nelson v. Brenham Compress Oil & Manufacturing Co.* (Tex. Civ. App.), 51 S. W. 514.

³⁰ *Rockdale Mercantile Co. v. Brown Shoe Co.* — Tex. Civ. App. —, 184 S. W. 281.

³¹ Amendment at close of plaintiff's case to amend to conform to proof

and one case disallowed an amendment to describe a foreign corporation by pleading a different state of origin from that first alleged.³² An amendment to allege a succession by a new corporation to the original nominal party was held permissible where in fact they were substantially the same.³³ Though amendment of name may be proper it may nevertheless be unnecessary where the corporation has appeared to it as pleaded.³⁴

The statement of the contract sued on may be amended by showing that it bore a seal of the corporation,³⁵ and to show that the corporation was the same as that which signed it.³⁶ A count on a subscription cannot be imported by amendment into an action on another promise.³⁷

A distinction as to the right to amend is made in states which follow

that defendant was a foreign and not a domestic corporation was proper, defendant having put it in issue. *Clokey v. International Rubber Clothing & General Supply Co.*, 22 N. Y. Misc. 518, 49 N. Y. Supp. 1014, aff'd 23 N. Y. Misc. 773, 53 N. Y. Supp. 1102.

Amendment to state that defendant was a West Virginia corporation and thus correct a statement that it was of New Jersey states no new cause of action. *Caldwell Furnace Foundry Co. v. Peck-Williamson Heating & Ventilating Co.*, 27 Ohio Cir. Ct. 665.

Correcting description of defendant by changing name of state where incorporated does not introduce new party. *Meitzner v. Baltimore & O. R. Co.*, 224 Pa. 352, 73 Atl. 434.

But changing the name radically and also the description as a foreign corporation so as to describe a domestic one, held not allowable. *Western Ry. of Alabama v. McCall*, 89 Ala. 375, 7 So. 650.

Where a Nevada corporation is alleged amendment by substituting a California one is not allowable. *Little v. Virginia & G. H. Water Co.*, 9 Nev. 317.

³² Amending name from D. M. Company "under the laws of Connecticut" to the same name "under the laws of Illinois" substitutes a new

defendant. *Hughes v. Diamond Match Co.*, 1 Pennw. (Del.) 140, 39 Atl. 772.

³³ Amendment setting up defendant's merger in a new corporation. *Friedenwald Co. v. Asheville Tobacco Works & Cigarette Co.*, 117 N. C. 544, 23 S. E. 490.

³⁴ *Meyer Bros. v. Insurance Co. of North America*, 73 Mo. App. 166.

A consolidation of defendant should be pleaded by amendment, but failure to do so and trial against the substituted defendant made it a harmless omission. *Kinion v. Kansas City, Ft. S. & M. R. Co.*, 39 Mo. App. 574.

³⁵ To show on contract set out verbatim that it bore a seal, one not having been indicated in the copy though alleged in the complaint. *Mathieson Alkali Works v. Mathieson*, 150 Fed. 241.

³⁶ To show that signer and party were the same corporation and that contract was signed by party in the name appearing, though variant from true name. *Rock Island Lumber & Manufacturing Co. v. Fairmount Town Co.*, 51 Kan. 394, 32 Pac. 1100.

³⁷ Action against individual on common counts cannot be amended by adding a special count declaring on a contract of subscription to plaintiff's stock. *Mt. Washington Hotel Co. v. Redington*, 55 N. H. 386.

common-law pleading between technical pleas in abatement and pleas in the nature of abatement, the latter being amendable.³⁸

A bill against the corporation alone with a prayer that officers answer may be amended by adding a prayer that the corporation answer under its seal without oath.³⁹

Amendment in matters of a defendant's corporate existence, which do not concern an intervener, need not be made in order to deny incorporation as against such intervener.⁴⁰

While the motion to amend should ordinarily be made according to usual practice by the party responsible for the pleading, in West Virginia a statute allows motion to amend for misnomer to be made by either party.⁴¹ Costs should not be imposed as a condition of allowing an amendment from the name by which defendant was commonly known to the true name, where it was done to meet a plea of misnomer.⁴²

The effect of an amendment may be to change the action from legal to equitable, and vice versa.⁴³ The amendment causes the pleading to read anew as amended, obviating objections that laid to it before,⁴⁴ and a plea in abatement met by amendment stands as not made.⁴⁵ If a succession be covered by an amendment no formal revivor

³⁸ A plea to the jurisdiction is by terms of statute amendable. *American Spirits Mfg. Co. v. Peoria Belt Ry. Co.*, 154 Ill. App. 330.

³⁹ *French v. First Nat. Bank*, 7 Ben. 488, Fed. Cas. No. 5,099.

⁴⁰ Plaintiff answering an intervener may deny incorporation of a defendant without amending the complaint alleging it, where it was immaterial to the objecting party which was the fact. Inconsistent defenses could be pleaded to the intervention. *Wall v. Mines*, 130 Cal. 27, 62 Pac. 386.

⁴¹ Motion to correct misnomer and showing thereon, see *First Nat. Bank of Ceredo v. Huntington Distilling Co.*, 41 W. Va. 530, 56 Am. St. Rep. 878, 23 S. E. 792.

⁴² *Bullard v. Nantucket Bank*, 5 Mass. 99.

⁴³ A suit for recovery of money paid in originally and an additional subscription later, when grounded on deceit is legal in nature, but becomes

equitable when amended to allege a request to the corporation to sue and its refusal, and to pray discovery from an officer. *King v. Livingston Mfg. Co.*, 180 Ala. 118, 60 So. 143.

Where a bill, begun as one to enforce a corporate debt against directors with the corporation joined, is reduced to one for enforcement of a contract debt against it alone, it is no longer in equity. *George H. Taylor Co. v. Woolverton*, 37 Ill. App. 358.

⁴⁴ Allegation in an amended complaint that the "annual license fee last due" has been paid satisfies the Washington statute (Rem. & Bal. Code, § 3715) if the one last before amendment was paid, and the complaint originally filed was wholly abandoned so that the amended one commenced the action. *Wilson Case Lumber Co. v. Mountain Timber Co.*, 200 Fed. 181.

⁴⁵ Where a plea in abatement is met by an amended petition alleging the

is required, as the amendment is sufficient in such a case.⁴⁶

Regular practice sanctions the pleading of a succession or dissolution pendente lite by plea puis darrein or, under the codes and in equity, by supplemental pleadings,⁴⁷ but it may be done under the statutes of some of the states by an order of substitution in the new name, leaving the cause to proceed.⁴⁸ A supplemental bill is also the proper mode of pleading under a remedial statute passed pendente lite and which applies to the rights in litigation.⁴⁹ A supplemental complaint charging that defendant is not incorporated but is an association does not import a new party.⁵⁰ Leave to file a supplemental pleading will be denied where the showing made informs the court that the proposed pleading is not founded on a meritorious basis and does not bind the corporation for which it is offered.⁵¹ A corporation should be brought in as a new party by pleadings and process properly describing it.⁵² Receivers succeeding after a dissolution pendente lite may appear specially and suggest the fact accompanied by a proper motion.⁵³

requisite jurisdictional fact and nothing is pleaded to this, the case stands as if no abatement was pleaded. *Piedmont & A. Life Ins. Co. v. Fitzgerald*, 1 White & W. Civ. Cas. Ct. App. (Tex.), § 1345.

⁴⁶ An amended petition setting out the consolidation and succession of defendant to liabilities suffices without prayer for revivor. Revivor need not be by motion alone. *Curry v. Kansas & C. P. Ry. Co.*, 61 Kan. 541, 60 Pac. 325.

⁴⁷ Expiration of charter after issue joined should be pleaded puis darrein. *Agnew v. Bank of Gettysburg*, 2 Harr. & G. (Md.) 478.

Dissolution after complaint was served should be pleaded by supplementary answer in nature of plea puis darrein continuance. *New York Marbled Iron Works v. Smith*, 11 N. Y. Super. Ct. 362.

Succession by merger may be pleaded supplementally in response to a plea in abatement on ground of dissolution. *Standifer v. Bond Hardware Co.* (Tex. Civ. App.), 94 S. W. 144.

⁴⁸ On a bill for specific performance against a corporation which pendente lite changed its name, the cause can proceed against it by the new name on order of court. *Welfley v. Shenandoah Iron, Lumber, Mining & Manufacturing Co.*, 83 Va. 768, 3 S. E. 376.

⁴⁹ *Bank of Kentucky v. Schuykill Bank*, 1 Pars. Eq. Cas. (Pa.) 180.

⁵⁰ *Grand Lodge A. O. U. W. v. Bollman*, 22 Tex. Civ. App. 106, 53 S. W. 829.

⁵¹ On a reserved case, leave to file a supplemental answer to a cross-petition and thereby to plead a revocation of the resolution on which the action was founded, will be denied where the affidavits reveal that the resolution was passed by a mere faction of defendant, a church corporation. *Wisswell v. First Congregational Church*, 14 Ohio St. 31.

⁵² Informal bill praying that corporation be made party "by serving" named person, "the president thereof" held sufficient. *Walker v. Hallett*, 1 Ala. 379.

⁵³ *Morgan v. New York Nat. Build-*

§ 3081. **Cross-bills and cross-complaints, and interpleader.** Cross-bills and cross-complaints are governed by the same rules as bills and complaints.⁵⁴ On a bill or petition for interpleader the facts of incorporation must be alleged as in other pleadings,⁵⁵ and an interpleaded corporation when brought in may demur for failure to allege defendant's incorporation and domicile as required.⁵⁶

§ 3082. **Set-off and counterclaim.** Undoubtedly a corporation is subject to the law of set-off and counterclaim and may also avail thereof⁵⁷ in so far as the right asserted against the corporation is subject to set-off,⁵⁸ but because the corporation and the members are distinct, and also because the debt of the stockholder is not that of the corporation, there can be no set-off or counterclaim of a debt owing by a stockholder in an action by the corporation. Necessary mutuality does not exist.⁵⁹ A stockholder may claim a set-off or counterclaim against the corporation when sued on his subscription by it, or when sued on his stockholder's liability to creditors, provided that the insolvency of the corporation does not make inequitable to do so.⁶⁰ Dividends due to stockholders and debts due from them may

ing & Loan Ass'n, 73 Conn. 151, 46 Atl. 877.

⁵⁴ A cross-petitioning corporation need not plead incorporation. The same rule applies as on a petition. *Brady v. National Supply Co.*, 64 Ohio St. 267, 83 Am. St. Rep. 753, 60 N. E. 218.

As to practice on counterclaims under the codes, see § 3082, *infra*.

⁵⁵ Must plead in corporation and domicile against interpleaded corporation. *Chandler v. Erie Transfer Co.*, 19 N. Y. Civ. Proc. 385, 13 N. Y. Supp. 573.

⁵⁶ *Chandler v. Erie Transfer Co.*, 19 N. Y. Civ. Proc. 385, 13 N. Y. Supp. 573.

⁵⁷ *Goodwin v. McGehee*, 15 Ala. 232, sometimes cited to this proposition, merely holds that it was permissible to cancel a stockholder's liability to it by offsetting a credit, but it does not appear that this was a judicial set-off.

⁵⁸ A claim for transportation of troops at the governor's order cannot be set off against the state suing for taxes, which are not a debt and are a superior claim. *Newport & C. Bridge Co. v. Douglass*, 75 Ky. 673.

The corporation may answer a counterclaim put in by a co-defendant in a suit to quiet title, in which counterclaim the rights of creditors are asserted which could not otherwise be defended. *Latta v. Catawba Elec. Co.*, 146 N. C. 285, 59 S. E. 1028.

⁵⁹ *Gallagher v. Germania Brewing Co.*, 53 Minn. 214, 54 N. W. 1115.

Stockholder and corporation as distinct parties, results of, see Chap. 1, *supra*.

Set-off by creditors, see chapters on Insolvency, Bankruptcy, Dissolution and Winding Up; Receivership; Stock and Stockholders, *infra*.

⁶⁰ See § 661, *supra*, chapter on Stock and Stockholders, *infra*.

be set off against each other.⁶¹ The subscriber may set off debts against his subscription.⁶²

§ 3083. Signature, seal and verifications or affidavits. The signature of the pleadings in present-day practice is by the attorney for the party, he being the representative of the corporation in litigation,⁶³ but it should purport to be signed by the corporation or by its chief officer or by another officer appearing to have reason and authority to sign.⁶⁴ The signature to the verification may also suffice as a signature to the pleading.⁶⁵

In chancery practice the answer of a corporation could not be made under oath for evidential purposes like an individual's, and was required to be made under the seal of the corporation with verification by one of the officers as desired or as required by the rules of practice.⁶⁶ Any other person having knowledge could verify the

⁶¹ See chapter on Stock and Stockholders, subd. Dividends, *infra*.

Money owing by plaintiff bank may be offset against its suit but not stock of defendant or dividends which should have been earned and paid. *Whittington v. Farmers' Bank*, 5 Harr. & J. (Md.) 489. The fact that a statute directed winding up and distribution would not alter this rule. *Id.*

⁶² See § 661, *supra*.

⁶³ See §§ 2933, 2934, *supra*.

By the technical practice of chancery the solicitor vouched for the bill by his signature. *George's Creek Coal Co. v. Detmold*, 1 Md. Ch. 371.

⁶⁴ The answer should be signed by the president with the corporate seal affixed. *Teter v. West Virginia Cent. & P. Ry. Co.*, 35 W. Va. 433, 14 S. E. 146.

A signature of a petition in involuntary bankruptcy by the creditor, a foreign corporation, in its own name by its treasurer, also signed by its attorney, and verified by its treasurer, is sufficiently authenticated in the first instance. Want of authority must be put in issue. *Whyte v. Betts Mach. Co.*, 61 Md. 172.

If the pleading is not signed by the corporation or by the authorized officer, as where signed by a church elder without showing reason why the chief officer did not sign demurrer lies. *German Reformed Church v. Com.*, 3 Pa. St. 282.

⁶⁵ A sufficient verification by an officer and signed by him is also a good subscribing "by the party or his attorney" (Code, § 2983), though not otherwise signed as a pleading. *West Mountain Lime & Stone Co. v. Danley*, 38 Utah 218, 111 Pac. 647.

⁶⁶ The corporate answer should be under its seal but not upon oath. *Broinson v. La Crosse & M. R. Co.*, 2 Wall. (U. S.) 283, 17 L. Ed. 725; *French v. First Nat. Bank*, 7 Ben. 488, Fed. Cas. No. 5,099; *Board Sup'rs Fulton Co. v. Mississippi & W. R. Co.*, 21 Ill. 338; *Teter v. West Virginia Cent. & P. Ry. Co.*, 35 W. Va. 433, 14 S. E. 146.

It must answer under its seal unless dispensed with by leave of court. Any seal may be adopted *pro hac vice*. *Ransom v. Stonington Sav. Bank*, 13 N. J. Eq. 212.

If an answer bears no seal it must be disregarded. *R. Frank Williams*

answer.⁶⁷ The chancery rule that a sworn answer overcomes a sworn bill is met by having a corporator verify the answer, which ordinarily is under the corporate seal.⁶⁸ The effect of the answer as evidence is discussed hereafter.⁶⁹ The bill, unlike the answer, need not have been under its seal.⁷⁰ In order to verify a bill for an injunction the oath of a co-plaintiff of the corporation has been held sufficient in Massachusetts.⁷¹ By rule of federal practice in equity it is now unnecessary to verify the bill unless where special relief is prayed, but a rehearing petition requires it.⁷² Other pleadings must be under seal as the local practice may require.⁷³ It will be presumed that the officers signing are what they purport to be⁷⁴ and the verification

Co. v. United States Baking Co., 36 Md. 475, 38 Atl. 990.

By statute the seal on the answer in chancery is dispensed with and it may be sworn to by any general officer (Code 1892, § 524). The secretary and treasurer may verify it as a general officer. *Masonic Ben. Ass'n v. Simmons*, 86 Miss. 470, 38 So. 791.

If a sworn answer is desired some of the officers must be joined as defendants for that purpose. *Baltimore & O. R. Co. v. Wheeling*, 13 Gratt. (Va.) 40.

It must be verified by oath of a corporator. *Hemphill v. Ruckersville Bank*, 3 Ga. 435; *Fulton Bank v. New York & S. Canal Co.*, 1 Paige (N. Y.) 311.

In order to dissolve an injunction against it the answer must be verified by some of its officers, though it could not be compelled to answer under oath. *Fulton Bank v. New York & S. Canal Co.*, 1 Paige (N. Y.) 311.

⁶⁷ "The officer or other person who has the principal personal knowledge of the facts should swear to" the bill. *Youngblood v. Schamp*, 15 N. J. Eq. 42.

⁶⁸ A properly sworn answer by officers and directors sued as co-defendants is sufficient to swear off an injunction though the corporation puts in no answer under its seal. *Hemphill v. Ruckersville Bank*, 3 Ga. 435.

See also cases in the note preceding.

⁶⁹ § 3111, *infra*.

⁷⁰ *Moundsville v. Ohio River R. Co.*, 37 W. Va. 92, 20 L. R. A. 161, 16 S. E. 514.

The solicitor's signature vouches for the bill. *George's Creek Coal & Iron Co. v. Detmold*, 1 Md. Ch. 371; *Washington Nat. Building & Loan Ass'n v. Buser*, 61 W. Va. 590, 57 S. E. 40.

⁷¹ *First Bapt. Soc. in Brookfield v. Dexter*, 193 Mass. 187, 79 N. E. 342. And see *George's Creek Coal & Iron Co. v. Detmold*, 1 Md. Ch. 371, as to officer's power to verify.

⁷² A rehearing petition must however be verified by "the party or some other person" by the express provision of Rule 69.

An injunction bill prays such relief and must be verified. *Schenerle v. One-piece Bifocal Lens Co.*, 241 Fed. 270.

⁷³ Answer in garnishment must be under its seal. *Baltimore & O. R. Co. v. Gallahue's Adm'rs*, 12 Gratt. (Va.) 655, 65 Am. Dec. 254.

⁷⁴ *Carolina Agency Co. v. Garlington*, 85 S. C. 114, 67 S. E. 225.

An answer in garnishment by one described as vice president of the garnishee and purporting to be on its behalf is binding on it. *Gerhard Hardware Co. v. Texas Cotton-Press Co.* (Tex. Civ. App.), 26 S. W. 168.

stating that the seal is that of the corporation suffices to prove that fact.⁷⁵

Under the codes and statutes it is required in most of the states that the pleadings not only of an equitable but also of a legal nature be verified or accompanied by an affidavit. The statutes vary in their provisions as to the manner of verification, as to the persons who may make it, and as to the pleadings which must be verified, as will be seen in the cases which follow.⁷⁶ The effect of a proper verification under some of the statutes is to allow a trial of the issue or issues which without it the statute would require to be taken as confessed. The same result is accomplished elsewhere by putting in an affidavit to save the issue, or a notice of intention to insist on the defense.⁷⁷

An exemption of certain corporations from making verification does not apply generally to private corporations unless they come within its terms;⁷⁸ but the statutory excuses have been held to apply equally to corporations and individual parties.⁷⁹ Under statutes requiring a verified answer only when the complaint is verified, the verification of the complaint must be legally sufficient or else none to the answer is required⁸⁰ or if not well made is immaterial.⁸¹

⁷⁵ Officer's verification by signature and oath that seal is that of corporation shows answer under seal. *Ransom v. Stonington Sav. Bank*, 13 N. J. Eq. 212.

⁷⁶ In Pennsylvania and other eastern states an affidavit of defense is required to prevent summary judgment. See cases in this and next section.

⁷⁷ See generally §§ 3084-3086, *infra*, where this is discussed along with other cognate matters.

⁷⁸ A statute exempting from necessity of verification of a denial of execution, "any county, city or town" sued on an instrument alleged to have been executed by such county * * * "or any corporate authorities," does not apply to a business corporation (levee corporation). *Parsons v. Egyptian Levee Co.*, 73 Mo. App. 458.

⁷⁹ A corporation is excused from serving a verified answer in the same cases as an individual, and no affidavit of excuse is required which an individual would not need to give.

Goff v. Star Printing Co., 21 Abb. N. Cas. (N. Y.) 211.

The corporation is not excused from verifying its pleading because all of its officers may under the plea of privilege from self-crimination decline to make the oath. N. Y. Code Civ. Proc. § 525, requiring verification to be by an officer obliges the corporation to have an officer who can verify without self-crimination. *Simon v. American Tobacco Co.*, 192 Fed. 662.

⁸⁰ Verification by an individual describing himself as "plaintiff" is a nullity in suit by a foreign corporation and an unverified answer is sufficient. *Phonoharp Co. v. Stobbe*, 20 N. Y. Misc. 698, 46 N. Y. Supp. 678.

Replevin affidavit alleging incorporation of defendant on information and belief must be met by verified answer denying it. *Sloan v. Implement Dealers' Mfg. Co.*, 25 N. Y. Misc. 451, 55 N. Y. Supp. 558.

⁸¹ *Phifer v. Travelers' Ins. Co.*, 123 N. C. 410, 31 S. E. 716.

Whether or not the reasons must be stated for a particular person's making verification, or an attorney's making it, depends on terms of the statutes.⁸² It should show that the person is one of those whom the statute qualifies, if his name and description does not import enough to show it.⁸³ "An agent" has been held not to include the president per se.⁸⁴

In form the affidavit or verification should be that of a person and

⁸² When an attorney verifies a pleading for a corporation he need not state the reasons why it is not made by the corporation. Civ. Code, § 116, requiring that applies only to natural persons. *Hornick v. Union Pac. R. Co.*, 85 Kan. 568, 38 L. R. A. (N. S.) 826, Ann. Cas. 1913 A 208, 118 Pac. 60.

Stating that the case is one of those in which verification may be by attorney or agent shows sufficiently "why" it is made by an attorney or agent. *Bullock Beresford Mfg. Co. v. Hedges*, 76 Ohio St. 91, 81 N. E. 171.

Under Rev. St. § 5102, an officer verifying stands as a party would, if a natural person, and may verify in the same manner; but an "agent or attorney" can verify only as a natural person's agent or attorney could. Hence by section 5109 when an agent or attorney verifies it must appear that it is in a proper case included within that section. *Bullock Beresford Mfg. Co. v. Hedges*, 76 Ohio St. 91, 81 N. E. 171.

It must show why officers did not make it. *Kelly v. Singer Mfg. Co.*, 4 Pa. Dist. Ct. 440.

The sole stockholders of a merged corporation could make affidavit of defense for it, though they were strangers to the record, on a showing of those facts and of the further facts that the new corporation's officers had no knowledge and the old one no officers, and that affiants were the only persons having knowledge. *Citizens' Natural Gas Co. v. Waynesburg*

Natural Gas Co., 210 Pa. 137, 59 Atl. 822.

⁸³ Attorney deposing that he is duly authorized attorney and agent to verify pleadings shows that he is "an officer" of the corporation (Code Civ. Proc. § 525). Verification of petition for condemnation held good. In re *St. Lawrence & A. R. Co.*, 133 N. Y. 270, 31 N. E. 218.

General manager is not as such an officer. If he is an officer the verification should so state. *Thomas F. Meton & Sons, Ltd. v. Isham Wagon Co.*, 15 N. Y. Civ. Proc. 259, 4 N. Y. Supp. 215.

"Former president" cannot verify as an officer (Code Civ. Proc. § 525) though he affirms in the verification that all officers tendered resignations and no successors were elected. *Kelly v. Woman Pub. Co.*, 15 N. Y. Civ. Proc. 259, 4 N. Y. Supp. 99.

The treasurer making an affidavit of demand must swear that he is treasurer. *Wilmington Sash & Door Co. v. Taylor*, 2 Boyce (Del.) 528, 82 Atl. 86; *St. Joseph's Polish Catholic Beneficial Soc. City of Wilmington v. St. Hedwig's Church of Wilmington*, 3 Pennw. (Del.) 229, 50 Atl. 535; *Blades Lumber Co. v. Kent & Weeks Lumber Co.*, 2 Marv. (Del.) 302, 43 Atl. 174.

⁸⁴ The president is not per se an agent to swear to a plea, and must depose to the fact of agency. *Jones & Co. v. C. W. Hancock & Sons*, 117 Va. 511, 85 S. E. 460.

not by the corporation itself,⁸⁵ for the same reason that in chancery it could not swear to the bill or answer.⁸⁶ The grounds of the affiant's belief must commonly be stated in and as a part of a verification which is not positive on knowledge but is made on information and belief,⁸⁷ but an exemption of a "party" from so stating has been held to include the officer of the corporate party.⁸⁸ It is the grounds of belief and sources of information which should be stated and not the grounds of positive knowledge.⁸⁹ A statement of the grounds of "knowledge" was held sufficient under such a statute where it was plainly used in the sense of belief.⁹⁰ If the pleading refutes the verification the latter will be stricken.⁹¹ Objections to the verification must be promptly taken.⁹²

⁸⁵ *Barrett Min. Co. v. Tappan*, 2 Cole. 124.

The affidavit of defense should not purport to have been made by the corporation. *Knickerbocker Life Ins. Co. v. Hoeske*, 32 Md. 317.

⁸⁶ See this section, *supra*.

⁸⁷ A state agent's affidavit of defense is insufficient which does not aver personal knowledge or that he is an officer whose duties require him to have knowledge. Averment that it is his duty to make it because "no officers better able to make it are residents" is bad. *Wakely v. Sun Ins. Office of London, England*, 246 Pa. 268, 92 Atl. 136.

An officer's verification that the facts stated are true of his own knowledge derived from personal acquaintance with defendant and from plaintiff's books, is good where all allegations are such as might thereby be known to him. *Carolina Agency Co. v. Garlington*, 85 S. C. 114, 67 S. E. 225.

A verifying officer is not required to state sources of knowledge and grounds of belief. *Commercial Nat. Bank v. Hutchison & Hutchison*, 87 N. C. 22.

⁸⁸ *Code Civ. Proc. §§ 525, 526*. *Henry v. Brooklyn Heights R. Co.*, 43 N. Y. Misc. 589, 89 N. Y. Supp. 525.

A verification by the only officer

within the United States may be regarded as that of a party and the statement of grounds of belief or knowledge thus dispensed with. *Glaubenskie v. Hamburg & A. Packet Co.*, 9 Abb. Pr. (N. Y.) 104, followed holding that the rule is the same under the amended code. *American Insulator Co. v. Bankers' & Merchants' Tel. Co.*, 2 How. Pr. N. S. (N. Y.) 120, 7 N. Y. Civ. Proc. 443, 13 Daly (N. Y.) 200.

⁸⁹ *Andrews v. Blue Ridge Packing Co.*, 206 Pa. 370, 55 Atl. 1059.

⁹⁰ A statement of grounds of affiant's "knowledge" is sufficient if it appears that the latter sense was meant and that the belief is well founded (*Code Civ. Proc. § 526*). *High Beck Knitting Co. v. Bronner*, 18 N. Y. Misc. 627, 43 N. Y. Supp. 725.

⁹¹ An answer on information and belief denying the complaint refutes a verification made by an officer as on "personal knowledge" and makes it invalid where on such knowledge alone could affiant be competent to verify. *West v. Home Ins. Co.*, 18 Fed. 622.

⁹² The form of the verification cannot be challenged after evidence is taken. *Hornick v. Union Pac. R. Co.*, 85 Kan. 568, 38 L. E. A. (N. S.) 826, Ann. Cas. 1913 A 209, 118 Pac. 60.

Under some of the statutes there is no express provision for verifications by or for corporations pointing out the person or officer who is to make the verification, and it then becomes a question how the statutes applicable to persons shall be applied to corporations, if at all, and who may verify under them. Generally an affidavit or verification required of a corporation party may be made by any of its officers or agents or other person cognizant of the facts.⁹³ Some of the states hold that a person competent for service is competent to verify.⁹⁴ Statutes regulating verifications by "a party" necessarily apply to a corporation if it is a party, and its attorney authorized by the statute to verify for "a party" may do so for it.⁹⁵

In other states the statute provides a way in which corporate parties shall make verification and by whom it is to be done. Within such a statute an "officer" has been held to include any officer and not only the one served,⁹⁶ also a director,⁹⁷ a manager,⁹⁸ a member of a liquidating committee,⁹⁹ and an agent designated by a foreign corporation.¹

⁹³ President could make affidavit for certiorari. *Ex parte Hefin*, 54 Ala. 95.

⁹⁴ The agent who was served and who is conversant with the facts may verify the petition for certiorari to a justice. *Hunt v. Atchison, T. & S. F. R. Co.* (Tex. Civ. App.), 28 S. W. 460.

⁹⁵ A domestic corporation is a party "within the county" where its principal place of business is, and therefore, an attorney may verify in an action by it in the county where he resides (Code Civ. Proc. § 525). *High Rock Knitting Co. v. Bronner*, 18 N. Y. Misc. 627, 43 N. Y. Supp. 725.

May be verified by attorney the same as with natural persons for clients. *Market Nat. Bank v. Hogan*, 21 Wis. 317; *Western Bank v. Tallman*, 15 Wis. 92.

⁹⁶ Under Code Civ. Proc. § 446, "the verification may be made by any officer," and this includes the vice president (verification of petition in insolvency of corporation's debtor). *In re Close*, 106 Cal. 574, 39 Pac. 1067.

Affidavit of defense need not be

made by officer served. *Kinney v. Harrison Manufacturing & Boiler Co.*, 22 Pa. Super. Ct. 601.

⁹⁷ *Eastham v. York State Tel. Co.*, 86 N. Y. App. Div. 562, 83 N. Y. Supp. 1019; *Bigelow v. Whitehall Mfg. Co.*, 1 N. Y. City Ct. 138.

⁹⁸ *Stockton Lumber Co. v. Blodgett*, 3 Cal. App. 94, 84 Pac. 441.

A managing agent who may be served is also an officer who may verify. *Glaubensklee v. Hamburg & A. Packet Co.*, 9 Abb. Pr. (N. Y.) 104.

Assistant district manager deposing that he is an officer (Code, § 207) may verify. *Southern Cotton Oil Co. v. Lightsey*, 100 S. C. 41, 84 S. E. 301.

⁹⁹ *Wills v. James Rowland & Co.*, 117 N. Y. App. Div. 122, 102 N. Y. Supp. 386.

¹ A foreign corporation admitted to the state and with a designated agent is not "absent" so as to enable an agent or attorney to verify (Oregon Code Civ. Proc. § 79); but such agent is "any officer" of such corporation and may verify as such if he has "personal knowledge." *West v. Home Ins. Co.*, 18 Fed. 622.

Unless such a statute is restrictive to officers or others designated, any person conversant with the facts and with ability to make the required oath may verify.² The statutes of New York allow an officer to make it and alternatively in stated circumstances the attorney may do so,³ and in Nebraska a statute pointing out the attorney as a competent person to verify, was held not to require that he be competent for service, merely because that was also one of the qualifications of a verifying agent.⁴

In respect to a petition for removal to the federal courts, now required to be verified (and formerly verified as a common practice or because the state statutes required pleadings to be verified) but not expressly required to be signed under the present or former statutes,⁵ numerous decisions have been made. As the present statute does not specify how or by whom the verification shall be made, these decisions may be instructive or even decisive. A signature by the president,⁶

² The provision for verification by an officer is permissive. Another who is conversant with the facts may make it. *H. G. Bittleston Law & Collection Agency v. Howard*, 172 Cal. 357, 156 Pac. 515.

Under specific statute (Code, § 62) any officer, stockholder, agent, superintendent or attorney of the corporation may verify (verification by attorney). *Tulloch v. Belleville Pump & Skein Works*, 17 Colo. 579, 31 Pac. 229.

Managing or local agent may verify as well as officer (Code, § 258 as amended), but formerly only an officer could do so. *Godwin v. Carolina Telephone & Telegraph Co.*, 136 N. C. 258, 67 L. R. A. 251, 103 Am. St. Rep. 941, 1 Ann. Cas. 203, 48 S. E. 636, distinguishing *Phifer v. Travelers' Ins. Co.*, 123 N. C. 410, 31 S. E. 716; *Banks v. Gay Mfg. Co.*, 108 N. C. 282, 12 S. E. 741.

³ The intentment of the statute is to permit verification by domestic corporations either by an officer as representing "the party" (Code Civ. Proc. § 525, subd. 1), or by an attorney if the corporation is foreign or "is not within the county", and is

domestic (same section, subd. 3). It is therefore not always essential for an officer to verify for a domestic corporation. *High Rock Knitting Co. v. Bronner*, 18 N. Y. Misc. 627, 43 N. Y. Supp. 725.

In municipal court of New York a corporate defendant's answer need not be verified by an officer. The attorney may do so (Mun. Ct. Act, § 164). *Chadwick v. Waldorf Steam Laundry Co.*, 54 N. Y. Misc. 618, 104 N. Y. Supp. 746; *Climax Specialty Co. v. Benjamin C. Smith & Sons*, 31 N. Y. Misc. 275, 64 N. Y. Supp. 42, 7 N. Y. Ann. Cas. 373, 64 N. Y. Supp. 42.

⁴ Under Code Civ. Proc. § 120, the attorney may verify, though he cannot be served with summons. The concluding words "or any officer or agent on whom summons could be legally served" does not require that capacity of the attorney. *Beatrice Rapid Transit & Power Co. v. German Nat. Bank*, 45 Neb. 147, 63 N. W. 374.

⁵ See Judicial Code, § 29.

⁶ A petition signed by the president was entertained but denied on the merits in *Weeks v. Billings*, 55 N. H. 371.

the general agent,⁷ the attorney,⁸ if of the court to which it is presented,⁹ seems to be sufficient and probably the act of presenting the petition when clearly that of the corporation suffices without much regard to the signature.¹⁰ The verification may be made by some person who knows the facts, e. g., its attorney, under the present statute.¹¹ Before that an agent's¹² or officer's¹³ verification had been accepted. None but allegations of fact are to be verified and if no facts are stated no verification is needed;¹⁴ and they may be "duly verified" on information and belief.¹⁵

§ 3084. Issues, variance and admissions—In general. Ordinary rules for the construction of the pleadings and their effect govern in corporation actions.¹⁶ By construction a plea may be regarded as one

⁷ A signature by the general agent to a petition presented by defendant's attorney is good. *Bell v. Lycoming Ins. Co.*, 3 Hun (N. Y.) 409.

⁸ There was a signature by defendant's attorney to the removal petition but the objection to it was passed over without discussion in *Harley v. Home Ins. Co.*, 125 Fed. 792.

⁹ A removal petition, though concededly bad because signed by attorneys of another state not admitted generally or specially to practice before the court to which it is presented, is not assailable for that defect by plaintiff after moving to remand for want of ground for removal. *Tomson v. Iowa State Traveling Men's Ass'n*, 78 Neb. 400, 110 N. W. 997.

¹⁰ In the Removal Cases, 100 U. S. 457, 25 L. Ed. 593, the absence of any signature to the individual defendants' removal petition was held not open to objection in the federal court, where its face purported that it was defendants' petition, and all parties so treated it.

¹¹ *Berry v. Mobile & O. R. Co.*, 228 Fed. 395.

¹² A petition for removal signed in defendant's name by "B., agent" and verified by him was held good. *Fayette Title & Trust Co. v. Mary-*

land, P. & W. V. Telephone & Telegraph Co., 180 Fed. 928.

¹³ Verification by officer is binding when petition signed by attorney is presented for defendant. *Shaft v. Phoenix Mut. Life Ins. Co.*, 67 N. Y. 544, 23 Am. Rep. 138.

¹⁴ Statements of law need not be verified under this section. *Murray v. Southern Bell Telephone & Telegraph Co.*, 210 Fed. 925.

If the petition for removal be a pleading it is suggested that the state practice might require verification if facts were stated but not otherwise. *Harley v. Home Ins. Co.*, 125 Fed. 792. (Since this decision the Judicial Code, § 29, was passed requiring verification but with the same distinction as to law and fact.)

¹⁵ "Duly verified" under that section is satisfied with a verification of the facts as true to the knowledge of deponent except those "stated on information and belief," none being so stated and all others being statements of law. *Murray v. Southern Bell Telephone & Telegraph Co.*, 210 Fed. 925.

¹⁶ Allegations construed to mean that an agent had general authority to sell stock but no authority to make an agreement for repurchase of it.

of nul tiel corporation though couched in the language of a plea ultra vires,¹⁷ and a plea that the laws of the corporation were violated may be treated as an allegation of misdoing by defendant promoters.¹⁸ Immaterial matters likewise will be disregarded.¹⁹ It is bound by its own allegations as any other party,²⁰ in construing the pleadings against the pleader exhibits though not a part of the pleading may be examined as an aid to understanding them.²¹ By pleading a resolution set out with an allegation that it was so resolved, no issue is made as to the truth of the facts recited by it without an allegation affirming such facts.²² All facts involved which are legally presumed on the pleadings as they stand²³ are taken as established and out of the issues until overcome by evidence. If no answer is made the admission is limited to the pleaded facts of the bill or complaint.²⁴ A defense, such as fraud, may admit that the contract was made as al-

Dennette v. Boston Securities Co., 206 Mass. 401, 92 N. E. 498.

¹⁷ Denial of validity of a contract predicated on denial that plaintiff is de jure or de facto a corporation is plea of nul tiel corporation and not one of ultra vires. Rialto Co. v. Miner, 183 Mo. App. 119, 166 S. W. 629.

¹⁸ In an action against promoters and the corporation to recover the price of land, allegations of failure to observe the corporation laws, were construed as incidental to the main purpose of charging the individuals. Delgarno v. Middle West Portland Cement Co., 93 Kan. 654, 145 Pac. 823.

¹⁹ On a suit to charge the corporation for debts of its incorporators on the ground that they fraudulently transferred merchandise to it, it is immaterial what they did with their stock, and equally so if the suit is on the theory of assumption of their debts. Byrne & Hammer Dry Goods Co. v. Willis-Dunn Co., 23 S. D. 221, 29 L. R. A. (N. S.) 589, 121 N. W. 620.

²⁰ Plaintiff cannot deny that defendant sued as a corporation is such, or that it has its office where the charter locates it. Etowah Milling Co. v. Crenshaw, 116 Ga. 406, 42 S. E. 709.

Corporation is bound by facts alleged that an action taken was authorized by directors. Grants Pass Hardware Co. v. Calvert, 71 Ore. 103, 142 Pac. 569.

The relation of an officer to the corporation cannot be affirmed and denied in the same pleading. O'Rourke v. Grand Opera House Co., 47 Mont. 459, 133 Pac. 965.

²¹ An exhibit attached to the answer of a corporation denying that it was formed under a later act, may be looked into, not to make the answer good but to show that what was done amounted to a reorganization under the later act. Com. v. Licking Valley Bldg. Ass'n No. 3, 118 Ky. 791, 26 Ky. L. Rep. 730, 82 S. W. 435.

²² A statement contained in a copied or quoted resolution embodied in an answer with an allegation that it was so resolved does not amount to an allegation that the statement is true (answer in a stockholder's suit). Coquard v. St. Louis Cotton Compress Co. (Mo.), 7 S. W. 176.

²³ As to presumptions generally in such actions, see § 3090 et seq., infra.

²⁴ Frye v. Bank of Illinois, 10 Ill. 332.

leged, and overcome a denial of it.²⁵ Admission of any fact may be made by other means than by the answer or subsequent pleadings. For example a motion presupposing a dissolution admits it²⁶ or taking an appeal may admit it²⁷ while an appearance admits the corporate existence and also its name as pleaded.²⁸

Pleading or admitting any fact admits such other facts as are presupposed or necessarily implied, but no more. The general issue to a contract admits defendant corporation's existence and capacity but not its particular powers,²⁹ or even the time when the existence began, if that is material.³⁰ Admission of incorporation does not include the corporate liability or the facts thereof.³¹ The admission of the defendant's corporate existence by suing it as such is likewise

²⁵ *Baines v. Coos Bay Nav. Co.*, 41 Ore. 135, 68 Pac. 397.

²⁶ Moving for a substitution of trustees on the assumption that a forfeiture has occurred. *Kehrlein-Swinerton Const. Co. v. Rapken*, 30 Cal. App. 11, 156 Pac. 972, where, however, the question was passed without decision.

²⁷ Appealing from justice of the peace and filing bond as corporation proves incorporation in the circuit court. *L. Gerlinger Co. v. Labadie*, 41 Ill. App. 283.

On appeal to the court from an assessment and levy of ditching costs, no issue as to incorporation can be made. *Foster's Branch Ditching Co. v. Makepeace*, 45 Ind. 226.

See also § 3125, *infra*.

²⁸ A party which has appeared under the name sued by, cannot say that it is not a corporation or not properly named, or that the complaint was silent on these facts. *Butterfield v. Graves*, 138 Cal. 155, 71 Pac. 510.

See also § 3019, *supra*, as to admissions by appearance.

²⁹ Foreign corporation. *Phenix Bank v. Curtis*, 14 Conn. 437, 36 Am. Dec. 492.

Admits capacity to bring the action, *e. g.*, one for possession of land. *Society for Propagation of Gospel v.*

Pawlet, 4 Pet. (U. S.) 480, 7 L. Ed. 927.

General issue admits only the existence of the corporation and capacity to sue (or be sued), and the unpleaded fact that conditions precedent to liability on the cause of action (contract of subscription) was performed is not admitted. *Penobscot & K. R. Co. v. Dunn*, 39 Me. 587; *Oldtown & L. R. Co. v. Veazie*, 39 Me. 571.

³⁰ General issue pleaded by corporation admits competency to sue or be sued, but not the time when it was acquired; hence it may show against a plaintiff suing as stockholder that it was not organized when his claim to stock originated. *Freeman v. Machias Water Power & Mill Co.*, 38 Me. 343.

Admission of corporate existence in the present tense in an agreed statement will not conclude party as to existence at an earlier time. *Maryland Tube & Iron Works v. West End Improvement Co.*, 87 Md. 207, 39 L. R. A. 810, 39 Atl. 620.

³¹ Admission of incorporation by failure to deny it under oath does not make admission of corporation's ownership of dangerous wires covered by a general denial. *Freeman v. Missouri & K. Tel. Co.*, 160 Mo. App. 271, 142 S. W. 733.

limited.³² Pleading *ultra vires* admits making the contract.³³ Admitting a contract or deed with a corporation admits all requisite corporate powers.³⁴ Admission of possession or ownership by the corporation admits its incorporation.³⁵ Admitting execution of a contract or writing admits the officer's authority.³⁶ Admission of an officer's signing admits his authority to sign.³⁷ Repayment by the corporation admits receipt by it.³⁸

Possession of the incidental powers need not be proved by the corporation against a general issue,³⁹ but as to powers not incidental or presumed and challenged by a general issue such proof must be offered by plaintiff corporation,⁴⁰ but when the assignee of the corporation

³² Suing a corporation as such does not debar the state from taking issue on a claim of privilege made by the corporation. *State v. Mercantile Bank*, 95 Tenn. 212, 31 S. W. 989.

³³ Denial of indorser's incorporation or power to indorse admits the making and the company's indorsement. *Ogden v. Raymond*, 18 N. Y. Super Ct. 16, *aff'd* 40 N. Y. 42.

³⁴ Admission of a contract with plaintiff admits its power and capacity to make it. *Monson v. St. Paul, M. & M. Ry. Co.*, 34 Minn. 269, 25 N. W. 595.

An answer admitting the making of a deed to the corporation admits its power to purchase the land and included therein its power to assume payment of an incumbrance thereon. *Woods Inv. Co. v. Palmer*, 8 Colo. App. 132, 45 Pac. 237.

Admission of making of mortgage to plaintiff admits plaintiff's incorporation. *Butterfield v. Third Ave. Sav. Bank*, 25 N. J. Eq. 533.

The rule that by contracting with a corporation as such, corporate existence is admitted, also applies when *non est factum* is pleaded to the contract. *West Side Auction House Co. v. Connecticut Mut. Life Ins. Co.*, 186 Ill. 156, 57 N. E. 839, *aff'g* 85 Ill. App. 497.

³⁵ In ejectment against a corporation its admission of alleged possession admits its incorporation. *Chapman v.*

Delaware, L. & W. R. Co., 3 Lans. (N. Y.) 261.

Allegation that "defendant, a corporation," etc., "were" the owners of a railroad and answer admitting such ownership, carries admission of incorporation; since, though "were" being plural might mean an association not incorporated, it must mean a corporation which only could own a railroad. *Woodson v. Milwaukee & St. P. Ry. Co.*, 21 Minn. 60.

³⁶ Admission of execution of instrument admits authority of executing officers. *Leonard & Montgomery Real Estate & Investment Co. v. Bank of America*, 86 Fed. 502.

³⁷ Admission that an alleged contract was signed by a manager admits that he had authority to sign it. *Beleh v. Big Store Co.*, 46 Wash. 1, 89 Pac. 174; *Frost v. Ainslie Lumber Co.*, 3 Wash. St. 241, 28 Pac. 354, 915.

³⁸ Receipt of money by the corporation through the officer is admitted by its plea that the money was repaid by stock issued to such person for plaintiff. *Quinn v. American Bankers' Assur. Co.*, 183 Mo. App. 8, 165 S. W. 823.

³⁹ See also § 3054, *supra*.

⁴⁰ Power of domestic corporation to hold property need not be proved. *New Haven Steamboat & Transportation Co. v. Vanderbilt*, 16 Conn. 420. That of a foreign corporation to make a particular contract must be. *Phenix*

sues he need not prove its involved powers if on any basis they are presumable.⁴¹ Corporate power is in issue under a plea of ultra vires⁴² even though not well pleaded.⁴³

Proof of the agent's authority may be made under an issue that the corporation made the contract sued on,⁴⁴ or committed the tort or act alleged.⁴⁵ The same allegation admits proof that a promoter's contract was adopted or ratified.⁴⁶ Without a denial of the contract sued on the authority of the officer cannot be gone into,⁴⁷ and there should be an additional denial of his power to overcome the presumption of authority of the officer, though this is not requisite in the case of an agent.⁴⁸ A general denial of all other facts alleged puts in issue authority of one admitted only to "be the officer alleged."⁴⁹

The rules of variance differ only in the facts involved from the ordinary action, between natural persons. Besides the variance in name, and charter and existence,⁵⁰ illustrations will be found in the footnotes of allegations of parties to a corporate contract⁵¹ of the man-

Bank v. Curtis, 14 Conn. 437, 36 Am. Dec. 492.

⁴¹ *McIntire v. Preston*, 10 Ill. 48, 48 Am. Dec. 321.

⁴² *People v. Revelli*, 184 Ill. App. 233.

⁴³ If issue is joined on an insufficient plea of ultra vires and sustained it avails defendants. *Hobbie v. Bank of Montgomery*, 107 Ala. 329, 18 So. 131.

⁴⁴ *Trigg Candy Co. v. Emmett Shaw Co.*, 9 Ga. App. 358, 71 S. E. 679.

See also § 3057, *supra*.

⁴⁵ *Union Naval Stores' Co. v. Pugh*, 156 Ala. 369, 47 So. 48.

Assault by the president consequent on his order to plaintiff to desist from vending merchandise on the company's land where it had granted the concession to another is in line of company business; hence a pleaded assault by the corporation is supported by proof of such assault by him. *Hart v. Jones*, 14 Ala. App. 327, 70 So. 206, certiorari denied *Ex parte Bellevue Highlands Land Co.*, 195 Ala. 695, 70 So. 1012.

See also § 3057, *supra*.

⁴⁶ Doctrine of relation applies back to time of making. *Gordon v. House of Childhood*, 83 N. Y. Misc. 74, 144 N. Y. Supp. 685.

⁴⁷ *Lord & Thomas v. Sanitary Drinking Cup Co.*, 191 Ill. App. 150.

⁴⁸ Proof of execution by the president is all that is required in action on a contract of a kind which the corporation could make, unless the president's authority was put in issue so that it, too, must be proved. In the case of an agent ordinarily lacking such power his authority would need to be proved though not denied. *George E. Lloyd & Co. v. Matthews*, 223 Ill. 477, 7 L. R. A. (N. S.) 376, 114 Am. St. Rep. 346, 79 N. E. 172.

⁴⁹ Admission that one was president with denial of all other facts alleged denies his pleaded authority. *Gallatin Nat. Bank v. Nashville, C. & St. L. R. Co.*, 42 Hun (N. Y.) 660, 4 N. Y. St. Rep. 714.

⁵⁰ §§ 3085, 3086, *infra*.

⁵¹ Suit by agent and contract by corporation is a variance. *Hall's Safe & Lock Co. v. Americus*, 69 Ga. 746.

Allegation of corporate contract and proof of one with individuals is variant. *Mackey v. Mutual Aid, Loan & Investment Co.*, 94 Ga. 104, 20 S. E. 643.

In a suit on a corporate note proof that an individual also signed it is not

ner of making it,⁵³ of the making of a "loan" to it,⁵³ of the terms and particulars of a note set out by copy,⁵⁴ of the place of a meeting,⁵⁵ and the adoption of a by-law.⁵⁶

Apart from the sufficiency of the pleadings to join and present an issue, it has been enacted in the interest of eliminating formal proofs of matters not really disputed, that some such matters will not be considered in issue without a verification of the answer, or an affidavit of defense, or a notice of special defenses under a general answer, or an order for a trial of such issues, or some similar specific mode of developing the issue. The verification of the complaint has nothing to do with this except as it requires the answer to be verified too.⁵⁷ As a general rule of practice it is enacted in many states that a verified answer is not required unless the complaint is verified, and accordingly in such a state of the pleadings the issues are made without such verification of the answer as otherwise would be re-

a variance. *Rock Valley Paper Co. v. Nixon*, 84 Ill. 11.

It is a variance to prove stockholders liable on an express promise under allegations charging the corporation. *Dodge v. Chambers*, 43 Colo. 366, 96 Pac. 178.

⁵³ Allegation of note made by corporation and S. is not variant from proof that corporation made it by his hand and he individually indorsed it. *Luther Lumber Co. v. Sheldahl Sav. Bank*, 22 Wyo. 302, 139 Pac. 433.

⁵³ Allegation of a loan to the corporation is not met either by proof of money paid on subscriptions or by proof of a loan to be repaid on a condition not proved to have befallen. *Stanton v. Baird Lumber Co.*, 132 Ala. 635, 32 So. 299.

⁵⁴ Proof of a note unlike the copy attached to the declaration in that printed words "Treasurer, Assistant Treasurer" did not appear on the copy, is not variant, those being printed form words. *Crystal River Lumber Co. v. Consolidated Naval Stores Co.*, 63 Fla. 119, 58 So. 129.

⁵⁵ Variance in that a meeting was held at B whereas P was alleged to

have been the principal place of business must be objected to on trial when it could be obviated. *Barrell v. Lake View Land Co.*, 122 Cal. 129, 54 Pac. 594.

⁵⁶ Allegation that the president and directors adopted a by-law is not variant from proof that a majority adopted it. *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Dougl. (Mich.) 124, 43 Am. Dec. 457.

⁵⁷ See the cases *infra* this section.

The various rules of practice and statutes by reason of which bills and complaints must be verified in order to obtain certain interlocutory orders or relief, such as injunction, apply alike to all plaintiffs, except as made by statute peculiarly applicable to corporations. Nothing about such practice requires treatment here, but the chapters on Injunction and Receivers should be consulted. See chapters so entitled, *infra*.

A federal bill now must be verified if preliminary injunction is asked (New Equity Rule 25) that being "special relief pending the suit." *Scheuerle v. Onepiece Bifocal Lens Co.*, 241 Fed. 270.

quined;⁵⁵ but there is nothing in this about corporations. It simply dispenses with verification and leaves the general rules for the formation of the issues to operate uninfluenced. Among issues thus specially made the most common is that of non est factum, which generically includes the execution and inception of a corporation's contract as depending on corporate power, official authority, or form of writing. Many statutes make an affidavit or special order necessary for the trial of this issue as between natural persons, and the courts have applied those statutes to corporations as well, but some statutes apply in express terms to corporation contracts or notes when sued on. In substance all of these issues are reducible to non est factum, as will be seen. Issues of another class which under statutes and rules of practice will be taken as confessed if not verified or otherwise specially made are those which correspond to pleas of fact in abatement and special traverses of new matter, as they were known at the common law; and these include corporate existence, dissolution, suspension, jurisdictional facts, and perhaps others. At the common law these must have been pleaded under a readiness to verify, since they did not go to the jury.⁵⁶ The common-law forms having long since been done away with except in Illinois and a few other states, it is permissible to touch briefly on this history for the purpose of getting a background of the modern practice of making these special issues; because such issues are so frequently involved in corporation actions.

The manner of verifying and the officers by whom it is to be done (including the swearing to affidavits of defense or merits) has been treated in the preceding section.⁵⁷ The denial of the instrument or of its execution which the sworn denial only will put in issue, includes the authority of the agent to make it,⁵⁸ or of an officer,⁵⁹ and the statute applies to such contracts as indorsements on a note or bill.⁶⁴ Without

⁵⁵ See the local statutes and see § 3083, *supra*, as to bad verification of the complaint excusing verification of the answer.

⁵⁶ The history of this rule is concisely stated by Sergeant Stephen (Pleading, Tyler's Ed., pp. 378-380), who shows that it was originally only a proffer of one of the modes of proving the facts so alleged.

⁵⁷ § 3083, *supra*.

A statute requiring a special demand for proof to make up such issue held not to operate on a case where

issues were already made up. *Goodwin Invalid Bedstead Co. v. Darling*, 133 Mass. 358.

⁵⁸ Authority of an agent to sign for the corporation must be denied. *Barrett Min. Co. v. Tappan*, 2 Colo. 124.

Authority of an agent to make a corporate note must be denied. *Union Dray Co. v. Reid*, 26 Ga. 107.

⁵⁹ *Union Dray Co. v. Reid*, 26 Ga. 107.

⁶⁴ Where indorsement of a bill by the corporation by its president is al-

the required verification execution stands admitted⁶⁵ leaving only the existence of the contract to be proved.⁶⁶ Although the verification is by the officer the denials must be ascribed to the corporation.⁶⁷ The denial if explicit may be good though general, being construed fairly, and the allegations will not be forced to admit inferences destructive of it.⁶⁸ The necessity of verifying a plea non est factum is not dispensed with by the fact that the answer is so ambiguous that in one view it may be regarded as pleaded to a contract of individuals and not of the corporation, and in the other view contrariwise.⁶⁹

A plea in abatement must be positively verified and not made on information and belief.⁷⁰ In Illinois where a modified common-law system prevails, a plea to the jurisdiction for bad service need not be verified or be accompanied with an affidavit of merits, it being in the nature of a plea of abatement only.⁷¹

A plea of non assumpsit must be verified or execution of the instrument must be denied by the affidavit to raise the issue under the laws of Illinois.⁷² The want of power of the corporation to enter into a lease must likewise be pleaded under a verification,⁷³ but no verification was required to let in ultra vires as a defense to an action of

leged. *Montgomery & E. R. Co. v. Trebles*, 44 Ala. 255.

⁶⁵ Unverified answer admits execution of corporate bonds sued on (Cal. Code Civ. Proc. § 447). *Perris Irrigation Dist. v. Thompson*, 116 Fed. 832.

⁶⁶ General denial not on oath admits execution of subscription and denies only its existence. *Price v. Grand Rapids & I. R. Co.*, 18 Ind. 137; *Evans v. Southern Turnpike Co.*, 18 Ind. 101.

⁶⁷ A denial of the factum of a bond under oath (Justice's Act, § 14) must not be by affiant. *Barrett Min. Co. v. Tappan*, 2 Colo. 124.

An affidavit of defense purporting to have been made by the corporation itself is bad. *Knickerbocker Life Ins. Co. v. Hoeske*, 32 Md. 317. See also § 3083, *supra*.

⁶⁸ An explicit denial that the directors ever authorized the making of a note by the business manager with a corresponding verification, will not be construed as a bare denial of spe-

cial authorization leaving it admitted that some general authority existed. It is a good denial of all authority. *Topeka Capital Co. v. Remington Paper Co.*, 61 Kan. 6, 59 Pac. 1062 (rehearing), rev'g 61 Kan. 1, 57 Pac. 504.

⁶⁹ *City Water Works v. White*, 61 Tex. 536.

⁷⁰ *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582.

See § 3086, *infra*, as to pleas of no corporation.

⁷¹ *American Spirits Mfg. Co. v. Peoria Belt Ry. Co.*, 154 Ill. App. 330; *Beck & Pauli Lithographing Co. v. Monarch Brewing Co.*, 131 Ill. App. 645.

⁷² Practice Act, § 52. *Lord & Thomas v. Sanitary Drinking Cup Co.*, 191 Ill. App. 150.

Denial of acceptance of a bill must be by plea under oath. *Peoria & O. R. Co. v. Neill*, 16 Ill. 269.

⁷³ *Northwestern Brewing Co. v. Manion*, 44 Ill. App. 424.

assumpsit.⁷⁴ A requirement that pleas of non est factum be verified, applies where the defense is that the officer lacked authority.⁷⁵

The affidavit of defense, in use in Pennsylvania and other states, in order to prevent judgment must definitely and certainly traverse the facts alleged or stated,⁷⁶ and show a good defense.⁷⁷ It must therefore not be hypothetical⁷⁸ or leave destructive inferences.⁷⁹ The affidavit is to be made responsive to the statement of the claim rather than to the filed cause of action under the Pennsylvania practice of accompanying a declaration with a statement of particulars⁸⁰ and if the statement is bad the affidavit is needless.⁸¹ When so made and meeting these tests, it is equivalent to a formal appearance for the purpose of preventing default.⁸² Under the practice of giving notice of special defenses under a general issue, a general issue in a suit for damages requires notice to let in an issue of power to hold the property which was damaged.⁸³ The notice need not go beyond the state-

⁷⁴ Ultra vires may be proved under general issue in action of assumpsit against corporation. *Badger v. Inlet Swamp Drain. Dist.*, 42 Ill. App. 79, aff'd 141 Ill. 540, 31 N. E. 170.

⁷⁵ Verified plea is essential to question official authority to make contract. *Kennedy v. Supreme Lodge Knights of Pythias*, 124 Ill. App. 55.

Under R. S. art. 1265, § 8. *A. S. Cameron Steam Pump Works v. Lubbock Light & Ice Co.*, — Tex. Civ. App. —, 147 S. W. 717.

⁷⁶ *Cunningham v. Standard Sew. Mach. Co.*, 219 Pa. 477, 68 Atl. 1027.

An affidavit that the notes sued on are those of individuals does not meet a statement averring that they represent a loan to the corporation and that the notes were made in its behalf. *Wanner v. Emanuel's Church of Evangelical Ass'n*, 174 Pa. St. 466, 34 Atl. 188.

⁷⁷ Hence to state that money for which instruments were given was "never paid into the treasury" of the company shows no defense. *Holt v. Holt Elec. Storage Co.*, 79 Fed. 597.

Affidavit held to show as defense that the obligation was by its terms not yet due. *Schwerdfeger v. Co-*

lumbia Gesang Verein, 26 Pa. Super. Ct. 515.

Sufficient to plead fraud to note as against original party to fraud who later took up note from indorsee. Such party could not shield himself by bona fides of such indorsee. *Erie Boot & Shoe Co. v. Eichenlaub*, 127 Pa. St. 164, 17 Atl. 889, 24 Wkly. Notes Cas. 332.

⁷⁸ An affidavit that, if the loan sued on was made at all, it was made to a seceding faction of defendant church, is hypothetical and bad. *Wanner v. Emanuel's Church of Evangelical Ass'n*, 174 Pa. St. 466, 34 Atl. 188.

⁷⁹ Held not sufficient to impeach judgment sued on for want of jurisdiction, it leaving open an inference that appearance was made by attorney. *Wyoming Mfg. Co. v. Mohler*, 1 Monag. (Pa.) 622, 17 Atl. 31.

⁸⁰ *Wanner v. Emanuel's Church of Evangelical Ass'n*, 174 Pa. St. 466, 34 Atl. 188.

⁸¹ *Kinney v. Harrison Manufacturing & Boiler Co.*, 22 Pa. Super. Ct. 601.

⁸² *Deskins v. Beverting Fund Ass'n*, 3 Pa. Dist. Ct. 394.

⁸³ The rule (14 Conn. 140) requiring notice at the time of pleading

ment of the defense into further details with regard to the elements thereof.⁸⁴

The New York statute provides, as to suit on a written promise "for the absolute payment of money," that if the answer be not put in within a limited time a default may be entered. It has been held to be in derogation of common law and strictly construable.⁸⁵ The answer need not be rejected in order to avail of the right to take default under this statute,⁸⁶ and after one order and an amendment no further one is necessary.⁸⁷ A formal answer need not be put in but a counterclaim will serve as an answer to prevent the default.⁸⁸ No leave to enter judgment in defaulting according to this statute is required.⁸⁹ The promise which will come within the statute is one which is absolute and not conditional or contingent and not dependent on extrinsic facts to be binding.⁹⁰ A promise collateral to such a promise is not thereby brought under the statute.⁹¹ If the action is

applies where a domestic corporation sues for damages to its property, and defendant questions corporate power to hold such property. *New Haven Steamboat & Transportation Co. v. Vanderbilt*, 16 Conn. 420.

⁸⁴ The rule (Rule 13) which requires notice of intention to deny the execution of the instrument does not require notice of intention to show that members signed as individuals, not as agents. *Lyndon Sav. Bank v. International Co.*, 75 Vt. 224, 64 Atl. 101.

⁸⁵ N. Y. Code Civ. Proc. § 1778; *Bradley v. Albemarle Fertilizing Co.*, 2 N. Y. Civ. Proc. 50.

In the marine court default can be taken in six days instead of the twenty required in other courts. *Schlegel v. American Beer & Ale Bottling Co.*, 12 Abb. N. Cas. (N. Y.) 260, 64 How. Pr. (N. Y.) 196, 2 N. Y. Civ. Proc. 593.

⁸⁶ Code Civ. Proc. § 1778 merely makes answer ineffectual without the order. *Watertown Nat. Bank v. Westchester County Waterworks Co.*, 19 N. Y. Misc. 685, 44 N. Y. Supp. 1101.

⁸⁷ *Edward Barr Co. v. George M. Kuntz & Co.*, 18 Abb. N. Cas. (N. Y.) 476.

⁸⁸ *Pennypacker v. Thomas B. Levis*

& Co., 63 N. Y. Misc. 384, 116 N. Y. Supp. 771.

⁸⁹ *Hutson v. Morrisania Steamboat Co.*, 12 Abb. N. Cas. (N. Y.) 278, 64 How. Pr. (N. Y.) 268.

⁹⁰ A corporation's indorsement is not a promise "for the absolute payment of money." *Ghorer v. Times Prtg. & Pub. Co.*, 119 N. Y. 483, 23 N. E. 979, aff'g 53 Hun (N. Y.) 68, 6 N. Y. Supp. 63.

Nor is a life insurance policy within such statute. *New York Life Ins. Co. v. Universal Life Ins. Co.*, 88 N. Y. 424.

Nor a guaranty by the corporation. *Canaville v. Michael & Co.*, 31 N. Y. Misc. 170, 63 N. Y. Supp. 967.

Nor is action on a guaranteed stock contract of a building and saving society, where evidence extrinsic to the certificate was required to prove its real date and maturity of the promise to pay. *Tautphoeus v. Harbor & Suburban Bldg. & Sav. Ass'n*, 96 N. Y. App. Div. 23, 83 N. Y. Supp. 769.

See also under an earlier statute, action on insurance policy is not within its terms. *Tyler v. Aetna Fire Ins. Co.*, 2 Wend. (N. Y.) 322.

⁹¹ An assumed liability on a promise to pay a predecessor's note is not within it. *Fifth-Third Nat. Bank of*

on such a promise with another contract the statute cannot apply.⁹² It applies where the indorser of notes within its terms sues after being obliged to take them up.⁹³

§ 3085. — **Misnomer or misdescription.** It is settled that by pleading the general issue the defendant waives a misnomer and cannot complain that the true name varies from it.⁹⁴ This is only a statement of another side of the principle elsewhere stated in the form of the rule that abatement for misnomer must be specially pleaded,⁹⁵ and it reappears in the rule that a judgment against a corporation appearing by the wrong name is valid and will not be reversed for that reason.⁹⁶ A misnomer is also waived by answering in the true name.⁹⁷ The rules as to materiality of a misnomer in pleadings and other instruments generally were stated in an early chapter to be, that it will not be deemed material if the identity of the corporation is in no way rendered uncertain by it.⁹⁸ In accordance therewith and with the rules of pleading a variance consisting in the omission or addition of a word⁹⁹ or of the place which is part of the name¹ or of prefixes like "President of" etc.,² or other differences in the name will not be

Cincinnati v. Hudson Refrigerator Co., 153 N. Y. Supp. 168.

⁹² On goods sold and also on a note. *McGovern v. Bulman-Warner Paint Co.*, 28 N. Y. Civ. Proc. 212, 55 N. Y. Supp. 767; *Bradley v. Albemarle Fertilizing Co.*, 2 N. Y. Civ. Proc. 50.

⁹³ *Ford v. Binghampton Hydraulic Power Co.*, 54 Hun (N. Y.) 451, 7 N. Y. Supp. 714.

⁹⁴ *Hanover Sav. Fund Society v. Suter*, 1 Md. 502; *Bank of Metropolis v. Orme*, 3 Gill (Md.) 443; *Gilbert v. Nantucket Bank*, 5 Mass. 97; *Lake Superior Bldg. Co. v. Thompson*, 32 Mich. 293; *Young v. South Tredagar Iron Co.*, 35 Tenn. 189, 4 Am. St. Rep. 752, 2 S. W. 202.

⁹⁵ § 3072, *supra*.

⁹⁶ §§ 3118, 3125, *infra*.

⁹⁷ *Mahon v. San Rafael Turnpike Road Co.*, 49 Cal. 269.

⁹⁸ §§ 742, 743, *supra*.

⁹⁹ *Gillespie v. Planters' Oil Mill & Manufacturing Co.*, 78 Miss. 406, 24 So. 900.

"Loeber Hair Co.," held not materially variant from *Loeber Hair Goods Co.*, and the misnomer waived. *Grassman v. Loeber Hair Co.*, 155 N. Y. Supp. 1012.

Omission of "American" from name *American Bell Telephone Co.* held not fatal and not objectionable except by plea in abatement. *State v. Bell Tel. Co.*, 36 Ohio St. 296, 38 Am. Rep. 583.

¹ Omission of name of state at end of name of bank held immaterial. *Thatcher v. West River Nat. Bank*, 19 Mich. 196.

Omission or addition of words "city and state of" before "New York" in corporate name held immaterial. *International Ins. Co. of New York v. Danport*, 57 Mo. 289.

² A variance by leaving off the words "President, etc., of," in the contract is not fatal if identity with plaintiff is shown. *Hendel v. Berks & D. Turnpike Road*, 16 Serg. & B. (Pa.) 32.

material if not specially pleaded in abatement.³ It was fatal, however, where introduction of the articles showed that the place was part of the true name and that they required the suit to be in the name of the president.⁴ Proof of existence cannot be made by production of a charter to a corporation of similar but variant name.⁵

When a contract or instrument is pleaded to which the corporation is a party, and so alleged, there is not necessarily a variance though the name in the instrument varies from the true name of the corporation as pleaded,⁶ and even if a variance, but of immaterial nature, it may be ignored.⁷ Proof of a contract to the corporation by its former name is not variant from amended allegation of a name adopted by change.⁸ Variance in the name occurring in other col-

Addition in contract of words prefixed, "President and Managers of," to corporate name held no variance. *Culpeper Agr. & Mfg. Society v. Digges*, 6 Band. (Va.) 165, 18 Am. Dec. 708.

But a name running "President and Trustees of," etc., has been held fatally variant from a name without that prefix. *Burnham v. Sav. Bank*, 5 N. H. 446.

³ *Bank of Utica v. Smalley*, 2 Cow. (N. Y.) 770, 14 Am. Dec. 526, aff'd 8 Cow. (N. Y.) 398.

Variance of "1st National Bank" from "First National Bank" held immaterial on appeal, because not amended on trial. *Sayers v. First Nat. Bank*, 89 Ind. 230.

⁴ Plaintiff suing as "Bank of Commerce," a corporation existing under the laws of New York, cannot introduce articles showing its name to be "Bank of Commerce in New York" by which it must sue in the name of its president. *Bank of Commerce v. Mudd*, 32 Mo. 218.

⁵ Charter to "The United Slavonians Benevolent Society" does not prove existence of "Garfield Lodge, No. 1, of United Slavonian Benevolent Society." *Sprey v. Garfield Lodge No. 1 of United Slavonian Benev. Society*, 117 Ill. App. 253.

⁶ Name signed to contract is not

variant from that alleged if in fact defendant corporation was signer. *Board Education Walton Dist. Roane Co. v. Board Trustees Walton Lodge*, No. 132, I. O. O. F., — W. Va. —, 88 S. E. 1099.

By proper pleading it may sue on a contract made in a variant name or in the name of its officer. See §§ 3045-3051, et seq., supra. But see *Woolwich v. Forrest*, 2 N. J. L. 115, a municipal corporation case.

⁷ Variance between plaintiff's pleaded name and that in an instrument payable to it, consisting only in omission of the words from the name in the bond, "in the state of Pennsylvania" held not material. *Coulter v. Western Theological Seminary*, 29 Md. 69.

Addition in a contract of the words "of Hartford" to the corporate name of one party and "of Chicago" to the name of the other does not constitute variance from those names pleaded in the declaration. *West Side Auction House Co. v. Connecticut Mut. Life Ins. Co.*, 186 Ill. 156, 57 N. E. 839, aff'g 85 Ill. App. 497.

⁸ Amendment setting up a change of name held to admit bond running to corporation in former name. *West v. Carolina Life Ins. Co.*, 31 Ark. 476. See § 3045, supra.

lateral writings and documents will be disregarded if slight and not misleading.⁹ Slight variance in the name of the signatory agent on a contract is immaterial.¹⁰ If the variance is in the name of a corporation not a party to the suit, but merely in a chain of title or right to which one of the parties is privy, it will be held immaterial unless amounting to a failure of proof.¹¹

§ 3086. — **As to existence or charter.** The principle heretofore laid down that a special plea of no corporation or of nonexistence is necessary to plead that fact defensively¹² reiterates itself in the form of a rule that there is no issue of corporate existence unless made by a plea nul tiel or otherwise specially,¹³ or by denial.¹⁴ One is merely the converse of the other, and all the cases cited to one might be well cited to the other, and all of them together might be cited to the principle that the general issue or a general denial joins no issue on corporate existence unless that is a part of the very cause of action.¹⁵ Even with such a plea, or under any other plea or denial, the issue may have been waived by appearance of the corporation itself¹⁶ or by any other act or proceeding recognizing its existence;¹⁷ and it need not be proved when admitted,¹⁸ but an admission of incorporation does not establish whether it was under a general or a special act, and the burden of proving that remains.¹⁹ An issue of incorporation of a

⁹ Corporate ownership of a vessel may be shown by producing her certificate of ownership to be in a corporation of substantially defendant's name, adding only the word "The." *Carlson v. White Star S. S. Co.*, 39 Wash. 394, 81 Pac. 838.

Omission in mechanic's lien, notice of words "of Grafton" from claimant's name held not a variance from the bill. *Grafton Grocery Co. v. Home Brewing Co.*, 60 W. Va. 281, 54 S. E. 349.

¹⁰ Variance in the middle initial of his name. *Chestnut Hill Reservoir Co. v. Chase*, 14 Conn. 123.

¹¹ *Chicago, St. L. & N. O. R. Co. v. Wilson*, 25 Ky. L. Rep. 525, 76 S. W. 138.

¹² §§ 3073, 3074, *supra*.

¹³ *Odd Fellows' Bldg. Ass'n v. Hogan*, 28 Ark. 261; *Calumet Paper Co. v. Knight & Leonard Co.*, 43 Ill. App.

566; *Gainesville & A. County Hospital Ass'n v. Atlantic Coast Line R. Co.*, 157 N. C. 460, 73 S. E. 242.

¹⁴ *Simon v. Calfee*, 80 Ark. 65, 95 S. W. 1011; *Whitmore v. Fourth Congregational Soc. in Plymouth*, 2 Gray (Mass.) 306; *Charleston Live Stock Co. v. Collins*, 79 S. C. 383, 60 S. E. 944.

¹⁵ This section, *infra*.

¹⁶ § 3019, *supra*.

¹⁷ § 3084, *supra*.

¹⁸ *Indiana Millers' Mut. Fire Ins. Co. v. People*, 65 Ill. App. 355, *aff'd* 170 Ill. 474, 49 N. E. 364. See also § 3084, *supra*.

¹⁹ Plea non assumpsit by corporation admits existence only. It does not admit that incorporation was under a general law as pleaded. Plaintiff must prove that to exclude the inference that it was by special charter. *Gay v. Keys*, 30 Ill. 413.

defendant as originally alleged may be eliminated by an amendment under which incorporation is denied.³⁰ Plaintiff cannot deny that defendant sued as such is a corporation.³¹ An admission of existence as pleaded also excludes evidence bearing on or tending to depart from the issue. Thus, if the special kind of corporation alleged is admitted, it cannot be shown that it was of a cognate kind.³² While the existence of the corporation may be refuted by the complaint itself, or by the judicial knowledge of the court, or may be proved by such knowledge,³³ unnecessary inferences as to unpleaded facts will not be indulged for this purpose.³⁴ An action to forfeit the corporation sued by name necessarily admits its existence notwithstanding allegations of illegal organization.³⁵ Going into the merits without a special plea admits it and excludes the issue,³⁶ in like manner as a plea of set-

³⁰ An amendment of pleadings of plaintiff during trial so as to deny incorporation of one of defendants leaves no issue on that fact. *Wall v. Mines*, 130 Cal. 27, 62 Pac. 386.

³¹ *Etowah Milling Co. v. Crenshaw*, 116 Ga. 406, 42 S. E. 709.

³² *Stork v. Supreme Lodge Knights of Pythias of World*, 113 Iowa 724, 84 N. W. 721; *Grand Rapids Furniture Co. v. Grand Hotel & Opera House Co.*, 11 Wyo. 128, 72 Pac. 687, 70 Pac. 838.

Admission of allegation that plaintiff "was duly incorporated," a copy of the certificate being attached to the complaint, establishes legal incorporation. *First Russian Nat. Organization of New England States v. Zuraw*, 89 Conn. 616, 94 Atl. 976.

³³ See § 3088, *infra*, and references there found as to judicial notice.

³⁴ Reference to the act of incorporation in pleading corporate existence does not show nonexistence by reason of the fact judicially known that the act calls for steps in organization which are not alleged to have been made. It is not necessary to plead them. *Cheraw & C. R. Co. v. Garland*, 14 S. C. 63; *Cheraw & C. R. Co. v. White*, 14 S. C. 51.

³⁵ *People v. Ravenswood*, H. C. &

W. Turnpike & Bridge Co., 20 Barb. (N. Y.) 518.

A defective corporation may be sued to restrain action threatened by it and the de jure existence of it denied in the complaint (dissenting opinion that suing it admits existence). *Newton County Draining Co. v. Nofsinger*, 43 Ind. 566. See also *Knight v. Flatrock & W. Turnpike Co.*, 45 Ind. 134, dissenting opinion.

³⁶ *United States*. *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 7 L. Ed. 189; *Goodyear v. Blake*, Fed. Cas. No. 5,560.

District of Columbia. *Tyler v. Mutual Dist. Messenger Co.*, 17 App. Cas. 85.

Louisiana. *Boston Belting Co. v. Simonds*, 22 La. Ann. 75.

Massachusetts. *Monumoi Great Beach v. Rogers*, 1 Mass. 159.

Michigan. *Canal St. Gravel-Road Co. v. Paas*, 95 Mich. 372, 54 N. W. 907.

Missouri. *Ludowski v. Polish Roman Catholic St. Stanislaus Kostka Benev. Society*, 29 Mo. App. 337.

South Carolina. *Faust v. Southern Ry.*, 74 S. C. 360, 54 S. E. 566.

By statute all pleas to the action admit the character of plaintiff and this applies to corporations. *Reed v.*

off;²⁷ in applying this rule a name importing incorporation or describing as "a corporation" is sufficient under the practice of most states in ordinary actions.²⁸ It is also admitted by implication when some other fact is admitted which necessarily implies corporate existence.²⁹ If there is no allegation of corporate existence that lack in the complaint must be challenged by some objection or demurrer, or it is waived.³⁰ The plea or answer properly construed must therefore amount to a denial or traverse of the fact of corporate existence,³¹ and a general denial or the general issue ordinarily does not do this.³² Neither can it be raised by attack on the judgment in the lower courts or on appeal if not made below.³³ The issue is presented by a plea of nonjoinder of the corporation to a bill alleging nonincorporation as a reason for not joining it.³⁴ A technical conclusion to the country is not the proper mode of making the issue where common-law distinctions are observed and the fact lies in proof of a record binding on the court.³⁵ Except under a practice where an affidavit is used to specialize a general plea or denial, and thus admit the issue under it,³⁶

Benton & M. Railroad & Banking Co., 4 How. (Miss.) 257, distinguishing *Carmichael v. School Lands*, 3 How. (Miss.) 84, holding the contrary before the passage of the statute.

Whether plea to merits puts plaintiff's corporate existence in issue, questioned. *Riverside Sand & Cement Mfg. Co. v. Hardwick*, 16 N. M. 479, 120 Pac. 323. But see *Butterfield's Overland Dispatch Co. v. Wedeles*, 1 N. M. 528.

Admitted by corporation's answer alleging issuance of policy by it as a defense. *Sengfelder v. Mut. Life Ins. Co.*, 5 Wash. 121, 31 Pac. 428.

²⁷ *McKnight v. Mineral Point*, 1 Pinney (Wis.) 99 (municipal corporation).

²⁸ *United Brotherhood of Carpenters & Joiners of America v. Diakle*, 32 Ind. App. 273, 69 N. E. 707. See also § 3043, *supra*.

²⁹ § 3084, *supra*.

³⁰ §§ 3066, 3068, *supra*.

³¹ Denial that persons named are "The Trustees of [name of plaintiff]" tenders no issue as to corporate

existence. *Wiles v. Philippi Church*, 63 Ind. 206.

Pleadings held to have made no denial of corporate existence but only of name or place. *G. F. Swift & Co. v. Crawford*, 34 Neb. 450, 51 N. W. 1034.

Nul tiel based on a change of identity as well as name raises the issue (municipal corporation). *Sunapee v. Eastman*, 32 N. H. 470.

³² This section, *infra*.

³³ See §§ 3119, 3124, 3125, *infra*; and *Reilly v. Union Protestant Infirmary*, 87 Md. 664, 40 Atl. 894.

³⁴ On a plea in abatement for failure to join the corporation as a necessary defendant, the bill alleging that there was no corporation and the plea that there was, an issue of de jure existence is presented. *Mayor, etc., of Wilmington v. Addicks*, 8 Del. Ch. 310, 43 Atl. 297, 7 Del. Ch. 56, 43 Atl. 297.

³⁵ *Bennington Iron Co. v. Rutherford*, 18 N. J. L. 105, 35 Am. Dec. 528.

³⁶ This section, *infra*.

it cannot be made by affidavit when not made by the pleadings.³⁷ The pleas relate to the time of the action, or at latest to the time of making, and hence if dissolution occurs after general issue pleaded, a special plea supplementally or *puis darrein continuance* is required to make the issue,³⁸ but it has been held that under a plea covering time since the commencement of action proof may be made.³⁹

The general issue goes only to the substance of the action and not to the parties or to matters of form, and accordingly it has been repeatedly held that it does not join issue on the corporate existence of the plaintiff or the defendant.⁴⁰ The admission made by the general issue

³⁷ Where the pleadings themselves raise no issue, but an affidavit was made to show that plaintiff was a partnership, no issue was made thereby; and evidence on it was properly excluded. *Iroquois Mfg. Co. v. Annan-Burg Milling Co.*, 179 Mo. App. 87, 161 S. W. 320.

³⁸ *Agnew v. Bank of Gettysburg*, 2 Harr. & G. (Md.) 478. See also § 3080, *supra*.

³⁹ Under plea and reply both directed to existence before, at and since commencement of action, its existence since may be shown. *Belvidere Water Co. v. Town of Belvidere*, 82 N. J. L. 601, 83 Atl. 241.

⁴⁰ *United States. Pullman v. Upton*, 96 U. S. 328, 24 L. Ed. 818 (plaintiff's assignee); *Society for Propagation of Gospel v. Pawlet*, 4 Pet. 480, 7 L. Ed. 927 (plaintiff); *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 450, 7 L. Ed. 189; *Union Cement Co. v. Noble*, 15 Fed. 502 (plaintiff); *Kenton Furnace R. & Mfg. Co. v. McAlpin*, 5 Fed. 737 (plaintiff); *Dental Vulcanite Co. v. Wetherbee*, 2 Cliff. 555, 3 Fish. Pat. Cas. 87, Fed. Cas. No. 3,810. And see *Garton v. Union City Nat. Bank*, 34 Mich. 279. Answer in chancery amounting to general denial does not raise the issue. *Emerson Co. of West Virginia v. Nimocks*, 88 Fed. 280.

Alabama. Southern Ry. Co. v. Hundley, 151 Ala. 378, 44 So. 195; *Prince v. Commercial Bank of Columbus*, 1

Ala. 241, 34 Am. Dec. 773 (plaintiff).

Arkansas. Mississippi, O. & R. R. Co. v. Cross, 20 Ark. 443; *Alderman v. Finley*, 10 Ark. 423, 52 Am. Dec. 244, where the corporation was municipal.

Florida. Arnau v. First Nat. Bank, 36 Fla. 398, 18 So. 786.

Kentucky. Taylor v. Bank of Illinois, 23 Ky. 576, 584 (plaintiff).

Maine. Rockland, Mt. D. & S. Steamboat Co. v. Sewall, 78 Me. 167, 3 Atl. 181; *Ticonic Nat. Bank v. Bagley*, 68 Me. 249 (plaintiff); *Orono v. Wedgewood*, 44 Me. 49, 69 Am. Dec. 81 (municipal corporation plaintiff); *Putnam Free School v. Fisher*, 30 Me. 523 (plaintiff); *Savage Mfg. Co. v. Armstrong*, 17 Me. 34, 35 Am. Dec. 227.

Maryland. Whittington v. Farmers' Bank, 5 Harr. J. 489. The contrary was held in *Agnew v. Bank of Gettysburg*, 2 Harr. & G. 478, where the corporation was foreign and the distinction was made that in the earlier case the court took judicial notice of the charter of Farmers' Bank as a public act. See also *McKim v. Odom*, 3 Bland 407. Expiration of charter after issue joined cannot be proved. *Agnew v. Bank of Gettysburg*, 2 Harr. & G. 478.

Massachusetts. Cessation of meetings for nine years cannot be shown under the general issue to a writ of right by the corporation. Sutton First

is limited to the corporate existence and capacity and does not exclude evidence of the time thereof or other facts inhering in the substance of the cause of action pleaded.⁴¹ An exception to this statement lies in those causes of action where the formation and existence of the corporation is a condition precedent to liability, or in some other equally essential way must be proved in order to make out plaintiff's case.⁴² Action on a subscription for stock is the commonest illustration of this exception, but even in such an action there is a division of opinion, some authorities regarding incomplete organization or formation of the corporation as defensive matter to be affirmatively pleaded.⁴³ Early New York and a few other early decisions dissented from the main rule and held that the fact of incorporation was essential in any contract action, but these decisions have long been obsolete by reason of statutes, or later decisions.⁴⁴

Parish v. Cole, 20 Mass. 232 (plaintiff). It is now made by giving notice of it as a special defense. This section, *infra*.

Michigan. *Imperial Curtain Co. v. Jacob*, 163 Mich. 72, 127 N. W. 772; 17 Det. L. N. 751; *Ludington Water-Supply Co. v. Ludington*, 119 Mich. 480, 78 N. W. 558, 5 Det. L. N. 891; *Garton v. Union City Nat. Bank*, 34 Mich. 279 (plaintiff); *Grand Rapids & I. R. Co. v. Southwick*, 30 Mich. 444 (defendant); *Smith v. Village of Adrian*, 1 Mich. 495 (municipal corporation plaintiff). In action by a corporation on a note or bill indorsed or payable to it, plaintiff must prove incorporation under the general issue. *Owen v. Farmers' Bank*, 2 Dougl. 133, margin; *Farmers' & Mechanics' Bank v. Troy City Bank*, 1 Dougl. 457.

New Hampshire. *School Dist. No. 1 v. Bragdon*, 23 N. H. 507 (school district); *Concord v. McIntire*, 6 N. H. 527; *School Dist. No. 1 v. Blaisdell*, 6 N. H. 197 (school district). Contra, *Society for Propagating the Gospel v. Young*, 2 N. H. 310 (plaintiff).

New Jersey. *Bennett v. Millville Improvement Co.*, 67 N. J. L. 320, 51 Atl. 706 (defendant).

New Mexico. *Butterfield's Overland Dispatch Co. v. Wedeles*, 1 N. M.

528 (plaintiff). But see the later case of *Riverside Sand & Cement Mfg. Co. v. Hardwick*, 16 N. M. 479, 120 Pac. 323.

Ohio. *Methodist Episcopal Church v. Wood*, 5 Ohio 283, *Wright* 12 (plaintiff).

Pennsylvania. *Rheem v. Naugatuck Wheel Co.*, 33 Pa. St. 358.

Vermont. *Aetna Ins. Co. v. Wires*, 28 Vt. 93.

⁴¹ *Ruxbury v. Huston*, 37 Me. 42.

Admits incorporation of plaintiff but denies substantive facts of cause pleaded. *Swift River & B. B. Improvement Co. v. Brown*, 77 Me. 40.

⁴² In these actions the corporate existence and character must be pleaded as a part of the cause of action, and accordingly must be proved or presumable to make a case. See § 3043, *supra*, as to necessity of allegations.

⁴³ § 659, p. 1483, *supra*. As to the rule under general denial see also this section, *infra*.

On a statutory proceeding by motion to collect calls on shares, the general issue raises the question. *Grays v. Lynchburg & S. Turnpike Co.*, 4 Rand. (Va.) 578.

⁴⁴ The general issue puts corporate existence in issue. *Wood v. Jefferson County Bank*, 9 Cow. (N. Y.) 194;

The general denial, while more extensive in scope than the general issue, is not more efficient to make this issue, as a rule; because unless the complaint materially alleges incorporation the denial does not reach the fact, since it no more inheres in the cause of action than it did at common law;⁴⁵ and mere denials in general terms are no

Trustees of Vernon Society v. Hills, 6 Cow. (N. Y.) 23, 16 Am. Dec. 429; *Bank of Utica v. Smalley*, 2 Cow. (N. Y.) 770, 14 Am. Dec. 526, aff'd 8 Cow. (N. Y.) 398; *Bill v. Fourth Great Western Turnpike Co.*, 14 Johns. (N. Y.) 416; *Dutchess Cotton Manufactory v. Davis*, 14 Johns. (N. Y.) 298, 7 Am. Dec. 459; *Jackson v. Plumb*, 8 Johns. (N. Y.) 378; *Williams v. Bank of Michigan*, 7 Wend. (N. Y.) 539, 540; *McKnight v. Mineral Point*, 1 Pinney (Wis.) 99 (municipal corporation). See New York cases on the rule under the statute since enacted, *infra*.

A bank suing on a bill indorsed to it must under the general issue prove incorporation. *Jones v. Bank of Illinois*, 1 Ill. 124; *Hargrave v. Bank of Illinois*, 1 Ill. 123. See also *Rees v. Conococheague Bank*, 5 Rand. (Va.) 326, 16 Am. Dec. 755; *Grays v. Lynchburg & S. Turnpike Co.*, 4 Rand. (Va.) 578.

It seems that general issue would raise question and require plaintiff to prove its incorporation. *Holloway v. Memphis, E. P. & P. R. Co.*, 23 Tex. 465, 76 Am. Dec. 68.

General issue in assumpsit presents issue where the corporation is defendant. *Anderson v. Kanawha Coal Co.*, 12 W. Va. 526.

⁴⁵ *United States v. United States v. Home Ins. Co.*, 22 Wall. 99, 22 L. Ed. 816; *Kardo Co. v. Adams*, 231 Fed. 959.

Indiana. Beatty v. Bartholomew County Agr. Society, 76 Ind. 91 (suit for negligence); *Wiles v. Philippi Church*, 63 Ind. 206; *Northwestern Conference of Universalists v. Myers*, 36 Ind. 375, criticised in *Chance v. Indianapolis & W. Gravel Road Co.*, 32

Ind. 472; *Cicero Hygiene Draining Co. v. Craighead*, 28 Ind. 274. General denial admits capacity to sue. *Price v. Grand Rapids & I. R. Co.*, 18 Ind. 137 (suit on subscription); *Carpenter v. Mercantile Bank*, 17 Ind. 253 (suit on note); *Harrison v. Martinsville & F. R. Co.*, 16 Ind. 505, 70 Am. Dec. 447 (suit on subscription); *Heaton v. Cincinnati & Ft. W. R. Co.*, 16 Ind. 275, 79 Am. Dec. 430; *Hardy v. Merriweather*, 14 Ind. 293 (on subscription notes); *Railsback v. Liberty & A. Turnpike Co.*, 2 Ind. 656 (suit on subscription note); *Dunning v. New Albany & S. R. Co.*, 2 Ind. 437. See also *Bartholomew v. Bright*, 18 Ind. 93; *Hubbard v. Chappel*, 14 Ind. 601; *Jones v. Cincinnati Type Foundry Co.*, 14 Ind. 89 (suit on note). General denial to complaint against it by name importing incorporation makes no issue. *Adams Exp. Co. v. Hill*, 43 Ind. 157.

Iowa. Blackshire v. Iowa Homestead Co., 39 Iowa 624.

Massachusetts. Deacons of Hebron Church v. Smith, 121 Mass. 90, note. The former practice that a specification of defense was necessary to raise the issue is abrogated by the new practice sanctioning general denials. They raise the issue against plaintiff. *Mosler, Rahmann & Co. v. Potter*, 121 Mass. 89. General denial by corporation held to make the issue. *Gott v. Adams Exp. Co.*, 109 Mass. 220.

Missouri. Young Men's Christian Ass'n v. Dubach, 82 Mo. 475.

Montana. Willoburn Ranch Co. v. Yegen, 49 Mont. 101, 140 Pac. 231 (plaintiff). Existence of a national bank alleged to be a corporation under laws of the United States is not

more efficient to raise ⁴⁶ it. So the issue must be raised by a specially pleaded defense of nonincorporation unless, as in many states has been done by statutes or rules of practice, another method of tendering and joining this issue has been prescribed.⁴⁷ The code, when adopted in New York, did not dispense with the necessity of specially pleading nonexistence, and therefore a general denial was insufficient.⁴⁸ Little or no distinction is made in applying these rules between denials emanating from the corporation as defendant and those made where it sues as plaintiff,⁴⁹ but it is said to be especially true that a general denial by the corporation itself is inefficacious for this purpose.⁵⁰ On whichever side of the case it stands its capacity to be a party is affirmed by suing or being sued, and if the complaint merely names it without impliedly or expressly alleging incorporation, that issue obviously cannot be presented by a mere denial of whatever kind. In such a state of the complaint allegations of non-

put in issue. *First Nat. Bank of Iowa City, Iowa v. Smith*, 44 Mont. 305, 119 Pac. 784.

Nebraska. *National Life Ins. Co. v. Robinson*, 8 Neb. 452, 1 N. W. 124.

Ohio. *Brady v. National Supply Co.*, 64 Ohio St. 267, 83 Am. St. Rep. 753, 60 N. E. 218; *Minzey v. Marcy Mfg. Co.*, 25 Ohio Cir. Ct. 593; *Elektron Mfg. Co. v. Jones Bros. Elec. Co.*, 8 Ohio Cir. Ct. 311, 4 Ohio Cir. Dec. 555, aff'd 54 Ohio St. 659, 46 N. E. 1160.

Oklahoma. *First Nat. Bank of Tishomingo v. Latham*, 37 Okla. 286, 132 Pac. 891. So by Rev. St. 1910, Ann. § 1230. *Marshall Mfg. Co. v. Dickerson*, 155 Pac. 224.

South Carolina. *Rembert v. South Carolina Ry. Co.*, 31 S. C. 309, 9 S. E. 968; *Palmetto Lumber Co. v. Risley*, 25 S. C. 309; *Liberian Exedus Joint Stock S. S. Co. v. Rodgers*, 21 S. C. 27; *Commercial Insurance & Banking Co. v. Turner*, 8 S. C. 107.

Washington. *Garneau v. Port Blakely Mill Co.*, 8 Wash. 467, 36 Pac. 463 (defendant).

Wyoming. Whether general denial raises issue "is at least doubtful." *Recht v. Acme Coal Co.*, 19 Wyo. 10, 113 Pac. 786.

⁴⁶ *Indianapolis Furnace & Mining Co. v. Herkimer*, 46 Ind. 142.

⁴⁷ Such statutes are of two kinds, those like New York, which now requires incorporation to be alleged in such manner that issues may be joined thereon by a denial, and those which take the fact as confessed unless a specific issue is made by a verification accompanying special denials, or unless an affidavit is made with the general denial or general issue presenting the defense, or instead of the affidavit a notice of intention to make the defense is put in with the answer.

⁴⁸ The former statute requiring a special plea to put corporate existence in issue was not repealed by adoption of the code and substituting answer for plea, and saving existing statutes "relating to actions, not inconsistent with" the code. Hence a general denial will not raise the issue. *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309.

See also § 3073, *supra*, as to this point.

⁴⁹ See the cases cited in notes just preceding.

⁵⁰ *Montgomery v. Seaboard Air Line Ry.*, 73 S. C. 503, 53 S. E. 987.

incorporation even though in words of denial must be regarded as a special defense. On the other hand if the incorporation be impliedly or expressly alleged in general or particular terms without any statute so requiring and not as a necessary part of the cause of action, the reasons against admitting the issue under a general denial are cogent without regard to the side the corporation is on. If defendant, its answering admits the fact about to be denied, unless the answer be under a special appearance or permitted by the local practice to go in with the general answer. If plaintiff, the allegation being unnecessary need not be proved though denied, since the identity of plaintiff and not its capacity or status in the law is the issue.⁵¹ It is proper to point out by way of distinction that under a general denial a defendant may prove that an existing corporation and not defendant is the responsible party.⁵²

The foregoing rules as to effect of a general denial are general rules subject to exceptions. Among the exceptions are those cases where the statute or the practice requires the allegation to be made in the complaint, so that a denial will present the issue.⁵³ Under the statute of New York, which may be taken as typical in its general provisions, these allegations are required and a denial will raise the issue. A positive, explicit and certain denial is necessary, however, and a bare general denial⁵⁴ or one on information and belief will not do.⁵⁵ Only

⁵¹ See cases in notes just preceding.

⁵² An individual under a general denial may show that he did not make the alleged contract but that a corporation did. *Lee v. Young*, 147 Wis. 55, 132 N. W. 595.

⁵³ Under the code system of pleading the facts of incorporation, except where it is done by public act, should be pleaded in the complaint and are put in issue by a general denial. *Girls' Industrial Home v. Fritchey*, 10 Mo. App. 344.

General denial does not admit incorporation necessarily alleged (municipal corporation). *Town of Denver v. Spokane Falls*, 7 Wash. 226, 34 Pac. 926.

Denial requires proof prima facie. *Daniels v. Roanoke Railroad & Lumber Co.*, 158 N. C. 418, 74 S. E. 331.

⁵⁴ *Dry Dock, E. B. & B. R. Co. v. North & E. River Ry. Co.*, 3 N. Y.

Misc. 61, 22 N. Y. Supp. 556; *Kingston Carriage Co. v. Hutton*, 25 N. Y. Civ. Proc. 68, 34 N. Y. Supp. 1101.

Without a proper issue defendant cannot disprove plaintiff's alleged incorporation at the time of making a contract. *Stone v. Western Transp. Co.*, 38 N. Y. 240; *Deutz Lithographing Co. v. International Registry Co.*, 32 N. Y. Misc. 687, 66 N. Y. Supp. 540; *Schmidt v. Nelke Art Lithographic Co.*, 17 N. Y. Misc. 124, 89 N. Y. Supp. 353.

⁵⁵ *Post Pub. Co. v. Bennett*, 164 N. Y. App. Div. 633, 149 N. Y. Supp. 867; *Stroock Plush Co. v. Talcott*, 129 N. Y. App. Div. 14, 113 N. Y. Supp. 214; *First Nat. Bank of Saratoga Springs v. Slattery*, 4 N. Y. App. Div. 421, 38 N. Y. Supp. 859; *McElwee Mfg. Co. v. Trowbridge*, 68 Hun (N. Y.) 28, 22 N. Y. Supp. 674; *East River Elec. Light Co. v. Clark*, 45 N. Y. St. Rep.

when the incorporation is alleged and not denied, is proof dispensed with by this statute,⁵⁶ which applies to foreign as well as to domestic corporations.⁵⁷ The statute does not apply to suits against a joint stock association suing or being sued by the name of an officer.⁵⁸ A similar statute of that state applied to banks, suing either in the name of the president under that statute or in their own corporate names.⁵⁹ An earlier statute of New York applied only to corporations "created by or under any statute of this state," and this was regarded as excluding one created under the colony.⁶⁰ Another exception lies in those cases which are based on causes of action in which incorporation is a part of the cause itself requiring to be pleaded and proved. In a suit on a contract purporting to be with an existing corporation, it suing as plaintiff need not prove incorporation under a general denial; but if it sues on one which would have been binding only if the corporation was formed as contemplated, then such proof must be made under a general denial.⁶¹

In admiralty,⁶² in condemnation and other special statutory proceedings,⁶³ the issue is raised by the methods used in ordinary actions.

635, 18 N. Y. Supp. 463; *East River Bank v. Rogers*, 20 N. Y. Super. Ct. 493.

The rule extends to foreign as well as domestic corporations. *Lamson Consol. Store Service Co. v. Conyngham*, 11 N. Y. Misc. 428, 32 N. Y. Supp. 129.

⁵⁶ *Crown Point Iron Co. v. Fitzgerald*, 47 Hun (N. Y.) 638, 14 N. Y. St. Rep. 427; *Howe Mach. Co. v. Robinson*, 7 Daly (N. Y.) 399.

⁵⁷ *Lamson Consol. Store Service Co. v. Conyngham*, 11 N. Y. Misc. 428, 32 N. Y. Supp. 129.

⁵⁸ When the action sounds as one against the officer of a joint stock association, and there is no averment that it is a corporation, a denial puts plaintiff to proof of its existence. The statute does not apply. *Saltsman v. Shults*, 14 Hun (N. Y.) 256.

⁵⁹ The rule absolves banks whether suing in their own or their presidents' names from making such proof unless so put in issue. *Bank of Waterville v. Belster*, 13 How. Pr. (N. Y.) 270.

When an action by a bank in its president's name contains an answer

denying incorporation and plaintiff's presidency those issues are material and plaintiff must establish them. *Hallett v. Harrower*, 33 Barb. (N. Y.) 537.

⁶⁰ *Common and Undivided Land and Meadows of Southold v. Horton*, 6 Hill (N. Y.) 501.

⁶¹ *Wert v. Crawfordsville & A. Turnpike Co.*, 19 Ind. 242, where a subscription to a corporation to be formed was sued on by it.

In a suit commenced before a justice of the peace on a subscription and alleging plaintiff's due organization, a sworn general denial puts existence in issue. *Chance v. Indianapolis & W. Gravel Road Co.*, 32 Ind. 472.

⁶² Allegation in petition in condemnation proceeding is admitted unless denied. *Clarke v. Chicago, K. & N. R. Co.*, 23 Neb. 613, 37 N. W. 484.

⁶³ On a libel in admiralty libellant must prove its incorporation and right to sue if denied. *The Guy C. Goss*, 53 Fed. 839.

This is also true in justices' courts⁶⁴ or where the pleadings are oral.⁶⁵

The denial, it has been seen must be positive and certain by the rules of practice generally in force,⁶⁶ hence the issue is not presented under such practice by a denial of information and belief or a denial on information and belief.⁶⁷ Even a general denial may be made with exceptions of facts admitted, and thus admit plaintiff's existence because it was recognized,⁶⁸ for instance where a counterclaim accompanied the denial.⁶⁹ In Missouri a direct denial suffices when accompanied with the statutory affidavit denying the fact of existence.⁷⁰

Attention was called in a preceding section to the necessity under many statutes of verifying an answer presenting defenses or pleas of a dilatory nature, as well as the practice required of verifying

Like an answer in an action an affidavit to a petition in condemnation should affirmatively state that petitioner is not a corporation, if the burden is to be put on petitioner. Even if under the statute respondent could "disprove" it on such affidavit the burden would be his. In re New York, L. & W. R. Co. v. Union Steamboat Co., 99 N. Y. 12, 1 N. E. 27.

⁶⁴ General issue to suit in justice's court on summons to answer plaintiff by name importing incorporation admits it. Wilson Sew. Mach. Co. v. Spears, 50 Mich. 534, 15 N. W. 894.

The assumed plea of the general issue in justice's court admits plaintiff's incorporation. Farmers' & Drivers' Bank v. Williamson, 61 Mo. 259.

Not in issue in justice's court if no objection made. Rumsey v. New York & N. J. Tel. Co., 49 N. J. L. 322, 8 Atl. 290.

⁶⁵ Where pleadings are oral and answer a general denial there is no issue. Riley v. Metropolitan St. Ry. Co., 36 N. Y. Misc. 789, 74 N. Y. Supp. 873.

⁶⁶ § 3073, *supra*.

Bad denial raises no issue. Perris Irrigation Dist. v. Thompson, 116 Fed. 832.

⁶⁷ Neither a general denial nor one on information and belief raises the issue. Trustees of First Presbyterian Church of Duluth v. United States Fidelity & Guaranty Co., 133 Minn. 429, 158 N. W. 709; Finch, Van Slyck & McConville v. Le Sueur County Co-op. Co., 128 Minn. 73, 150 N. W. 226.

Denial on information and belief is equivalent to general denial. Lummus Cotton Gin Co. v. Counts, 98 S. C. 136, 82 S. E. 391; Board of Education of Webster Independent School Dist., No. 101 v. Prior, 11 S. D. 292, 77 N. W. 106 (public corporation); Stoddard Mfg. Co. v. Mattice, 10 S. D. 253, 72 N. W. 891.

⁶⁸ There is no issue under a general denial of all facts not admitted, where corporate existence of plaintiff, though not alleged, is recognized by the answer. Ryan v. Farmers' Bank, 5 Kan. 658.

⁶⁹ Pittsburg Plate Glass Co. v. Monroe Bros., 79 S. C. 564, 61 S. E. 92.

⁷⁰ Direct denial of plaintiff's alleged incorporation supported by affidavit according to statute raises an issue of fact, and general demurrer to such answer is bad. Interstate R. Co. v. Missouri River & C. R. Co., 251 Mo. 707, 158 S. W. 349.

pleadings generally. The general requisites of a verification for whatever purpose have there been discussed as applied to corporation actions.⁷¹ The issue of nul tiel corporation or nonexistence is one as to which the statutes of numerous states expressly require a verification,⁷² but such a statute does not retroact and vitiate a plea held good without verification.⁷³ A suggestion of dissolution is such a pleading as must be verified under the Illinois practice.⁷⁴ In Texas a sworn plea according to the terms of the statute is required or the issue will not be presented.⁷⁵ The affidavit accompanying a plea or denial must verify it without leaving destructive inferences,⁷⁶ and if the denial be refuted by the terms of the verification it is of no avail.⁷⁷ Some statutes require in addition an affidavit denying existence.⁷⁸ Others require a notice of intention to rely on it as a special defense under a general answer.⁷⁹

⁷¹ § 3083, *supra*.

⁷² Unsworn plea of nul tiel corporation is bad. *Smith v. Hiles-Carver Co.*, 107 Ala. 272, 18 So. 37.

Verified answer is required to make issue on allegation that plaintiff (public corporation) is a domestic corporation. *School Dist. No. 3*, Tp. 30, Range 14, Scott County v. Young, 163 Mo. App. 526, 143 S. W. 1197, adopting opinion 152 Mo. App. 304, 133 S. W. 143.

⁷³ *Hanover Nat. Bank v. Johnson*, 80 Ala. 549, 8 So. 42.

⁷⁴ Under Illinois practice a suggestion of dissolution must be verified. *Life Ass'n of America v. Fessett*, 102 Ill. 315.

⁷⁵ Must deny incorporation by sworn pleading (R. S. 1911, art. 1906, subd. 7) or no proof is required. *Sovereign Camp Woodmen of World v. Ruedrich*, — Tex. Civ. App. —, 158 S. W. 170.

Must be denied as required by R. S. 1895, art. 1265, subd. 7. *Steele v. Texas Improvement Co.*, 55 Tex. Civ. App. 463, 119 S. W. 319; *P. J. Willis & Bro. v. Smith*, 17 Tex. Civ. App. 543, 43 S. W. 325.

The allegation must be sufficient to meet the statute (R. S. 1895, art. 1186), or it will not require an affi-

davit of denial. *Bury v. J. E. Mitchell Co.* (Tex. Civ. App.), 74 S. W. 341, holding allegation was sufficient.

⁷⁶ An affidavit that at time of suing there was no such corporation as defendant leaves open the inference that at some time there was, and hence is bad as a sworn denial. *Richmond Union Passenger Ry. Co. v. New York & S. B. Ry. Co.*, 95 Va. 386, 28 S. E. 573.

⁷⁷ *Minneapolis Plumbing Co. v. Arcade Inv. Co.*, 124 Minn. 317, 145 N. W. 37.

⁷⁸ The statute requires an affidavit denying corporate existence filed with the answer. Verification of the answer is not enough. *Meyer Bros. v. Insurance Co. of North America*, 78 Mo. App. 166.

Plea nul tiel must be sworn to and an affidavit denying corporate existence of plaintiff must be made. *Crews v. Farmers' Bank*, 31 Gratt. (Va.) 348; *Baltimore & O. R. Co. v. Sherman's Adm'r*, 30 Gratt. (Va.) 602; *Gillett v. American Stove & Hollow Ware Co.*, 29 Gratt. (Va.) 565.

⁷⁹ Under the statute, which abolished special pleas, defendant must give notice specifying as a defense that it is not incorporated, or no issue is made. *Townsend v. First Free-*

All that is necessary is *prima facie* proof.⁶⁰ The allegation of existence as a corporation if immaterial need not be proved,⁶¹ and it has been shown heretofore that in many or most states it is not a part of the ordinary cause of action to be pleaded as such.⁶² Accordingly a replication of existence to a bad plea of *nul tiel* need not be proved.⁶³ To escape a variance by misnomer⁶⁴ the charter or existence must be proved to be under substantially the same name as that alleged.⁶⁵ It is a fatal variance to prove a partnership or association on an issue of incorporation, and vice versa.⁶⁶ The allegations of incorporation, however, may be regarded as surplusage, and a seeming variance avoided, where trustees suing in ejectment for a benevolent society alleged to be a corporation are equally entitled to recover as trustees of the legal title.⁶⁷

will Bapt. Church, 6 Cush. (Mass.) 279; Christian Society v. Macomber, 3 Metc. (Mass.) 235.

As to present practice in Massachusetts, see this section, *supra*, effect of general denial.

General issue unaccompanied by a brief statement that the objection would be insisted on will not put foreign corporation's existence in issue. *Savage Mfg. Co. v. Armstrong*, 17 Me. 34, 35 Am. Dec. 227. And question, whether it is at all pleadable in bar. *Id.*

May plead general issue and give notice of issue. *Goodrich v. Compound School Dist. No. 5*, 2 Wis. 102 (municipal corporation).

⁶⁰ *Daniels v. Roanoke Railroad & Lumber Co.*, 158 N. C. 418, 74 S. E. 331. See also § 3091, *infra*.

Requisites of a *prima facie* showing, see § 3106, *infra*.

⁶¹ *Finch, Van Slyck & McConville v. Le Sueur County Co-op. Co.*, 128 Minn. 73, 150 N. W. 226.

In action by a bank on a note which it had power to purchase, it was held immaterial whether it was incorporated or an association. *Farmers' & Drovers' Bank v. Williamson*, 61 Mo. 259.

No sworn plea being made it is immaterial whether a certified copy

of charter was properly authenticated. *Mobile & O. R. Co. v. Postal Tel. Cable Co.*, 120 Ala. 21, 24 So. 408.

Nonexistence of the statute creating a foreign corporation plaintiff is a material issue. *Guaga Iron Co. v. Dawson*, 4 Blackf. (Ind.) 202. Evidence should be excluded if the fact stands admitted. § 3094, *infra*.

⁶² §§ 3043, 3068, *supra*.

⁶³ A replication in particular to a bad plea of *nul tiel* (bad because tantamount to the general issue) need not be proved as alleged but only to the extent of making such a case as would satisfy the general issue. *Wood v. Jefferson County Bank*, 9 Cow. (N. Y.) 194.

⁶⁴ § 3085, *supra*.

⁶⁵ *Spreyng v. Garfield Lodge No. 1 of United Slavonian Benev. Society*, 117 Ill. App. 253.

⁶⁶ Suit against partnership and proof of corporation is fatal. *Welton v. Genesee Lumber Co.*, 114 La. 842, 38 So. 580.

⁶⁷ In ejectment by trustees of a benevolent society, allegations of its incorporation may be considered as surplusage, and recovery by them as trustees of an unincorporated society sustained. *Brown v. Webb*, 60 Ore. 526, Ann. Cas. 1914 A 148, 120 Pac. 387.

[Chap. 47 is concluded in Vol. 5.]



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